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Preface

CEB's aim is to create exceptional practice materials for members of the California bar, and to keep those materials current. In 1957, CEB published the pioneer California Civil Procedure Before Trial, a one-of-a-kind resource for California trial attorneys. After nearly 50 years in print, this title still endeavors to offer litigators the reliable information they need to survive, and perhaps even thrive, in today's fast-paced pretrial environment.

The original one-volume edition was replaced by two casebound volumes in 1977 and 1978, with separate softcover updates published annually, until the Third Edition appeared in three looseleaf volumes in 1990. This Fourth Edition, also produced in three volumes, entirely replaces the earlier edition; similarly, an interleafed update that captures new legislation, cases, and court rules as they develop will be available to practitioners on a yearly basis.

The new edition has been reorganized and improved, with some chapters streamlined and combined with other chapters or rewritten from the standpoint of present-day law and practice. Material derived from chapters in the previous editions and new topics not discussed in former editions have been integrated into the current volumes. The sequence and content of chapters have been changed to reflect the ever-changing rules that govern the litigation process and to communicate them as clearly and as simply as possible.

For example, chap 40 fuses several earlier chapters on court-controlled status conferences into a new chapter on court management of civil cases. During the life of the previous edition, continually changing court rules implementing the Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620)—first as county "fast-track" programs and now as statewide differential case management rules—have had a significant impact on the landscape in which attorneys practice law. Because the trial courts have been under increasing pressure to dispose of most of their cases within one year after the filing date (see Cal Rules of Ct 209; App Div I §2), corresponding time constraints have been imposed on attorneys. Vigorous efforts by California trial judges to eliminate backlog and reduce delay have resulted in a barely perceptible swing toward individualized case management. Recent amendments to court rules are beginning to articulate the trial court's responsibility to apply disposition time goals in a fair and flexible manner and to consider each case on its merits. Litigators can expect this chapter to evolve in future years as CEB attorneys engage in the rather formidable task of updating this remarkable book.

Opening sections of this edition focus on managing the attorney-client relationship, avoiding conflicts, handling jurisdictional issues, and drafting court papers properly. Preparing and serving complaints, evaluating the variety of responses possible to challenge the pleadings, and dealing with injunctions and other provisional remedies are at the heart of the book. Whether to initiate or to oppose procedures that may terminate an action without trial are covered in such chapters as summary judgment and dismissal. Because today's advocates must be as skilled in nonadversarial approaches as in litigation procedures, an extensive group of chapters on various models for settling cases and for negotiating resolution of disputes concludes the book.

Discovery methods under the California Discovery Act, such as depositions, interrogatories, demands for inspection, and exchange of expert witness information, are thoroughly discussed in CEB's companion book, California Civil Discovery Practice. For cases that are likely to end in a trial, see California Trial Practice: Civil Procedure During Trial.

This publication is also available through CEB's Web-based product, *OnLAW,* which enables litigators to conduct word searches and to immediately view the exact language of citations through online links. For more information, go to www.ceb.com.

CEB has a long tradition of relying on advice drawn from the experience of experts, and to this end wishes to thank Palmer Brown Madden, who practices as an ADR neutral, for his contributions to chap 45 on alternative dispute resolution. CEB is deeply indebted to Jill A. Sperber, Director of the State Bar Office of Mandatory Fee Arbitration, for her invaluable work in rewriting chap 5.

CEB gratefully acknowledges the following authors whose chapters in A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005) were used as the basis for rewriting chapters 37, 45, and 46 in this publication: Hiro N. Aragaki, Simao J. S. Avila, Denise M. Howell, Peter J. Kennedy, Guy O. Kornblum, James C. Martin, Martin Quinn, William A. Robinson, and John S. Warnlof.

Finally, CEB gratefully acknowledges the countless California attorneys and judges who wrote commentary for previous editions, and who in effect continue to serve as consulting editors of this edition. The chapter authors of this title, as it emerged in 1957, 1978-1978, and 1990, are listed on page xvii.

Linda Compton was the project manager of this edition. CEB Attorneys Robin Kojima, Elizabeth Allen, and Julie Hammel Brook performed legal editing. Andy Rosner provided legal research analysis. Robert W. Burke and Kathryn Te Selle wrote the index. Cinda Ely handled copyediting and production. Grier Thornburg designed the book. Composition was performed by CEB's Electronic Publishing staff.

June 2010 Update

CEB Attorney Editors Karen Frasier-Kolligs (Managing Editor) and David Saunders and Legal Editors Beth Johnson, Diane Stanton, Karen Nutter, and Enrique DeAnda contributed to this update. Joseph Curran handled copyediting and production. Administrative support was provided by Kenya Denman and Nila Kanzaria. Kathryn Te Selle and Robert W. Burke updated the index. Composition was performed by CEB's Electronic Publishing staff.

Linda A. Compton
Practice Group Manager
Civil Litigation

Pamela J. Jester
Director

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About This Book

The amount of information in a book on California civil procedure before trial is necessarily vast, yet this title is designed to make the essential details easily retrievable. This Fourth Edition includes many features to help litigators find and use the specific information they need, including:

Chapter Outlines. The headings set out at the beginning of each chapter list the section numbers where explanations of particular items can be found. The outline also serves as a conceptual guide to the procedure covered in the chapter, how the parts fit into the whole, and the steps necessary to implement it.

Scope of Chapter. Each chapter begins with a brief introduction describing the topics covered and referencing where to find related matters.

Governing Law. A second introductory section cites the legal authorities on which a civil litigation procedure is based and provides the governing framework for the chapter's discussion.

Practice Tips, Examples, and Notes. Practice advice that attorneys and judges have contributed to chapters, examples that amplify points under discussion, and other matters that bear special notice are highlighted in a different format to call attention to the material.

Diagnostic Questions. A series of questions is often useful in suggesting how and when a procedure may be used. Chapters that include diagnostic questions alert practitioners to the characteristics and requirements of the procedure under consideration.

Checklists. Many chapters contain a checklist setting out the steps for initiating or responding to the procedure covered in the chapter. Cross-references after each item identify the sections that offer detailed explanations. An attorney familiar with a procedure may find that the checklist makes reference to the text unnecessary, while ensuring that all requisite measures are taken.

Forms. Forms used to implement the procedures discussed in this book, including mandatory and optional Judicial Council forms, are grouped at the end of each chapter. Model attorney-drafted forms are useful to litigators when adapted appropriately to a particular case or situation. See the table of forms for a complete list of the forms printed in the three volumes. These forms may also be accessed electronically on the CD-ROM containing the book's forms.

Tables. The table of cases and the table of statutes, regulations, and rules that appear before the index are indispensable research tools for finding where a particular case or provision is discussed. The table of forms lists the title and location of each form reproduced in the book.

Index. A comprehensive index allows the reader to locate information by topic.

Online. This publication is available electronically. For information about *OnLAW,* CEB's Web-based product that provides online links to the authorities cited, go to www.ceb.com.

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Authors in Previous Editions

Some members of the trial bar attribute this publication's longevity to the information it contains that cannot be found by reading cases, statutes, or rules. Although there is no substitute for legal research and analysis or the exercise of professional judgment in a particular case, problems endemic to the litigation process continually arise. The authors of this book have addressed many of the difficulties found in trial practice and have suggested strategies and viewpoints that attorneys may adopt to deal with them. The clarity of thought brought to these problems by gifted lawyers, whether from the past or the present, does not seem to go out of style. In this sense, current practitioners stand on the shoulders of the best from the past, and CEB's role is simply to communicate some of the timeless standards that litigators may decide to apply in an actual situation.

CEB's Fourth Edition builds on the excellent work of previous editions. Innumerable California attorneys and judges contributed to those editions, including the chapter authors named below:

1990 Edition

Richard P. Booth, Jr.	Offers to Allow Judgment (CCP §998); Settlement Conferences
Allan Browne	Bill of Particulars
Sandor T. Boxer	Default
M. Kathleen Butz	Demurrers
Jeffrey J. Carlson	At-Issue Memorandum; Demand for Jury Trial; Trial-Setting Conference
Rufus L. Cole	Law Office Litigation Procedures
Lori Huff Dillman	Conflicts of Interest
J. Alan Frederick	Interpleader
Bruce A. Friedman	Involuntary and Voluntary Dismissal
Robert W. Gilbert	Injunctions
Martin Glenn	Venue
Susan E. Hayes	Declaratory Relief
John E. Hoffman	Cross-Complaints
Clarke B. Holland	Declaratory Relief
Michael Holtzman	Intervention
Roger M. Hughes	Deposit in Court
Steven J. Kaplan	Injunctions
Holly Kraemer	Motions to Strike
Michael J. Leahy	Determining Good Faith of Settlement
Deborah Lee-Germain	Status Conferences and Other Pretrial Conferences
Kurt J. Lewin	Receivership

Jordan L. Lurie	Submitted Case; Consent Judgment
Bernard W. Mann	Service of Process and Papers
Kenneth M Malovos	Challenging Jurisdiction Over the Person
Cheryl White Mason	Suing in Forma Pauperis
Jo Anne McCracken	Sliding Scale Settlements
Thomas J. McDermott, Jr.	Security for Costs
Daniel J. McVeigh	Guardians Ad Litem
Mark A. Neubauer	California and Federal Jurisdiction; Federal Court Removal
F. John Nyhan	Submitted Case; Consent Judgment
Robert M. Peterson	Sliding Scale Settlements
Ellen A. Pansky	Conflicts of Interest
Robert M. Pine	Motions to Advance, Specially Set, and Reset; Trial Continuances
Suzanne Edgar Randolph	Summary Judgment Motions
Whitney Rimel	Motions for Judgment on the Pleadings
James K. Roberts	Motions to Dismiss or Stay for Inconvenient Forum
John A. Ruocco	Summary Judgment Motions
Arthur L. Sherwood	Noticed and Ex Parte Motions
Jack L. Slobodin	Settlement Evaluation; Settlement Demands and Offers
Richard de St. Phalle	Motions to Change Venue
John K. Trotter, Jr.	Alternative Dispute Resolution
Miram J. Vogel	Receivership
Edwin J. Wilson, Jr.	Claims Against Public Entities and Decedents' Estates
Andrew J. Wistrich	Consolidation; Severance
William L. Winslow	Structured Settlements
Russell F. Wolpert	Federal Court Removal; California and Federal Court Jurisdiction
Alexander B. Yakutis	Judicial Arbitration; Coordination
Kenneth R. Zuetel, Jr.	Complaints; Determining, Joining, and Naming Parties

1978 Edition

Peter Abrahams	Dismissal
A. Victor Antola	Jurisdiction

Kenneth J. Aran	Settlement
Richard S. Berger	Claim and Delivery
Sandor T. Boxer	Default
Richard P. Byrne	Consolidation and Severance; Setting Case for Trial
Jan T. Chilton	Summary Judgment
Mario Clinco	Settlement
Mary Ann Cohen	Interpleader
Elizabeth A. Cupp	Guardians Ad Litem
Robert Fainer	Summary Judgment
Robert W. Gilbert	Injunctions
Mary K. Gillespie	Suing in Forma Pauperis
Martin Glenn	Venue
John E. Hoffman	Consent Judgment; Submitted Case
Michael Holtzman	Intervention
Roger M. Hughes	Deposit in Court
William H. Levit	Coordination
Thomas J. McDermott	Security for Costs
Shelley M. Mercer	Motions and Orders
Richard M. Mosk	Declaratory Relief
Cecily B. Nyomarkay	Suing in Forma Pauperis
Peter I. Ostroff	Motions and Orders
Bernard Shapiro	Receivership
Arthur L. Sherwood	Motions and Orders
Edith R. Warkentine	Receivership
Joseph A. Wheelock, Jr.	Service of Process and Other Papers
Richard T. Williams	Security for Costs
Alexander B. Yakutis	Coordination

1957 Edition

Paul E. Anderson	Tax Aspects of Litigation
Everett B. Clary	Judgment on the Pleadings; Summary Judgments
C. Thorne Corse	Declaratory Relief
J. N. DeMeo	Motion Practice; Pleading
Robert W. Gilbert	Injunctions
Charles M. Giovanetti	New Parties

Hartly Fleishmann	Interpleader in California
John Leslie Goddard	Jurisdiction of the Subject Matter
Philip J. Gregory	Security for Costs
James S. Higgins	Federal Tort Claims Act
Robert H. Kroninger	Pre-Trial Conferences
Arthur K. Marshall	Process and Appearance; The Superior Court Structure
Ewart L. Merica	Default and Relief from Default
Samuel O. Pruitt, Jr.	Depositions and Discovery
Alred J. Rothman	Choice of Remedy
Allan L. Sapiro	Statutes of Limitation
Gregory S. Stout	Dismissal for Failure to Prosecute
Leslie C. Tupper	Attorney-Client Relationship
Arvo Van Alstyne	Claims Against Public Entities; Venue of the Action
Frederick J. Woelflen	Federal Tort Claims Act
Richard H. Wolford	Federal Court Removal

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Selected Developments

June 2010 Update

Avoiding conflicts of interest. An attorney's possible liability to a third party for negligence in, *e.g.*, drafting a will, does not create an attorney-client relationship between the attorney and the third party. *Baker Manock & Jensen v Superior Court* (2009) 175 CA4th 1414, 1422, 96 CR3d 785. See §2.10.

In *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 98 CR3d 422, the court disqualified a law firm from representing the plaintiff in lawsuit when the firm's associate had formerly represented one of several defendants in the same lawsuit. See §§2.21, 2.28.

Representation agreements. Attorneys practicing in California who know or should know that they do not have professional liability insurance must inform clients of this fact in writing at the time of engagement. Cal Rules of Prof Cond 3-410. See §3.19.

An attorney's lien has priority over a medical lien, regardless of which was first in time. *Gilman v Dalby* (2009) 176 CA4th 606, 619, 98 CR3d 231. See §3.20A.

In *Dietz v Meisenheimer & Herron* (2009) 177 CA4th 771, 99 CR3d 464, the court upheld the trial court's rejection of defendant law firm's argument that a referring attorney's suit to recover the promised referral fee based on a share of any contingent recovery should be dismissed because it might require disclosure of attorney-client communications regarding the fee agreement. See §3.35.

Client Fee Dispute Arbitration. For a recent case on arbitration of *Cumis* counsel fees, see *Compulink Mgmt. Ctr., Inc. v St. Paul Fire & Marine Ins. Co.* (2008) 169 CA4th 289, 87 CR3d 72 in §5.11.

On client waiver of the right to MFAA fee arbitration, see *Fagelbaum & Heller LLP v Smylie* (2009) 174 CA4th 1351, 1361, 95 CR3d 252 in §5.20.

A party that rejects a fee award after an MFAA arbitration and files a complaint that is involuntarily dismissed for failure to prosecute effectively repudiates its previous rejection of the arbitration award and its request for trial de novo. *Perez v Grajales* (2008) 169 CA4th 580, 605, 86 CR3d 784, in §5.37.

California Jurisdiction. Although subject matter jurisdiction is vested in the superior court as a whole, as a matter of convenience the superior court is divided into departments and the legislature may require certain matters to be heard in a particular department. *Estate of Bowles* (2008) 169 CA4th 684, 695, 87 CR3d 122. See §6.11.

For a recent case holding that an action for breach of a patent-licensing agreement arises under state, not federal, law, see *Applera Corp. v MP Biomedicals, LLC* (2009) 173 CA4th 769, 93 CR3d 178 in §6.41.

On appeal of a denial of a class certification motion after the representative plaintiff has settled his or her individual suit, see *Watkins v Wachovia Corp.* (2009) 172 CA4th 1576, 1591, 92 CR3d 409, criticizing *Larner v Los Angeles Doctors Hosp. Assoc.* (2008) 168 CA4th 1291, 1300, 86 CR3d 324. See §6.46.

Federally recognized Indian tribes and their for-profit business entities operating on their behalf are immune from suit in state court. See *Ameriloan v Superior Court* (2008) 169 CA4th 81, 84, 86 CR3d 572, in §6.52.

If a statute requires a particular class of controversy to be submitted first to an administrative agency, and the parties reasonably dispute whether the controversy comes within that class, then the agency has the power *before* judicial relief is obtained, to determine whether the controversy comes within the agency's statutory grant of jurisdiction. *Blanks v Seyfarth Shaw LLP* (2009) 171 CA4th 336, 362, 89 CR3d 710. See §6.54.

Plaintiffs lack standing to bring action under Unfair Competition Law or Labor Code Private Attorneys General Act of 2004 (Lab C §§2698-2699.5) if they have not suffered injury in fact; associations suing under these statutes are not exempt from standing requirement. See *Amalgamated Transit Union, Local 1756 v Superior Court* (2009) 46 C4th 993, 1005, 95 CR3d 605, in §6.57A.

A California court cannot refuse to take jurisdiction of a claim arising in California solely because the *plaintiff* is a nonresident. See *Epic Communications, Inc. v Richwave Technol., Inc.* (2009) 2009 Ca. App. Lexis 1834, *2 in §6.62.

Consent to jurisdiction may be implied by a party's actions. See *Szynalski v Superior Court* (2009) 172 CA4th 1, 9, 90 CR3d 683, discussed in §6.78.

Neither general nor specific jurisdiction existed over a defendant insurer that issued a policy to its insured in Florida, then continued to accept premiums from her and process her claims after she moved to California. *Elkman v Nat'l States Ins. Co.* (2009) 173 CA4th 1305, 1318, 93 CR3d 768 in §6.95.

For a recent case on state court jurisdiction over a parent company based on activities of its subsidiary, see *HealthMarkets, Inc. v Superior Court* (2009) 171 CA4th 1160, 1169, 90 CR3d 527, in §6.102.

Federal jurisdiction. For a recent case on "prudential standing," see *City of Los Angeles v County of Kern* (9th Cir 2009) 581 F3d 841, in §7.9.

A litigant who is forced into state court but seeks to preserve his or her federal claims should make a reservation of federal claims. See *England v Louisiana State Bd. of Med. Exam'rs* (1964) 375 US 411, 11 LEd2d 440, 84 S Ct 461; *Los Altos El Granada Investors v City of Capitola* (9th Cir 2009) 583 F3d 674, discussed in §7.12.

Before granting a petition to compel arbitration under the Federal Arbitration Act (FAA) (9 USC §§1-16), the federal court must "look through" the petition and determine whether (based on the plaintiff's own statement of the cause of action and not on defendant's defenses or counterclaims), but for the existence of the arbitration agreement, the court would have had jurisdiction over the substantive conflict between the parties. *Vaden v Discovery Bank* (2009) ___US___, 173 LEd2d 206, 129 SCt 1262 in §7.17.

State-law based counterclaims do not qualify a case for federal question jurisdiction, even if those counterclaims would be completely preempted by federal law. *Vaden v Discovery Bank* (2009) ___US___, 173 LEd2d 206, 219, 129 S Ct 1262, in §7.21. Also in §7.21, see *Yarick v PacifiCare of California* (2009) 179 CA4th 1158, 1167, 102 CR3d 379 for analysis of how doctrine of conflict preemption led the court to reject a plaintiff's common law duty claims against a health insurer.

Under the "act of state doctrine," the federal court has subject matter jurisdiction over claims challenging the validity of a foreign state's conduct within its own borders. *Provinicial Gov't of Marinduque v Placer Dome, Inc.* (9th Cir 2009) 582 F3d 1083, in §7.26.

A party that asserted subject matter jurisdiction in its petition for removal is not foreclosed from raising lack of subject matter jurisdiction on appeal. *International Union of Operating Eng'rs v County of Plumas* (9th Cir 2009) 559 F3d 1041, 1043, in §§7.14, 22.92.

On the effect of a district court dismissal without prejudice, see *Guevara v Ventura County Community College Dist.* (2008) 169 CA4th 167, 87 CR3d 50, in §§7.33, 7.41.

There is a split among the circuits as to whether intervention as of right under Fed R Civ P 24(a) must be supported by an independent ground of federal jurisdiction; the Ninth Circuit has not addressed this issue. *Perry v Proposition 8 Official Proponents* (9th Cir 2009) 2009 US App Lexis 25430, n 2. See §7.45.

The Ninth Circuit has held that a federal district court can take diversity jurisdiction over an appeal from a state administrative agency decision even when the review requires deferential, on-the-record review. *BNSF Ry. Co. v O'Dea* (9th Cir 2009) 572 F3d 785. See §7.48.

Federal removal jurisdiction extends to "mass actions," which are any civil actions in which 100 or more people propose to be treated jointly and the other jurisdictional requirements are met. See *Tanoh v Dow Chem. Co.* (9th Cir 2009) 561 F3d 945, in §§7.67, 22.29A.

Venue. As long as the case arises from a consumer transaction specified in the statute, CCP 395(b) governs venue regardless of whether the consumer is a plaintiff or a defendant or whether one of the defendants is an individual. *Fontaine v Superior Court* (2009) 175 CA4th 830, 96 CR3d 607, in §8.25.

Prelitigation claims, notices, and petitions for guardians ad litem. The 1-year limitations period of CCP 366.2 is not tolled during the minority of plaintiffs and applies to an action on the liability of a deceased person without regard to the location of decedent's personal representative or estate. *Farb v Superior Court* (2009) 174 CA4th 678, 94 CR3d 586, in §9.40.

Noticed Motions. In exercising its power to exclude or permit oral testimony at the hearing on a motion, the trial follows the principal that constitutional due process entitles the parties to notice and hearing appropriate to the case. See *Marriage of Nadkarni* (2009) 173 CA4th 1483, 1499, 93 CR3d 723, in §12.44.

On electronic service under CCP 1010.6(a)(6) of a file-stamped copy of the judgment, see *InSyst, Ltd. v Applied Materials, Inc.* (2009) 170 CA4th 1129, 1138, 88 CR3d 808, in §12.73.

A trial court that grants reconsideration on its own motion does so because, based on the evidence originally submitted, its earlier decision was wrong; the court does not have inherent power to grant a new trial, *i.e.*, to take new

evidence and hold a new hearing. *Marriage of Herr* (2009) 174 CA4th 1463, 95 CR3d 464, in §12.119.

A motion for reconsideration must be valid to extend the time to appeal. *Branner v Regents of Univ. of Cal.* (2009) 175 CA4th 1043, 1048, 96 CR3d 690, in §12.113.

A motion for mandatory relief from default based on attorney error under CCP §473 was not a motion for reconsideration under CCP §1008 even though the party had already sought reconsideration of the default judgment, because the first, unsuccessful motion had been based on mistake of law. See *Standard Microsystems Corp. v Winbond Elec. Corp.* (2009) 179 CA4th 868, 890, 102 CR3d 140, in §12.120.

Ascertaining, joining, and naming parties. It has been held that CCP 474 implicitly requires the plaintiff to amend the complaint to add the true names of the Doe defendants within a reasonable period of time after learning of their identity. *A.N. v County of Los Angeles* (2009) 171 CA4th 1058, 1066, 90 CR3d 293, in §§14.13 and 16.14.

Plaintiffs who designate defendants by fictitious names must take care that the summons on such defendants include notice that they have been sued under a fictitious name; if they are not notified, any default judgment against them may be vacated. See *Carol Gilbert, Inc. v Haller* (2009) 179 CA4th 852, 101 CR3d 843, in §14.13.

A corporation that is under suspension for failure to comply with Rev & Tax C 23305 suffers a legal disability, but when the corporation comes back into compliance and its corporate powers are revived, the procedural litigation steps it took during the suspension period are validated retroactively. *Center for Self-Improvement & Community Dev. v Lennar Corp* (2009) 173 CA4th 1543, 1554, 94 CR3d 74, in §§14.20, 23.30.

Complaints. On adequate pleading in a public nuisance case, see *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 1548, 87 CR3d 602, in §15.26.

For a case discussing pleading sufficient facts to invoke equitable tolling doctrine when facts of complaint show statute of limitations has run, see *Tarkington v California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 1502, 92 CR3d 131, in §15.26.

Service of summons. For a new case on proper service on a foreign corporation's "general manager in the state" under Corp C §2110(a), see *Yamaha Motor Co., LTD v Superior Court* (2009) 174 CA4th 264, 94 CR3d 494. See §17.19.

A prisoner may be served with summons by serving the sheriff or jailer who has custody of the prisoner. *Sakaguchi v Sakaguchi* (2009) 173 CA4th 852, 858, 92 CR3d 717, in §§17.25A, 17.35, 38.30.

Plaintiff serving fictitiously named defendant must comply with requirements both for endorsement of summons and recitals in proof of service. See *Pelayo v J.J. Lee Mgmt. Co., Inc.* (2009) 174 CA4th 484, 496, 94 CR3d 784, in §17.61.

Motions to stay or dismiss for inconvenient forum. For a recent case holding that China was a convenient forum to litigate claims arising from an air crash in China, see *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 696, 702, 91 CR3d 178. See §21.7.

For recent federal cases upholding dismissals on forum non conveniens grounds, see *Loya v Starwood Hotels & Resorts Worldwide, Inc.* (9th Cir 2009) 583 F3d 656, 666 and *Vivendi SA v T-Moblie USA, Inc.* (9th Cir 2009) 209 US App lexis 23982, *12, in §21.12.

Removal to federal court. Unless the plaintiff's failure to state a cause of action against the nondiverse defendant is obvious according to the settled law of the state, remand should be ordered. See *Hunter v Philip Morris USA* (9th Cir 2009) 582 F3d 1039, discussed in §22.19.

The 30-day time limit does not apply to a remand motion based on a forum selection clause specifying state court as the appropriate forum. *Kamm v Itex Corp.* (9th Cir 2009) 568 F3d 752, 757, in §22.92.

Demurrers. On demurrer, it is not the court's role to decide that the complaint is false in whole or in part; rather, a demurrer admits the truth of all material facts properly pleaded. *William v Southern Cal. Gas Co.* (2009) 176 CA4th 591, 600, 98 CR3d 258, in §§23.3, 23.18.

On judicial notice of documents on demurrer, see *C.R. v Tenet Healthcare Corp.* (2009) 169 CA4th 1094, 1103, 87 CR3d 424, discussed in §23.18.

On sustaining a demurrer without leave to amend because the plaintiff failed to carry the burden of demonstrating the reasonable possibility that amendments could cure defects, see *Hoffman v Smithwoods RV Park* (2009) 179 CA4th 390, 407, 102 CR3d 72, in §23.53.

Cross-complaints. An employer who sued its former employee for breach of contract and patent conversion should have raised the claims at the time of the employee's cross-complaint against the employer for wrongful termination,

because they were logically related to the cross-complaint. See *Align Tech., Inc. v Tran* (2009) 179 CA4th 949, 959, 102 CR3d 343, in §26.7.

A cross-complaint for equitable indemnity is not subject to dismissal solely because apportionment of fault is available through the assertion of an affirmative defense in the main action. *Paragon Real Estate Group of San Francisco, Inc. v Hansen* (2009) 175 CA4th 177, 187, 100 CR3d 234, in §§26.18, 26.27.

Security for Costs. A security statute is not the same as an attorney fee liability statute; under Corp C §800, the prevailing defendant is entitled to recover only the amount of bond posted by plaintiffs as compensation for litigation expenses, not full amount of attorney fees. See *West Hills Farms, Inc. v RCO Ag Credit, Inc.* (2009) 170 CA4th 710, 88 CR3d 458, in §29.31.

For an example of a vexatious litigant subject to a prefiling order, see *In re R.H.* (2009) 170 CA4th 678, 88 CR3d 650, in §29.55; plaintiff, challenging dependency court decisions in propia persona, filed 13 unsuccessful appeals and writ petitions within 7 years.

Intervention. Trial court did not abuse its discretion to strike insurer's complaint in intervention because insurer's denial of coverage and refusal to defend insured left insurer with no direct and immediate interest in litigation, even though insurer ultimately might be required to pay judgment. See *Hinton v Beck* (2009) 176 CA4th 1378, 98 CR3d 612, in §31.17.

A party seeking to intervene must file a complaint in intervention; a *motion* to intervene was denied. See *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 513, 89 CR3d 615, in §31.51.

Injunctions. If the moving party cannot establish probability of success on the merits, there is no need for the court to consider whether irreparable injury would result if an injunction does not issue. See *Nelson v Avondale Homeowners Ass'n* (2009) 172 CA4th 857, 861, 91 CR3d 726, in §32.35.

When deciding whether an injunction should issue, the court may balance conveniences if the defendant is merely negligent and not a wrongdoer. See *Linthicum v Butterfield* (2009) 175 CA4th 259, 266, 95 CR3d 538, in §32.117. When deciding whether to modify or vacate an injunction, it was no abuse of discretion to deny a motion to terminate domestic violence restraining order when there had been no material changes in the law or facts and the movant had not established that termination would serve the interests of justice. See *Loeffler v Medina* (2009) 174 CA4th 1495, 95 CR3d 343, in §32.124.

A preliminary injunction should not issue if a movant has no reasonable likelihood of prevailing on merits at trial. See *Millennium Rock Mort., Inc. v T.D. Serv. Co.* (2009) 179 CA4th 804, 812, 102 CR3d 544, in §32.129.

A motion for an injunction need not have been filed frivolously or in bad faith for a defendant to recover costs and fees as a prevailing party. See *Krug v Maschmeier* (2009) 172 CA4th 796, 91 CR3d 452, in §32.146.

Declaratory Judgment. No actual controversy existed when declaratory judgment concerning contractual remedies had no current practical consequences, given that no dispute had yet arisen between the parties and continuation of parties' contractual relationship did not depend on resolution of questions presented. See *Meyer v Sprint Spectrum L.P.* (2009) 45 C4th 634, 646, 88 CR3d 859, in §35.15.

Summary Judgment. See newly revised and reorganized chap 36 for the following new cases regarding summary judgment:

The moving party must comply with provisions of §437c(b)(1), and if it fails to do so, the court must deny summary judgment motion. *Teselle v McLoughlin* (2009) 173 CA4th 156, 168, 92 CR3d 696. See §36.63. In contrast, it was no error to grant summary judgment when defendants made prima facie showing of entitlement to judgment and plaintiffs failed to file a separate statement. *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 94 CR3d 288. See §§36.76, 36.109, 36.110.

It does not follow from the fact that summary judgments are reviewed de novo that the parties may stipulate that a summary judgment would have been granted, when none has been made, and when case law, statutes, and court rules provide otherwise, and seek review of the so stipulated "judgment." See *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 116, 94 CR3d 109, in §§36.8, 36.62, 36.197.

Because judicial admissions may be made only in a pleading, by stipulation, or in response to a request for admission, facts accepted as true for the purpose of summary judgment and included in the separate statement of facts cannot be characterized as judicial admissions. See *Myers v Trendwest Resorts, Inc.* (2009) 178 CA4th 735, 746, 100 CR3d 658, in §§36.62, 36.132.

Defendant's 764 objections to the plaintiff's evidence deemed waived because the court did not expressly rule on

individual objections. See *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 254, 100 CR3d 296, in §§36.19, 36.84, 36.94, 36.175, and 36.197.

Default. For a case striking amount of attorney fees from judgment because they were not alleged in body of complaint or prayer for relief, see *Hearn v Howard* (2009) 177 CA4th 1193, 1208, 99 CR3d 642, in §§38.9, 38.82.

It was no error to deny defendants' motion to set aside entry of default and default judgment, based on defendants' claim that an incorrect zip code was used on affidavits of mailing and that they did not receive notice. See *Rodriguez v Henard* (2009) 174 CA4th 529, 94 CR3d 313, in §38.37.

A movant "substantially complied" with the requirement that a motion for relief from entry of default or default judgment under CCP §473(b) must be accompanied by a copy of the answer or other pleading that is proposed to be filed, when it proffered an answer at a motion hearing. See *Carmel, Ltd. v Tavoussi* (2009) 175 CA4th 393, 401, 95 CR3d 694, in §§38.79, 38.83.

It was error to deny defendant's motion for relief from default judgment, because facts establishing attorney fault entitled defendant to mandatory relief under CCP §473(b). See *Standard Microsystems Corp. v Winbond Elec. Corp.* (2009) 179 CA4th 868, 102 CR3d 140, in §38.83.

A trial court lacked jurisdiction to grant a motion for relief from entry of default and default judgment, filed more than 9 years after entry of default, based on mistake, surprise, and excusable neglect. See *Manson, Iver & York v Black* (2009) 176 CA4th 36, 42, 97 CR3d 522, in §§38.85, 38.87, 38.90, 38.92.

A judgment was not void, but voidable, and therefore could not be set aside under CCP §473(b) 12 years after entry of default and default judgment. See *Johnson v E-Z Ins. Brokerage, Inc.* (2009) 175 CA4th 86, 95 CR3d 782, in §38.95.

Examples of void default judgments that were set aside include *Manson, Iver & York v Black* (2009) 176 CA4th 36, 43, 97 CR3d 522 (default judgment void because party was misnamed in complaint, service and judgment; party had no notice that ex parte order substituted her name for incorrect name, 6 years after entry of judgment); and *David S. Karton, a Law Corp. v Dougherty* (2009) 171 CA4th 133, 149, 89 CR3d 506 (default judgment void because it exceeded amount specified in complaint). See §38.96.

Dismissal. CCP §474 implicitly requires the plaintiff to amend the complaint to add the true names of Doe defendants within a reasonable period of time after learning of their identity. *A.N. v County of Los Angeles* (2009) 171 CA4th 1058, 1066, 90 CR3d 293, citing *Barrows v American Motors Corp.* (1983) 144 CA3d 1, 192 CR 380. See §39.11.

A voluntary dismissal filed 1 day after defendant filed motion to enforce settlement was timely; the trial court had issued no tentative ruling, and ruling in defendant's favor was not inevitable. See *Lewis C Nelson & Sons, Inc. v Lynx Iron Corp.* (2009) 174 CA4th 67, 76, 94 CR3d 468, in §39.104.

To recover court costs after the plaintiff voluntarily dismisses an action, the defendant need not file a proposed judgment together with its costs memorandum. See *Fries v Rite Aid Corp.* (2009) 173 CA4th 182, 92 CR3d 523, in §39.121.

It was error to award §128.7 sanctions for frivolous motion to vacate when the court denied the motion to vacate only 19 days after service of the §128.7 motion; the plaintiff was denied full 21-day safe harbor period). See *Li v Majestic Indus. Hills LLC* (2009) 177 CA4th 585, 99 CR3d 334, in §39.124. Similarly, an order granting sanctions was reversed because the notice of motion for sanctions failed to state the date of the motion hearing; this rendered the notice fatally defective, and deprived the plaintiff of the safe harbor period. See *Galleria Plus, Inc. v Hanmi Bank* (2009) 179 CA4th 535, 537, 101 CR3d 803 in §39.124.

Case Management Conferences. A sanction award against a non-party insurer whom trial court believed acted in bad faith at policyholder's settlement conference was reversed, because the conduct of insurer was not sanctionable under any statute or rule or court. See *Vidrio v Hernandez* (2009) 172 CA4th 1443, 92 CR3d 178, in §40.85.

Alternative Dispute Resolution. There was no jurisdictional authority for arbitrator when agreement did not clearly and unmistakably provide for it, and merely incorporated by reference American Arbitration Association rules, which when the agreement was executed did not permit arbitrators to decide jurisdiction. See *Gilbert Street Developers, LLC v La Quinta Homes, LLC* (2009) 174 CA4th 1185, 94 CR3d 918, in §45.27.

For recent cases discussing whether or not parties agreed to arbitrate, see §45.27 for *Rodriguez v Superior Court* (2009) 176 CA4th 1461, 98 CR3d 728 (in medical malpractice action in which patient signed arbitration agreement 4 days prior to surgery and then died during CCP §1295(c)'s 30-day recision period, agreement unenforceable against

patient's heir and no order compelling arbitration could be issued); and *Goldman v KPMG, LLP* (2009) 173 CA4th 209, 92 CR3d 534 (defendant nonsignatory to agreement containing arbitration clause may not compel arbitration under equitable estoppel theory unless claims against nonsignatory rely on or are inextricably bound up with contractual obligations of agreement).

Expensive fees associated with a requirement that disputes be heard before a panel of three arbitrators, and a prohibition on joinder of claims, were unconscionable as not being within the reasonable expectations of investors. See *Parada v Superior Court* (2009) 176 CA4th 1554, 98 CR3d 743, in §45.28. Further, a new dispute resolution policy was held procedurally unconscionable in part because an inaccurate policy description necessarily made the workers' agreement uninformed. See *Olvera v El Pollo Loco, Inc.* (2009) 173 CA4th 447, 454, 93 CR3d 65 in §45.28. However, an arbitration agreement was not substantively unconscionable for beginning with the phrase "I agree"; the phrase did not make agreement unilateral under the circumstances. See *Roman v Superior Court* (2009) 172 CA4th 1462, 1471, 92 CR3d 153 in §45.28.

Because an arbitration agreement contained an invalid class arbitration waiver and prevented plaintiff from acting as private attorney general, the entire agreement was held unenforceable. See *Franco v Athens Disposal Co.* (2009) 171 CA4th 1277, 90 CR3d 539, in §45.28. Similarly, the terms included in an arbitration agreement to discourage or prevent customers from vindicating their rights were unconscionable and were not severable; the arbitration provisions were unenforceable in their entirety. See *Parada v Superior Court* (2009) 176 CA4th 1554, 98 CR3d 743, 1586, in §45.30.

The arbitration of hate crime claims must meet *Armendariz* requirements. See *D.C. v Harvard-Westlake School* (2009) 176 CA4th 836, 98 CR3d 300, in §45.29.

It is no abuse of discretion to deny a motion to compel arbitration when all criteria of CCP §1281.2(c) have been satisfied. See *Birl v Heritage Care, LLC* (2009) 172 CA4th 1313, 91 CR3d 777, in §45.35.

An arbitration panel's good faith misinterpretation of governing law and factual errors are insufficient grounds to vacate an award under Federal Arbitration Act. See *Bosack v Soward* (9th Cir 2009) 573 F3d 891, in §45.48.

A provision stating merely that arbitrator "shall render an award in accordance with substantive California law" does not provide basis for judicial review. See *Christensen v Smith* (2009) 171 CA4th 931, 935, 90 CR3d 57, in §45.48.

The trial court properly vacated an arbitrator's award when the arbitrator's exclusion of material evidence substantially prejudiced a party and undermined "fundamental principle" of CCP 1286.2(a)(5). See *Burlage v Superior Court* (2009) 178 CA4th 524, 530, 100 CR3d 531, in §45.48.

When a petition to vacate is not timely opposed, the allegations of the petition are deemed admitted. However, this does not mean that the court must grant the petition; the court must draw its own conclusions from the allegations and confirm, correct, or vacate the award as appropriate. *Taheri Law Group, A.P.C. v Sorokurs* (2009) 176 CA4th 956, 98 CR3d 634, in §45.49.

When one party failed to petition trial court to confirm award and other party petitioned court to correct award, it was error to simply deny the petition; the court was required under CCP §1286 to confirm initial award if it did not correct, vacate or dismiss it. See *Law Offices of David S. Karton v Segreto* (2009) 176 CA4th 1, 97 CR3d 329, in §45.49.

Negotiation and Settlement. Code of Civil Procedure Section §664.6 does not apply after a judgment has become final. See *Walton v Mueller* (2009) 180 CA4th 161, 102 CR3d 165, in §46.46.

A party who discussed and agreed to terms of settlement agreement in court chambers stipulated to agreement "before the court" even though he was not present when his attorney later consented to the agreement on the record. See *1538 Cahuenga Partners, LLC v Turmeko Prop., Inc.* (2009) 176 CA4th 139, 97 CR3d 552, in §46.46.

Offers to Allow Judgment. If multiple defendants are found liable for a judgment under CCP §998, they are jointly and severally responsible for the prejudgment interest; plaintiffs are not entitled under CC §3291 to collect prejudgment interest on the total judgment from each defendant. See *Cadlo v Metalclad Insulation Corp.* (2009) 172 CA4th 1040, 1046, 91 CR3d 653, in §47.7.

If defendant's first settlement offer lapses and defendant later withdraws a second offer before the statutory period expires, the first offer is the relevant figure for §998 cost-shifting analysis if the plaintiff is awarded less than first offer at trial. See *One Star, Inc. v STAAR Surgical Co.* (2009) 179 CA4th 1082, 1089, 102 CR3d 195, in §47.23.

Submitted Case and Consent Judgment. A consent decree providing for class injunctive and declaratory relief and attorney fees for claims under Americans with Disabilities Act did not preclude an individual claim for damages under California's Disabled Persons Act. See *Louie v BFS Retail & Commercial Operations, LLC* (2009) 178 CA4th 1544, 101 CR3d 441, in §48.18.

On the facts of the case, a plaintiff was permitted to appeal from the consent judgment she requested after the court indicated adverse rulings on motions in limine. See *Villano v Waterman Convalescent Hosp., Inc.* (2010) 181 CA4th 1189, __CR3d __, in §48.19.

Good Faith Settlement. In a case involving several defendants and nearly $8 million in a global settlement, it was an abuse of discretion to hold physicians' $200,000 settlement to be in good faith when evidence at the time of settlement showed they shared in more than nominal liability and they timed offer to escape liability from other defendants, and the offer represented only 10 percent of their insurance policy limit. See *Long Beach Mem. Med. Ctr. v Superior Court* (2009) 172 CA4th 865, 91 CR3d 494, in §50.13.

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§1.1 I. SCOPE OF CHAPTER

This chapter covers matters that an attorney must attend to before and shortly after accepting a new civil case, including the rules of professional conduct that may apply. On considerations before taking a case, see §§1.2-1.11. Other topics are the initial interview (see §§1.12-1.16), case investigation (see §§1.17-1.19), and office management and procedures (see §§1.20-1.31).

This chapter also covers developing and using a case management system (see §§1.32-1.44), time- and recordkeeping (see §§1.45-1.47), and client questionnaire forms (see §§1.48-1.49).

On conflicts of interest that may require the client's written waiver or may make it necessary to decline to represent a potential client or another person, see chap 2. Representation agreements are covered in chap 3. On claims, notices, or demands that must be filed before suit is filed, see chaps 9-10.

On opening a law office, see also the State Bar's California Young Lawyers Association publication, Opening a Law Office: A Handbook for Starting Your Own Business (6th ed Cal CEB 2002).

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II. BEFORE TAKING CASE

§1.2 A. Determine Objectives of Litigation

An attorney has no explicit legal duty to accept employment in a civil matter. Counsel has an obligation to "maintain such actions, proceedings, or defenses only as appear to be legal or just, except the defense of a person charged with a public offense." Bus & P C §6068(c). However, an attorney has a duty not to reject for any personal considerations "the cause of the defenseless or oppressed." Bus & P C §6068(h).

Employment should not be undertaken if counsel knows or should know that the client's objective is (Cal Rules of Prof Cond 3-200):

- To bring an action, conduct a defense, assert a position, or take an appeal without probable cause and for the purpose of harassing or maliciously injuring someone; or
- To present a claim or defense in litigation not warranted under existing law unless based on a good faith argument for a change in the law.

An attorney who, after accepting a case, discovers conditions that are prohibited by the California Rules of Professional Conduct or other laws, has a duty to withdraw from the employment. Cal Rules of Prof Cond 3-700. See Cal Rules of Prof Cond 1-100 (rules not exclusive). Violation of these standards may give rise to the attorney's liability for damages (see §1.3) or sanctions (see §§1.6-1.7).

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.3 B. Avoid Future Claims of Malicious Prosecution or Abuse of Process

§1.3 B. Avoid Future Claims of Malicious Prosecution or Abuse of Process

An attorney generally owes no duty to adverse parties to conduct a reasonable investigation of the facts and law before filing a complaint against them, and, consequently, cannot be liable to them for malpractice under a negligence theory if the suit proves to have no basis in law or fact. See *Weaver v Superior Court* (1979) 95 CA3d 166, 156 CR 745. This immunity from liability for negligence does not protect the attorney against a suit for malicious prosecution if the elements of that cause of action are present.

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§1.4 1. Malicious Prosecution

An attorney may be held jointly liable with a client for the tort of malicious prosecution under circumstances showing that:

- The prior litigation terminated in favor of the defendant;
- The attorney lacked probable cause to represent the plaintiff; and
- The attorney acted maliciously.

See *Zamos v Stroud* (2004) 32 C4th 958, 12 CR3d 54; *Tool Research & Eng'g Corp. v Henigson* (1975) 46 CA3d 675, 120 CR 291, disapproved on other grounds in *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 254 CR 336).

NOTE: A public entity may not sue for malicious prosecution. See *Clark v Optical Coating Lab., Inc.*(2008) 165 CA4th 150, 182, 80 CR3d 812.

An attorney evaluating whether to initiate legal proceedings may generally rely on information provided by the client. *Morrison v Rudolph* (2002) 103 CA4th 506, 509, 126 CR2d 747. The attorney may be liable for malicious prosecution, however, if he or she initiates a lawsuit properly, but then continues to prosecute it after discovering it is not supported by probable cause. *Zamos v Stroud* (2004) 32 C4th 958, 12 CR3d 54 (attorney liable for malicious prosecution for continuation of suit after receipt of court transcripts containing statements by plaintiff that directly contradicted plaintiff's fraud allegations). See also *Hardy v Vial* (1957) 48 C2d 577, 581, 311 P2d 494 (applying cause of action to administrative proceedings). In *Zamos*, the California Supreme Court held that the standard for an attorney's actions is whether "any reasonable attorney" would agree those actions are totally and completely without merit in the initiation or in the continuation of a lawsuit. *Zamos,* 32 C4th at 970. See 26 CEB Civ Litigation Rep 127 (June 2004) for Comment discussing the implications of *Zamos*.

The California Supreme Court clarified the relationship between the role of research into the legal and factual basis for bringing the suit and liability for malicious prosecution in *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 881, 254 CR 336. The court held that the state of the defendant's knowledge of the facts may be submitted to a jury to determine what facts the defendant knew, but the question of probable cause is to be decided by the trial court under an objective test, *i.e.,* whether the trial court thinks that there was probable cause to file the suit. If the court finds that probable cause did not exist, the amount of research may be relevant to the element of malice. 47 C3d at 883. See *Sangster v Paetkau* (1998) 68 CA4th 151, 80 CR2d 66 (after *Sheldon,* proper inquiry is whether prior action was *objectively* reasonable; in this case, there was sufficient undisputed evidence in defendants' possession when they filed complaint in underlying action to independently establish probable cause).

PRACTICE TIP: Apart from avoiding liability to opposing parties, the attorney should do sufficient research to fulfill the professional obligation to adequately represent the client competently. Under *Sheldon*, mere lack of research will not support an action for malicious prosecution unless the court finds that the action was not legally tenable. The more likely it is that a particular action might be considered legally untenable, the more an attorney should research the matter and document that research.

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§1.5 2. Abuse of Process

An attorney may be held liable with (or without) the client for the tort of abuse of process. See *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 104, 101 CR 745 (knowingly and willfully filing collection actions in wrong county under statutorily inadequate pleadings with ulterior purpose of impairing individuals' rights to defend suits and coerce inequitable settlements). See also CCP §128.7 (court may order party or attorney to pay costs, including attorney fees, incurred by other party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay; however, court may not award sanctions against represented party for frivolous legal arguments). Merely filing or continuing a lawsuit, even for an improper purpose, is not a proper basis for an abuse of process proceeding. *Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 1169, 232 CR 567.

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C. Safeguard Against Sanctions

§1.6 1. For Litigation of Matter Unwarranted by Law

In addition to possible civil liability for the tort of malicious prosecution, counsel who takes a position in litigation that is unwarranted by existing law or not based on a good faith argument for a change of law may be subject to court-imposed sanctions. See CCP §128.7. See also Cal Rules of Prof Cond 3-200; discussion in §1.2.

Code of Civil Procedure §128.7 generally adopts revised Fed R Civ P 11. *Hart v Avetoom* (2002) 95 CA4th 410, 413, 115 CR2d 511. Section 128.7 permits the court, in certain situations, to impose appropriate sanctions on attorneys, law firms, or parties who violate the duty to conduct a reasonable inquiry into the law and facts before signing a pleading, written motion, or other paper filed or submitted to the court. By presenting (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, the attorney is certifying to the best of his or her belief that the paper is "warranted by existing law or by a nonfrivolous argument for [its] extension, modification, or reversal." CCP §128.7(b)(2). The court may award reasonable expenses and attorney fees for pleadings or other papers that are "presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" or for legal contentions that are unwarranted "by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." CCP §128.7(b)-(c).

The motion must be served on the opposing party *before* the conclusion of the case. *Hart v Avetoom* (2002) 95 CA4th 410, 413, 115 CR2d 511; *Barnes v Department of Corrections* (1999) 74 CA4th 126, 135, 87 CR2d 594. Under the safe harbor provision of the statute, a motion for sanctions may not be filed with the court unless, within 21 days after service of the motion, the challenged pleading or conduct is not withdrawn or corrected. To comply with this provision, a party seeking sanctions must proceed in two steps. First, the party must file a notice of motion for sanctions on the offending party at least 30 days before filing the motion with the court. The notice must describe the offending conduct specifically. CCP §128.7(c)(1); 74 CA4th at 130. Second, if the offending party does not withdraw the pleading or correct the objectionable conduct, then the motion may be filed with the court. 74 CA4th at 130. See also *Eichenbaum v Alon* (2003) 106 CA4th 967, 131 CR2d 296 (sanctions still available after voluntary dismissal of complaint following timely filing of motion for §128.7 sanctions). Sanctions under CCP §128.7 are improper if the motion that is filed is different from the motion that is served, thus violating the "safe harbor" requirements of the sanctions statute. *Hart v Avetoom, supra*.

A trial court may bring a motion for sanctions on its own initiative. CCP §128.7(c)(2). To comply with the safe harbor provisions, however, the court must bring the motion before it has ruled on a dispositive issue or on the merits of the case, *e.g.,* a summary judgment motion. *Malovec v Hamrell* (1999) 70 CA4th 434, 82 CR2d 712. An order sustaining a demurrer without leave to amend does not bar a motion for CCP §128.7 sanctions unless the order is reduced to a judgment before the sanctions motion is served and filed. *Banks v Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 CA4th 949, 118 CR2d 803.

If brought for "an improper purpose," the motion for sanctions is itself subject to a motion for sanctions. CCP §128.7(h).

NOTE: Section 128.7 applies to complaints filed, or proceedings initiated, after December 31, 1994. CCP §128.7(i). However, CCP §128.5 applies only to complaints filed, or proceedings initiated, on or before December 31, 1994. *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 11 CR3d 298.

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§1.7 2. For Bad Faith Appeal

An appellate court may impose penalties on parties or attorneys for "[t]aking a frivolous appeal or appealing solely to cause delay." Cal Rules of Ct 8.276(a). The reviewing court "may add to the costs on appeal such damages as may be just." CCP §907. See *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1080, 275 CR 594 (attorney sanctioned for prosecuting appeal without having adequately researched its merits). See also *Cosenza v Kramer* (1984) 152 CA3d 1100, 200 CR 18 (court affirmed judgment in plaintiff's favor and awarded sanctions greater than judgment against both lawyer petitioning for appeal and his client).

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§1.8 D. Check for Conflicts

Before accepting a new case, counsel should make sure that no conflict of interest exists. Conflicts occasionally arise when not every attorney in the firm is aware of the identity of all the firm's present or former clients, or of all the matters in which the firm is or was involved. Some small firms circulate lists of new clients and matters among their attorneys in an effort to avoid representation of conflicting interests and to record the firm's inquiry into this question. In most firms, this procedure is not an adequate means of avoiding conflicts, and attorneys clear a new matter through a conflicts screening system, *e.g.,* a firmwide check of the names of past and present clients and the type of matter handled by the firm.

Under Cal Rules of Prof Cond 3-310, an attorney cannot agree to represent conflicting interests without all affected past and present clients' informed written consent. A check for any conflicting interests that the attorneys themselves may personally have in the present matter should also be included. For discussion of conflicts of interest generally, see chap 2.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.9 E. Know Rules of Professional Competence

§1.9 E. Know Rules of Professional Competence

The attorney must have the ability to perform legal services competently. "Ability" is defined as the quality or state of having sufficient learning and skill and being mentally, emotionally, and physically able to perform legal services. See Cal Rules of Prof Cond 3-110.

Thus, an attorney whose workload or activities will preclude the time, care, or effort that the case is likely to require should decline the representation. Similarly, an attorney should not accept a case that will present substantial difficulty, given the level of experience and skills required and the opportunity for obtaining self-education, assistance, and advice during the progress of the case. Cal Rules of Prof Cond 3-110.

The State Bar Rules of Professional Conduct can be found at www.calbar.ca.gov/state/calbar/calbar_home.jsp under Attorney Resources, Rules & Regulations, Rules of Professional Conduct.

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§1.10 F. Ascertain Circumstances of Referral

Before accepting a matter previously handled by other counsel, the attorney should inquire into the reasons for and circumstances of the party's decision to seek new representation. Frequent changes in counsel can be a sign that the client or matter is for some reason undesirable. For example, the party may

- Be disputing fees owed to the former attorney;
- Have unreasonable expectations about the case or otherwise be difficult to work with; or
- Be involved in a matter that has little merit or other major weaknesses.

The attorney should inspect correspondence and litigation files to verify any applicable deadlines and confirm the party's perception of the status of the litigation. If a referral was made for an innocuous or even flattering reason, these inquiries will enable the attorney to acknowledge the favor. On changes in representation, see chap 4.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.11 G. Consider Economic Feasibility and Other Matters

§1.11 G. Consider Economic Feasibility and Other Matters

An important preliminary factor to consider is whether the cost of litigation to the client is likely to outweigh the gain. Even if a party is willing to pay a fee, the attorney may be of better service by declining to represent a client in litigation until other means of resolution have been evaluated. On settlement generally, see chap 46. On alternative dispute resolution, see chap 45.

Each new matter will raise different concerns, but a few of the more common practical problems the plaintiff's attorney should consider before accepting employment are:

- **Liability.** Is liability clear? The evidence supporting each element of each cause of action, and the strength of anticipated affirmative defenses, should be evaluated. The credibility of and empathy likely to be given the prospective client and any known witnesses should be taken into account, if possible.
- **Damages.** Assuming success on one or more theories of liability, what damages can realistically be projected as the client's recovery? The attorney should assess whether any causes of action will support claims for punitive damages or multiple (*e.g.,* treble) damages, and whether any statutory limitations on damage awards exist (*e.g.,* CC §1431 limits liability for general damages to that allocated to a joint tortfeasor; CC §§3333.2 limits general damages in medical malpractice actions).
- **Attorney fees.** Is there a possibility of recovering attorney fees if the action is successful? Besides contractual clauses covering attorney fees, California and federal statutes provide for attorney fee awards to a successful litigant; there are also statutory limitations on attorney fees that may apply. See California Attorney Fee Awards (2d ed Cal CEB 1994).
- **Case management.** To what extent would the attorney have to streamline service in order to make the litigation economically feasible? The attorney should consider whether it is possible to cut back on case preparation sufficiently to make the litigation economically practicable while meeting professional obligations and maintaining professional standards, particularly if an opposing party escalates the litigation by requiring responses to various discovery methods. See Cal Rules of Prof Cond 3-110. If case preparation will be curtailed in order to allow the client a day in court, this fact should be fully and frankly disclosed to the prospective client, and the attorney-client understanding put into writing. Note that, while the scope of services to be performed may be defined, no agreement can be made to prospectively limit the attorney's liability to a client for malpractice. See Cal Rules of Prof Cond 3-400.
- **Costs.** How expensive will it be to prove actual damages? In addition to the costs of discovery, the attorney should consider (1) in a business case: the cost of analyzing and tabulating lost profits; the time involved in locating, organizing, and analyzing documents; the fees of an expert, if needed, to analyze and testify to losses; and (2) in a personal injury case: the cost of obtaining medical and employment records; the fees of medical and other experts.
- **Confidentiality/Publicity.** Will the proof of injury or lost profits entail discovery of sensitive personal or business information? The attorney should ascertain whether information—even if protected by court order from disclosure outside the litigation—will cause embarrassment or competitive disadvantage to the client.
- **Enforcing judgment.** Even if the prospective plaintiff's case on liability and damages appears solid, is there a good chance of recovering an award from the target defendant? The attorney should determine whether, *e.g.,* the prospective defendant is solvent or has insurance coverage for the type of claims contemplated, or whether the plaintiff will have to pierce the corporate veil or pursue another theory of vicarious liability in order to reach sufficient assets.

Before accepting a case, the attorney who is considering representation of the defendant should evaluate such factors as:

- The prospective client's prior litigation experience or sophistication in legal matters, and the client's ability to commit to a lengthy litigation course, if necessary;

- The monetary and other costs of litigation, including the possibility of adverse publicity;
- The client's ability to pay the fees;
- Whether the costs of defense are likely to surpass the dollar exposure (*i.e.,* largest judgment that could be awarded against the defendant at trial);
- The existence of insurance policies that may provide for a defense paid by the carrier (and except in a conflict situation usually handled by carrier's attorney), as well as coverage; and
- The relative ease or difficulty of communicating with the prospective client, especially about important decisions that must be made with a client's input during the course of litigation.

For further discussion of these factors as they can be determined during the attorney's initial interview with the prospective client, see §§1.12-1.16.

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III. INITIAL INTERVIEW

§1.12 A. Obtain Facts

The attorney ordinarily obtains the basic information about the prospective client and the legal issues in the initial interview. Questionnaires filled out by the prospective client or the attorney may assist in gathering personal data or other facts. See sample questionnaires in §1.48 (for individuals) and §1.49 (for businesses).

In conducting the initial interview, the attorney should record the client's version of the facts that give rise to the claims or defenses. Usually, it will be appropriate to ascertain:

- **The dates of relevant transactions or events.** Even a rough chronology is useful at the outset.
- **The correct names of all parties or potential parties.** This list may include the names of parent and subsidiary companies, and, if applicable, their attorneys. This step is important in checking for conflicts of interest. See §1.8.
- **Whether the claim may be barred by the running of a statute of limitations.** If so, the attorney should find out whether there are facts that might show that the statute was tolled or that the potential defendant is estopped to assert this defense.
- **Whether there is any other claim-filing requirement before initiating the lawsuit.** For example, the plaintiff's attorney should promptly learn whether any potential defendants are public entities for purposes of meeting governmental claims requirements; see chap 9.
- **The identity and location of witnesses.** The attorney should inquire into the likelihood of witnesses becoming unavailable due to age, ill health, or relocation.
- **The location of important documents and records.** Any written contract involved in the dispute should be examined for legal issues, including attorney fees provisions or other clauses expanding or limiting the parties' remedies.
- **The existence of insurance coverage**. The defense attorney should investigate the available insurance coverage (*e.g.,* homeowner's, business, title, and umbrella liability insurance) and whether the insurer has been given written notice of the claim against a prospective defendant.
- **The existence of written statements**. Counsel should find out whether anyone has investigated the matter or has possession of any written reports (*e.g.*, the party's own statements given to claims adjusters and the like) and should arrange to obtain copies.
- **Whether efforts have been made to resolve the matter informally.** The attorney should inquire into any efforts the prospective client and other parties have made to resolve the dispute informally.
- **The prospective client's financial condition.** The initial interview is the time to determine ability to pay the attorney fees and costs of handling the litigation.

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§1.13 B. Establish Good Working Relationship

The initial interview is important because the attorney and client form the first impressions of one another at this time. A lawyer can use this opportunity to inspire client confidence and show concern for the client as a person apart from the possible litigation. Observing a client's manner may also give the attorney insight about personality traits that could affect the litigation and may suggest ways to prepare the client later for direct and cross-examination at depositions and trial.

The attorney should explain the ground rules of the attorney-client relationship and the nature of representation in the initial interview, including:

- **Attorney-client privilege.** Counsel should emphasize that full disclosure to the attorney ensures that proper advice is given, and that the privilege protects an initial interview even if it does not result in representation. See *Sullivan v Superior Court* (1972) 29 CA3d 64, 69, 105 CR 241. Counsel should explain that even the client's partial disclosure of confidential information to outsiders may cause the privilege to be waived, but that communication with the law firm's staff to whom "disclosure is reasonably necessary" for the "accomplishment of the purpose for which the lawyer is consulted," is permissible. See Evid C §952.
- **Fee arrangement.** The requirement that a representation agreement be written, and the terms that must be included (*e.g.,* attorney fee and costs) should be explained and a clear understanding reached with the prospective client. See chap 3. See also §1.15.
- **Roles of attorney and client in litigation process.** The attorney should inform the prospective client of the existence of various professional obligations, *e.g.,* Cal Rules of Prof Cond 4-210 (restricting ability of lawyer to pay expenses for client) and 3-510 (communication of any settlement offers).
- **Attorney's office procedures**. Most law offices have customary practices regarding client status reports, the returning of client telephone calls, the use of legal assistants and associate attorneys, and items included in billing; see chap 3 (representation agreements). See also §§1.32-1.44 (case management system).
- **Conflict of interest rules.** The attorney should communicate the intention to determine immediately whether there are any conflicts that could preclude the attorney from accepting a case. See §1.8.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.14 C. Outline Possible Results, Risks, Costs, Timing, and Alternatives

§1.14 C. Outline Possible Results, Risks, Costs, Timing, and Alternatives

Based on the information given by the prospective client, the attorney should provide an initial assessment of the matter and the available alternatives. That is, even though it is rarely possible or wise to give a firm, unqualified opinion as to the likelihood of success, or even to recommend a particular course of action at the first meeting, the attorney should be prepared to describe generally:

- What the attorney sees as the significant legal or factual issues in the case and which way the issues (or some of them) might be resolved, assuming the facts as stated.
- If litigation is undertaken, what the attorney envisions in the way of:
- Any steps that should be taken immediately (*e.g.,* to prevent the running of a statutory deadline or to preserve evidence);
- Legal research and factual investigation;
- Possible pleadings (including cross-complaints), motions, and discovery likely to be undertaken by the parties;
- The likely duration and expense of the litigation; and
- The range of recovery or exposure for the client if reasonably based on the information provided in the first interview and known to the attorney.
- Whether the claim or defense could be considered unmeritorious and could present ethical or other problems if vigorous litigation is undertaken (see §§1.3-1.7).
- The possibility of early settlement and the feasibility of a minimal cost approach to the litigation. Depending on the client's legal sophistication, the attorney might explain that:
- The vast majority of lawsuits do not go to trial;
- The expenses of a lawsuit, if taken all the way to trial (or appeal), weighed against the potential outcome, may be prohibitive;
- Some cases settle quickly when concessions are made and a conciliatory stance is taken at the appropriate time; and
- The other parties may nonetheless undermine settlement efforts, escalate discovery, and force the case to trial.
- The possibility of doing nothing or seeking to resolve the matter short of litigation if:
- Liability is weak or too expensive to prove, or the chance of recovering damages from the prospective defendant is slim; or
- Seeking a legal solution could escalate an already difficult situation, causing disclosure of confidential personal or business information, unflattering or intrusive publicity, or the setting of an adverse precedent arising from the case.

PRACTICE TIP: It may be advisable in the initial interview to caution the client that litigation should be viewed as a last resort or the least desirable option, often taxing family or a business resources emotionally and financially. Risks to be weighed include the possibility of having to pay the costs and fees of the adverse party if the suit is not successful, or having to defend against a cross-complaint. The attorney might suggest that further negotiations be attempted, either by the attorney or another person, before any legal action is taken or that the client consider other means, *e.g.,* arbitration or mediation. See chap 45.

Most clients will appreciate, and some will expect, the attorney's written assessment of the issues and concerns outlined above within a reasonable time after the attorney is retained. Sophisticated clients may ask for an initial written analysis, plan, and proposal from prospective counsel. Any written assessment should include a recitation of the pertinent facts known and assumed by the attorney to be true.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.15 D. Discuss Fee Agreements

§1.15 D. Discuss Fee Agreements

The attorney should be sure to discuss legal fees, costs, and expenses at the first client contact and should reach an agreement with the client on these matters. With some exceptions, all fee agreements must be in writing. Bus & P C §§6146, 6148. Business and Professions Code §6147 governs contingent fee matters and Bus & P C §6148 governs all other matters when the expense to the client will be greater than $1000.

Exceptions to Bus & P C §6148 include:

- The client is a corporation.
- Services are rendered in an emergency.
- The client presents a written waiver.
- The attorney has represented the client on a similar matter.

See Bus & P C §§6147, 6148(a), (d)(1)-(3).

On written fee agreements, see chap 3.

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§1.16 E. Draft Engagement or Retainer Letter

After the attorney decides to accept the client, he or she should send a letter outlining the terms of the engagement or nonengagement. A major area of malpractice liability arises from misunderstandings between a client and an attorney regarding whether the attorney-client relationship was formed as a result of the first interview. The client may assume that the attorney is representing him or her, and the attorney may assume that no such relationship was formed. The engagement or retainer letter should define specifically the terms of the representation. Business and Professions Code §§6147-6148 require written retainer agreements with very specific information about fees. See §1.15. The engagement letter should also outline the terms of the representation. If the attorney declines representation, the letter should state that an attorney-client relationship was not formed, and the person should continue to seek an attorney.

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IV. CASE INVESTIGATION

§1.17 A. Confirm Client's Facts; Resources

Although it is usually appropriate to enter into a representation agreement before undertaking extensive investigations, the attorney often cannot assess the merits of litigation without preliminary factual investigation and legal research. If the results of investigation and research show that a client's or prospective client's perception or recollection of facts was faulty and do not constitute a meritorious cause of action or defense, the attorney must consider professional ethical obligations. See, *e.g.,* CCP §128.7 (sanctions for violating duty to conduct a reasonable inquiry into law and facts before submitting pleading, written motion, or other paper to court for complaints or petitions filed after December 31, 1994); Cal Rules of Prof Cond 3-200 (prohibition against taking position in litigation without probable cause or that is unwarranted by law). It is important to communicate clearly with the party on these points, and if necessary provide explicit written notice of nonengagement or of nonrepresentation, or if the lawyer has already become the attorney of record, to file a substitution of attorneys on motion to withdraw from the case. See chap 4 (changes in representation).

The methods, breadth of, and budget for legal and factual investigation will differ from case to case, but usually the attorney uses the same general resources, *i.e.,* the client's own files, other relevant documents obtained from witnesses, experts, public and private agencies and entities, opposing counsel, unrepresented parties, and, given the facts and issues known, appropriate research of the law. Many attorneys may find it beneficial to telephone opposing counsel, explaining they are now representing the client, and ask for information about the case. Sometimes key points known to the opposing party and eagerness to settle suggested by such a conversation can help attorneys evaluate and plan the strategy of the case at an early stage.

If the merits of a case turn on a technical point, the attorney should hire an expert consultant to help evaluate the client's position. The consultant's opinion can generally be shielded as the attorney's work product. See discussion of this privilege in California Civil Discovery Practice §§3.52-3.66 (4th ed Cal CEB 2006). In some cases (*e.g.,* medical malpractice suits), the attorney is required to consult an expert. See chap 9.

Other useful resources include:

- Legal research databases, *e.g.,* CEB (www.ceb.com), Lexis (www.lexisnexis.com), Westlaw (www.westlaw.com), which have online data of analytical and primary source material, as well as major periodicals, *e.g.,* The Wall Street Journal, The Patent Quarterly.
- Government Internet sites, *e.g.,* Judicial Council (www.courtinfo.ca.gov) for local rules, jury instructions, and Judicial Council forms, EDGAR (www.sec.gov/edgar.shtml) for SEC filings and forms.
- Government document repositories (*e.g.,* the Public Affairs Service Department at UCLA University Research Library and the document libraries at UC Berkeley and UC San Diego), where legislative and executive reports on topics of public interest and a multitude of statistical and demographic information can be found.
- Court files showing pleadings and other public records filed in similar actions involving the same parties or the same industry.
- Plaintiffs' and defendants' attorney associations with central repositories of information on experts, trial witnesses, and legal issues.
- Trade associations, which may be fruitful sources of industry standards and referrals to technical experts.
- Large accounting and securities brokerage firms, which may be able to supply published analyses of certain companies and industry trends.

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§1.18 B. Organize Research of Issues

Early and well-thought-out organization of a case is important in achieving an economically advantageous result for the client, whether through summary judgment, settlement, or trial. The initial interview should provide a basis for the attorney to develop a rough chronology of events and an outline of the general categories of legal and factual issues. Many attorneys start with jury instructions to assist in outlining the proof that will be necessary for each element of a cause of action or defense. For the Judicial Council Official Jury Instructions, see www.courtinfo.ca.gov. See also chap 41.

As the case progresses, a filing system can be set up to designate evidence pertaining to each element.

EXAMPLE: The issues for a breach of contract cause might be set up as follows:

1.1. Existence of enforceable contract
1.1.1. Written agreement signed 1/1/2004
1.1.2. Terms
1.1.3. Modified on 3/1/2004 in writing
1.1.4. Consideration for modification
1.2. Contract not illegal restraint of trade
1.3. Plaintiff performed
1.4. Defendant breached
1.4.1. Defendant's breach not excused
1.4.2. Supplier's strike not excused
1.5. Plaintiff took mitigation steps
1.6. Plaintiff suffered damages
1.6.1. Out-of-pocket mitigation expenses
1.6.2. Lost profits
1.6.3. Prejudgment interest
1.6.4. Attorney fees per contract

A legal assistant summarizing deposition transcripts can assign a number to each relevant portion of the testimony that corresponds to the issue outline. Files containing copies of important court decisions, draft jury instructions, legal research memorandums, and notes on the nature and location of evidence can also be assigned corresponding numbers. The issue outline then becomes the framework for organizing the law and evidence gathered in the case and will be available to assist in the preparation of trial briefs and declarations for summary judgment or other motions as well as be useful in an arbitration or at trial itself.

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§1.19 C. Plan Discovery

An outline of the legal and factual issues will enable the attorney to identify the evidence needed to prove the client's claims or defenses in the litigation. The attorney can then develop a discovery plan tailored to the subject and budget of the case. The timing of various discovery methods and the priorities for establishing key facts can be formulated, taking into account any applicable local court rules designed to speed the resolution of litigation under the Trial Court Delay Reduction Act. See chap 40. On creating and executing discovery plans, see California Civil Discovery Practice, chaps 1-2 (4th ed Cal CEB 2006).

Depending on the nature of the case and the relationship of the parties, it may be less costly and more effective tactically to conduct informal discovery on certain topics. Informal discovery and the initial investigation of the case often overlap, but the attorney should not overlook the advisability of proceeding informally at a later time in the litigation.

It is often useful to forgo formal discovery methods when attempting to locate nonparty witnesses or when checking into background information (*e.g.,* to assist in effective cross-examination, or to establish patterns of prior conduct, the competitive position of a party in a particular market, intent, conspiracy, or alter ego). When the defendant's solvency is in doubt, the attorney should obtain updates on the original asset search so that informed decisions may be made periodically about whether to continue the litigation.

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V. OFFICE MANAGEMENT AND PROCEDURES

§1.20 A. Establish Procedures and Controls

In past years attorneys, like doctors and dentists, had the reputation of being undisciplined about their business practices. Foremost among new developments demanding sound business practices are increasing economic pressures, court-mandated time limitations under delay reduction processing rules, and malpractice concerns.

The legal profession has become more competitive, requiring attorneys to carefully scrutinize their business practices. The high cost of legal services prevents most attorneys and firms from increasing their fees sufficiently to cover the costs of increased overhead for rent, malpractice insurance, salaries, computer equipment, and other basic items. The result is that, in order to maintain profits while remaining competitive, lawyers are forced to practice law in a more efficient manner. Doing so may be facilitated by adopting and implementing specific office procedures and controls.

The same procedures and controls that increase efficiency also increase effectiveness. They also minimize instances in which the clients' interests are endangered and they protect the attorneys' interests by reducing their exposure to malpractice claims. Undoubtedly, the increase in legal malpractice claims over recent years is at least partly a result of the public's perception that clients' interests are not being protected. In a survey of claims handled by one legal malpractice insurer, the four most common causes of claims arising from negligent attorney behavior, accounting for more than 80 percent of such claims, were (Blumberg, *Avoiding Malpractice*, 7 Cal Law 65, 66 (June 1987)):

- Failure to properly calendar a matter;
- Failure to be clear about the attorney's intention to take or withdraw from a case;
- Failure to monitor client payments, resulting in a suit for fees that prompts a client's cross-complaint for malpractice; and
- Inadequate knowledge of the law or investigation of the facts.

The first two of these (and, to a lesser extent, the third) are likely products of inadequate office procedures and controls and, therefore, their incidence can be reduced by improvement in these areas.

For discussion of establishing procedures and controls, see Opening a Law Office: A Handbook for Starting Your Own Business, chap 5 (6th ed Cal CEB 2002).

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§1.21 1. Client Intake Forms and Procedures

When a new matter is taken into the office, the first action taken should be to open a new file. The process of opening a new file should provide in one step all the information necessary for the various case management functions. Standardized client information necessary for case management includes:

- The client's name; address, including e-mail; telephone (office and cellular), and fax numbers;
- Information relating to the opposing party and the opposing party's counsel;
- Information identifying the file, the client, and the means of contacting the client and the opposing counsel; and
- Information on the manner in and rate at which the client will be billed.

For corporate clients, it is helpful to include information on a contact person for billing issues or questions.

Most offices that handle a significant volume of any particular type of case use client intake forms or questionnaires. Completion of the form may be performed by the client before the attorney interview, by a paralegal before or after the attorney interview, or by the attorney as the interview is conducted. Some of the advantages associated with the use of such forms are:

- The attorney interview process may be shortened.
- The information that experience has shown to be necessary for the specific type of case is obtained, thus minimizing omissions during the interview process.
- The location of information for similar matters is consistent from case file to case file, thus facilitating retrieval for discovery and other purposes.

Among the disadvantages of standardized client intake forms are:

- Completion of the forms may interfere with the client's need to "tell the story."
- The first and most important impression the client receives from the attorney may be one suggesting a depersonalized approach to the client's problems.
- The forms may require the client to provide more information than is reasonably necessary for the client's case or may omit information because of the unique nature of the client's problem.

If standardized client information forms are used, care should be taken to ensure that the representation is not too depersonalized in the process of obtaining necessary information. If a paralegal or staff person other than the attorney conducts the initial intake, the client should be informed at the outset that a few questions need to be asked before the client meets with the attorney so that the attorney can better respond to questions and assist with legal problems. If additional information or documentation is required, the client should be provided with a written list of what is needed and the date by which it will be provided should be agreed on.

The attorney should introduce the client to other staff members who will be assisting the attorney on the matter. Frequently, these individuals will have more day-to-day contact with the client than the attorney will have, and an early introduction can make the contacts more personal and pleasurable for everyone.

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§1.22 2. Office Procedures

Law offices, like other service businesses, require written procedures to assist employees in understanding and meeting their employers' expectations. Although office manuals often cover a multitude of subjects, including communications systems, employee benefits, employee compensation, office organization, office security, and personnel policies, the focus here is on litigation procedures. Among topics in this area that might appropriately be covered in an office manual are calendaring, client intake forms and procedures, closing files, confidentiality, document processing, forms manuals, opening files, "tickler" system, and timekeeping.

In many respects, the office manual sets the tone for the firm. Such manuals may be very detailed and extensive or may be brief and cover only areas of special concern to the firm. Each employee should receive an individual copy of the manual when their employment commences. An office copy should remain available in the library or similar location where it can be easily consulted by all employees.

All attorneys and the staff should be made aware of the manual and should strive to apply its procedures in uniformly and consistently. Procedures that are not working should be deleted or changed. The manual should be updated regularly to avoid confusion and its revision date should be indicated whenever any part of the manual is revised and updated.

NOTE: Like all employers, law firms should consider having an employment attorney review the office manual for personnel policies, such as "at will" employment and other issues. See generally Advising California Employers and Employees (Cal CEB 2005).

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§1.23 3. Forms Manuals

Attorneys performing many different tasks for many different clients have learned the benefit of maintaining forms. There is no attorney who does not recognize the value of having an example of a previously drafted complaint, contract, or will. Rather than develop forms *manuals,* however, attorneys too often seek to recall a particular case or client matter previously handled when they are faced with a client who has a similar problem or requires similar work performed. The task of creating a document can be greatly simplified by maintaining work product files and developing forms manuals.

One approach to developing a forms manual is to classify work produced on behalf of clients generally by the area of law in which it falls, *e.g.,* personal injury, family law, criminal law. As greater numbers of documents are collected, they are then classified more specifically within the subject areas of the law, *e.g.,* complaints, interrogatories, demand letters. As the number of documents in each classification grows, a large percentage of the same clauses will appear in each similar document. These basic clauses are then adopted as the basic form. Variations of the basic common clauses should be maintained.

The forms manual should be periodically updated as changes in the law occur or as more desirable formats are developed. The forms manual can be an excellent training device for new associates and staff and can be a significant timesaver because it does not rely on the attorney's ability to recall the names of old files containing similar work.

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B. Use of Contract Attorneys and Paralegals

1. Contract Attorneys

§1.24 a. Advantages and Disadvantages

Contract attorneys are usually hired to perform specific tasks or to work on specific cases. When the work is completed, the attorney's services are terminated or a new contract is entered into for other services needed by the firm. This type of arrangement can provide considerable savings to the firm through lower billing rates, salaries, and employment benefits. Savings may also result if the contract attorney works out of a local law library or from home, thereby obviating any need for the firm to provide office space. The disadvantages most often encountered with contract attorneys are frequent turnover and lack of familiarity with the law office or the client matter involved.

For discussion of staffing and contract attorneys, see Opening a Law Office: A Handbook for Starting Your Own Business, chap 6 (6th ed Cal CEB 2002).

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§1.25 b. Need for Written Contract

In hiring contract attorneys, it is imperative that the relationship between the firm and the attorney be defined by a written contract. In addition to defining the relationship between the contract attorney and the firm, the employment contract may help to avoid later disputes between them over a malpractice claim by the client or entitlement to profits, bonuses, or court-ordered attorney fees.

Before using contract attorneys, a firm should contact its malpractice carrier to determine the effect that using contract attorneys may have on malpractice coverage.

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§1.26 c. Depositions and Court Appearances

Care should be taken to ensure that a contract attorney who is hired for a deposition or court appearance is thoroughly versed about the case and the specific assignment. If there will be direct contact between the contract attorney and the client, the client should be advised and, if possible, introduced personally or by telephone to the contract attorney. After the deposition or court appearance has been completed, the contract attorney should provide a thorough written report of the proceedings.

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§1.27 2. Paralegals

In most law firms, salaries are the largest part of overhead. As pressure to increase salaries and related employment benefits continues to rise, law firms are becoming increasingly creative in developing ways of controlling such expenses.

Over the years, firms have turned more frequently to paralegals to assist with various tasks performed for clients, *e.g.,* preparing or responding to discovery requests, summarizing documents and deposition testimony, and trial preparation responsibilities. With proper training and supervision, a paralegal may do much of the work otherwise performed by attorneys. The advantages of using paralegals are twofold: First, the billing rate for paralegals is considerably less than for attorneys, resulting in a smaller bill for the client. Second, the work performed by paralegals on client matters normally results in significant savings of attorney time, allowing the attorney to devote greater time to matters requiring legal attention.

For discussion of staffing and paralegals, see Opening a Law Office: A Handbook for Starting Your Own Business, chap 6 (6th ed Cal CEB 2002).

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§1.28 a. Definition and Permitted Activities

Legislation defines the term "paralegal," sets educational and training standards, describes and sets limits on their permissible activities, defines their professional responsibilities, and provides a remedy for consumers injured by their unauthorized activities. Bus & P C §§6450-6456. Under Bus & P C §6450, a paralegal is an individual who holds him- or herself out to be a paralegal, who is qualified by education, training, or work experience, who either contracts or is employed by a lawyer, law firm, corporation, governmental agency, or other entity, and who performs "substantial legal work" under the direction and supervision of an attorney. The work must be "specifically delegated" to the paralegal by the attorney. Bus & P C §6450(a). Permissible activities for a paralegal may include, but are not limited to (Bus & P C §6450(a)):

> case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is permitted by statute, court rule, or administrative rule or regulation.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.29 b. Prohibited Activities

§1.29 b. Prohibited Activities

A paralegal may not provide legal services directly to a consumer of legal services except as performed under the direction and supervision of the lawyer, law firm, corporation, government agency, or other entity that employs or contracts with the paralegal. Bus & P C §6451. In addition, the following activities are specifically prohibited (Bus & P C §6450(b)):

- Giving legal advice;
- Representing a client in court;
- Selecting, explaining, drafting, or recommending the use of any legal document to or for anyone other than the paralegal's supervising attorney;
- Acting as a runner or capper (see Bus & P C §§6151-6152);
- Engaging in the unlawful practice of law;
- Contracting with or accepting employment as a paralegal for any individual who is not an attorney;
- In connection with providing paralegal services, inducing a person to enter into an allegedly profit-making or income-producing transaction; and
- Setting the fees that will be charged to the client for the paralegal's services, unless the client is an attorney (or organization authorized to employ or contract with paralegals) contracting for the paralegal's services.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.30 c. Education and Training Requirements

§1.30 c. Education and Training Requirements

A paralegal must have one of the following (Bus & P C §6450(c)):

- A certificate of completion of a paralegal program approved by the American Bar Association;
- A certificate of completion or a degree from an accredited postsecondary institution that requires successful completion of at least 24 semester units in law-related courses; or
- A bachelor's or advanced degree in any subject, plus one year of law-related experience under the supervision of a qualified attorney, and a written declaration from the supervising attorney that the paralegal is qualified to perform paralegal tasks.

An individual with a high school or general equivalency diploma, three years of law-related experience under the supervision of a qualified attorney, and a written declaration from the supervising attorney that the paralegal is qualified to perform paralegal tasks, may become a paralegal *but only* if the experience portion of the qualification requirements was completed by December 31, 2003. Bus & P C §6450(c).

Paralegals must also meet the following continuing legal education requirements (Bus & P C §6450(d)):

- Four hours of continuing education in legal ethics every 2 years; and
- Four hours of continuing education in general law or a specialized area of law every 2 years.

The supervising attorney has responsibility for certifying that the paralegal has met the continuing education requirements. The paralegal must keep a record of the certifications. Bus & P C §6450(d).

NOTE: A "legal document assistant" (see Bus & P C §6400(c)) who has a registered business name that includes the word "paralegal" may continue to use that name until the time for renewing the registration. Bus & P C §6450(f).

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§1.31 3. Delegation and Supervision

The chances of obtaining the desired finished product will be increased if tasks are clearly assigned. Although some attorneys have great success, others continue to have problems with those assisting them in matters relating to their clients. A few helpful hints to follow when working with support staff are:

- **Provide background information.** Most individuals understand an assignment better if they are able to appreciate how the assignment fits into the overall case and objectives.
- **Describe the result expected.** It is frequently helpful, for example, to provide a copy of a similar product, preferably one that was completed to the attorney's satisfaction, pointing out strong and weak aspects.
- **Provide time guidelines.** The employee should be told how much time to devote to the assignment. If the guideline is only an estimate, that should be indicated. The employee should be directed to inform the attorney if significantly more time is required than was initially anticipated.
- **Set priorities**. The employee should be informed about the relative importance of the assignment and whether it should be placed ahead of or behind other matters previously assigned. If there is a conflict with an assignment received from another attorney in the office, that attorney should be contacted so that the priority between the two projects can be worked out.
- **Set a date for completion.**
- **Direct the employee to potential resources.** These resources should include other attorneys and files that have addressed similar problems.
- **Delineate the employee's responsibilities.** The division of decisionmaking between the attorney and the employee should be made clear.
- **Discuss the assignment.** The employee should be given sufficient detail to ensure an understanding of the assignment and an opportunity to raise any questions.
- **Keep in contact.** The employee should be informed at the outset how and when the attorney will check on progress.

It is often helpful to provide the employee with a written assignment sheet containing much of the information suggested above.

For discussion of duties regarding delegation and supervision, see Opening a Law Office: A Handbook for Starting Your Own Business, chap 6 (6th ed Cal CEB 2002).

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§1.32 VI. CASE MANAGEMENT SYSTEM

Ideally, every law office would be staffed with experienced personnel who have the knowledge, skill, and time to handle competently all matters that cross their desks. But even when those attributes are present, such things as vacations, illness, forgetfulness, and procrastination sometimes prevent the accomplishment of tasks in an appropriate manner. An effective case management system helps to prevent tasks from being overlooked, which would expose clients and attorneys to potentially serious consequences. A case management system should:

- Organize client information for effective filing, retrieval, and use;
- Facilitate workflow by providing sufficient notice to accomplish specific tasks in a timely manner;
- Generate information for billing, budgeting, and other financial purposes; and
- Provide data for decisionmaking about growth and marketing.

Even in a small law office, there may be a multitude of documents that must be filed, retrieved, and utilized over the years. A good filing system should be in place and ready for the first client, and, once established, will likely outlast particular attorneys and staff. The system should be designed to withstand the departure of a key employee as well as the breaking up of the firm. It should provide the ability to easily locate and retrieve every active and inactive file.

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A. Filing System

1. Case Files

§1.33 a. Numbering

Although many attorneys initially use an alphabetical filing system, the system invariably fails when the office accumulates a large number of cases. Files can easily be misfiled and become difficult to locate. Serious problems also develop when an alphabetical system becomes decentralized and more than one attorney begins sharing the same 26 letters of the alphabet.

A numerical filing system is clearly preferable to an alphabetical one. When the numbers are reused, a numerical filing system provides a quick check for missing files. Because billing and client information systems are usually based on client numbers, a numerical system facilitates a highly computerized office. In some instances, a computer billing system may require that a particular type of numerical system be used.

An example of a simple numerical system is one in which each client matter is assigned a four-digit number that follows the year in which the file was opened. The first case opened in 1999 would be assigned 99-0001 as a file number, the second 99-0002, and so forth. The system can be modified when there is more than one attorney in the office. Each attorney sharing the system may be assigned an interval of numbers. For example, Attorney A might have numbers 1000 through 1999, Attorney B 2000 through 2999, and Attorney C 3000 through 3999. Additional files for a single client matter may be identified by adding a letter following the number. Thus, if the first case opened in 1999 eventually requires three files, they might be numbered 99-0001, 99-0001A, and 99-0001B.

Alternatively, when an attorney handles several matters for a single client, the *client* may be assigned a number, to ensure that all matters relating to the same client are filed in the same location. Subsequent matters handled for the same client are then added in sequence to the client number. For example, client 1500 may have matters numbered 1500-1, 1500-2, and so forth. This approach is also helpful for the person responsible for billing, in producing a single client statement for all matters being handled.

The number for any particular file can be ascertained by reference to the appropriate client directory file (see §1.38) or a master open-file list. On numbering *closed* files, see §1.37.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.34 b. Individual File Organization

§1.34 b. Individual File Organization

Each client file should be organized in the same manner. This method will greatly enhance office efficiency because all personnel will know where to locate particular items. The specific organizational approach may vary among offices.

Each side of the folder (or each section when folders with multiple dividers are used) should be designated for particular items. With standard folders, for example, pleadings and court documents are commonly placed on the right and correspondence, notes, and other items on the left. More complex approaches should be developed for cases requiring large numbers of file items. For example, separate subfiles might be maintained for:

- Correspondence;
- Pleadings;
- Discovery documents;
- Memorandums and research; and
- Notes and drafts.

Within each side or subfile, the most recent item should appear on top.

Some attorneys keep an envelope in each file for storing small notes and telephone messages.

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§1.35 c. Location

When there is a single attorney in the practice, all files may be kept in a single, centralized location. If there are more attorneys, however, a centralized filing system may not be desirable because each attorney may wish to have easy access to the files for the cases he or she is handling. Consideration should also be given to the needs of paralegals, clerical staff, and others who regularly work on client matters and require access to the files.

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§1.36 d. Document Management and Evidence Retrieval

At the initial interview, most attorneys take a few pages of notes, review the relevant documents in the client's possession, and place the notes and documents in the file along with the retainer agreement. As the matter progresses, photographs may be taken, witness statements obtained, and deposition transcripts, medical records, and other documents received. Every document received should be date-stamped. In complicated matters involving multiple documents, many offices have developed procedures to facilitate identifying the source and page numbers as well as the description of the document. For example, in a case with one plaintiff and four defendants, each party might be designated by a letter, *e.g.,* the plaintiff as "A" and the defendants as "B" through "E," respectively. At the time of receipt, each page of a document will be given a sequential number prefaced with the letter of the party from whom it is received. Thus, A0037 and D0103 represent, respectively, page 37 of a document received from plaintiff and page 103 of a document received from defendant "D."

This system is especially useful in responding to discovery requests by opposing counsel. When responding to requests for inspection of documents, both the document itself and its identifying numbers are provided. This procedure helps to avoid a party later claiming they failed to receive specific documents. For example, if memorandums identified as D0329 to D0372 were provided in a discovery response, a claim at trial that this is the first time counsel has seen document D0350 may reasonably be met with suspicion. An additional advantage to this system is that the attorneys may agree to use the same numerical designations throughout the litigation, including deposition and trial proceedings, if permitted by the court.

With this type of retrieval system, it is necessary to maintain an index or log of documents received. The major drawback to this procedure is the time and expense associated with numbering and logging each document received. For large quantities of documents, use of numerical rotating stamps is clearly preferable to numbering by hand.

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§1.37 e. Closing Files

Although most resolved client matters stay resolved, almost all lawyers have had cases that seem never to die. Also, it may occasionally be necessary to retrieve documents even on matters that do stay resolved. Attorneys who fail to establish a system for closed files too often find themselves wasting hours or even days searching for files out of the past. It is important to develop a system for retrieving "closed" files should they be needed in the future.

When a matter is completed, the file should be closed in accordance with a standard procedure established by the office. It may be helpful to have a closing checklist, including such items as a check for any unfinished work, removal of any duplicate copies of documents, return to the client of original documents provided to the firm, and a closing letter to the client.

Like open files, every closed file should be assigned a closed file number at the time of closing. The numbers may be a simple sequence or begin with a "C" for "closed" and then follow a format similar to the open file numbering system (*e.g.,* C99-0001 to designate the first file closed in 1999).

The assigned closed file number then replaces the open file number, which is then removed from the "open" client directory file (see §1.38) and placed in a "closed" client directory file. If a master closed-file list is also maintained, the new closed file should be added to it.

Unless closed files are to be maintained forever, a policy should be developed for when files are destroyed and any preparatory steps to be taken beforehand.

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§1.38 2. Client Directory Files

Each attorney should maintain a client directory file, containing a list of each open case file being handled by the attorney. At a minimum, the list should show each client's name, the matter being handled, and the open case file number.

It is also advisable to include other information that may be helpful if the case file is unavailable. Possible items include the client's address and telephone numbers; opposing counsel's name, address, and telephone number; the court case number, if any; and information necessary to contact other persons involved with the case (*e.g.,* experts, adjusters, mediators).

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§1.39 3. Conflicts File

A conflicts file contains information required to determine whether a potential client matter presents a conflict. The conflicts file should always be checked before any actual consultation with the potential client. See chap 2.

For every matter handled, the name of the client and each opposing party, if any, should be filed in the conflicts file with a reference to the client file number.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.40 B. Evaluating Services Rendered

§1.40 B. Evaluating Services Rendered

Every member of the staff serves the client and should reflect positively on the firm. To ensure the quality of professional services rendered, employees should be made to feel that they are part of a team and not simply employees. Their work should be evaluated and they should be given constructive criticism when improvement is necessary. Clients should be asked about the treatment they receive from employees.

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§1.41 C. Calendaring and Docket Control

Missed deadlines caused by failure to properly calendar matters are the most significant cause of malpractice claims against attorneys. Without a good docket control system, even the most knowledgeable practitioner may fail to meet deadlines or may not have enough time to properly prepare. A good docket control system not only aids in avoiding serious losses to clients, but it provides the attorney with substantial peace of mind. Most, if not all, malpractice insurers require a docket control system.

A basic calendaring and docket control system has three components:

- A master calendar;
- Secondary calendars; and
- A "tickler" system.

For discussion of calendaring and docket control, see Opening a Law Office: A Handbook for Starting Your Own Business §§5.4-5.20 (6th ed Cal CEB 2002).

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§1.42 1. Master Calendar

All activity associated with client matters is entered on the master calendar. It should include all deadlines, court appearances, and other dates associated with litigation, such as statute of limitations filing deadlines (entered in red or another bright color); due dates for filing pleadings or other documents; discovery deadlines and due dates; and expiration dates for judgments requiring renewal.

There should be only one master calendar for the entire office. It is very important that a specific individual be designated to calendar matters in the master calendar. The person should review all incoming pleadings to determine the appropriate response date, consistent with established office guidelines. Once this has been accomplished, the pleading should be initialed or stamped in a manner verifying that calendaring has occurred. Each attorney should also review dates calendared and add any necessary additional dates. To avoid the failure to calendar a matter properly, no pleading should be filed unless it bears the stamp or initials of the person responsible for calendaring.

Some law firms also keep a statute book that is a centrally located 10-year diary. Entries are made in the statute book with (1) the date that the statute of limitations runs on each matter, and (2) after suit is filed, the date of any delay reduction deadline or any other crucial procedural deadline.

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§1.43 2. Secondary Calendars

Each attorney should have a secondary calendar, which should be reviewed daily and updated with the matters added to the master calendar (see §1.42) that relate to cases handled by the particular attorney. On the secondary calendar, the attorney may also include appointments and other professional matters requiring attention. As the name implies, a secondary calendar serves as a backup to the master calendar and allows the individual attorney to focus on matters for which he or she is responsible.

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§1.44 3. "Tickler" System

A "tickler" system that is tied to the master calendar is designed to give those responsible for specific tasks adequate time to perform them and to ensure that files are reviewed on a regular basis so that no file or required task is overlooked. Some offices use the tickler system both to ensure timely file review and to remind the attorney responsible to report regularly to clients on the progress of the case.

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VII. TIMEKEEPING AND RECORDING

§1.45 A. Importance of Accurate Recordkeeping

Many attorneys, especially those in small offices, limit their timekeeping efforts to cases that are billed on an hourly basis. By limiting their timekeeping efforts in this manner, these attorneys lose valuable information that could otherwise be used for planning. Accurate records of time spent on cases are also essential when a positive result is obtained and a court award of attorney fees is sought. Judges are generally more inclined to award fees for time that has been contemporaneously recorded and maintained throughout the course of the litigation than for time reconstructed near the conclusion.

Accurate time tracking is equally important in contingency fee cases, even though the compensation may not be related to the actual number of hours on the case. If the attorney's services are discharged before a recovery, a question will arise as to what the measure of the attorney's compensation will be. Time records become important because it is recognized that the attorney is, in that case, no longer entitled to the contingency fee amount, but the reasonable value of his or her services. *Fracasse v Brent* (1972) 6 C3d 784, 100 CR 385. The best way to establish the reasonable value of the attorney's services is by submitting time records that were maintained, even though the attorney was working on a contingency basis.

Daily time records should not only be kept on all work performed, whether by attorneys, paralegals, or other such support staff and whether involving billable or nonbillable time, but work should also be recorded at the time it is performed and not at the end of the day or week. This practice provides accurate and complete time records. The attorney may decide later not to charge for certain tasks, or to reduce excessive time, but this decision should be made when the client's statement is prepared, not when the time is logged.

For discussion of timekeeping and billing, see Opening a Law Office: A Handbook for Starting Your Own Business, chap 5 (6th ed Cal CEB 2002).

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§1.46 B. Timekeeping Systems

The specific manner in which the time is recorded is not particularly important as long as it is consistent and concurrent with the work performed. The essential data include the client's name, the matter, the file number, the task performed, and the amount of time spent. Most attorneys log time by the tenth or quarter hour.

There are many commercial time recording systems; some have codes for the type of work done, and many produce time slips that can be organized by client and matter, as well as master time sheets that record all billed time chronologically. Many of the suppliers of time and billing software may allow the attorney to test the system before purchasing it. The attorney should consider the cost of the system, the ease of use, the ability to record certain costs, such as long distance phone call charges and photocopying costs.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.47 C. Review of Office Productivity

§1.47 C. Review of Office Productivity

To ensure that a law firm remains in business, office productivity must be frequently scrutinized and evaluated. Use of daily time records will assist the firm, including the sole practitioner, to make many business decisions designed to keep the firm solvent and productive. Among the kinds of data that may be developed from complete and accurate time records on all cases are the following:

- A comparison of the hourly rate of return on contingent fee cases and cases in which fixed fees are charged with that in hourly fee matters;
- The percentages of the overall time spent and the hourly rates of return on cases in different areas of the law (*e.g.,* family law, personal injury, criminal law);
- The number of nonbillable hours worked per week or other given period;
- The percentage of attorney time spent on marketing activity, pro bono work, or other such activities, and the returns received at later dates; and
- A comparison of time spent by paralegals and other nonattorneys on various types of cases.

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ VIII. FORMS/§1.48 A. Questionnaire: Client Interview (Individuals)

VIII. FORMS

§1.48 A. Questionnaire: Client Interview (Individuals)

▶ To download **Word** version, right click and choose *Save Target As*

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1. Name _____

2. Home address _____

_____

3. Business address _____

_____

4. Address where attorney's correspondence should be sent _____

_____

5. E-mail address _____

6. Telephone numbers _____

Office (days and hours) _____

Fax number_____

Cell phone number _____

Home phone number_____

Secretary's name and telephone number _____

Best telephone number for messages _____

7. Employer

_____

8. Occupation _____

_____

9. Date and place of birth _____

10. Driver's license number _____

11. Social Security number _____

12. United States citizen? ____ (If not, state immigration status) _____

13. Spouse's name _____

Date of birth _____

Date of marriage _____

Address, if different _____

_____

Office address _____

_____

Office telephone number (days and hours) _____

Home telephone number, if different _____

14. Insurance information (if relevant) _____

Name of insurance agent _____

Home insurance coverage _____

Vehicle insurance coverage _____

Medical insurance coverage _____

Other _____

_____

15. Have you ever consulted another lawyer about this case? _____

Name _____

16. Have you been served with any papers concerning this case?

Describe briefly _____

17. Do you have any documents relating to this case (*e.g.,* correspondence, invoices)?

Describe: _____

18. Where are your files or papers relating to this case? _____

19. Are you aware of any witnesses or people with knowledge of the facts of this case?

Identify: _____

20. Have you made any statements to anyone concerning this case? _____

To whom/when/what _____

21. Referred by _____

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Source: Civil Litigation/California Civil Procedure Before Trial/1 Accepting Cases and Implementing Office Procedures/ §1.49 B. Questionnaire: Client Interview (Businesses)

§1.49 B. Questionnaire: Client Interview (Businesses)

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

1. Name of business _____

Headquarters address _____

State and date of incorporation _____

Licensed to do business in California? _____

Fictitious business name(s) _____

Corporate affiliates (parent and or subsidiary companies) _____

2. General counsel's name _____

Business address _____

E-mail address _____

Office telephone number _____

Fax number _____

Cell phone number _____

Home telephone number _____

3. Officer in charge of litigation _____

Title _____

Business address _____

E-mail address_____

Office telephone number _____

Fax number _____

Cell phone number _____

Home telephone number _____

4. Where and to whom should attorney's correspondences be sent? _____

_____

5. Insurance information

Officer in charge of risk/insurance _____

Outside broker_____

CGL carrier(s) and date(s) _____

Auto carrier(s) and date(s) _____

Workers' comp carrier(s) and date(s) _____

Employer's liability carrier(s) and date(s) _____

6. Have you consulted another (outside) counsel about his case? _____

Name _____

7. Have you been served with any papers concerning this case? _____

Describe briefly _____

8. Have you conducted any internal investigation concerning this case? ____

Who/when _____

9. Have you made any statements to anyone outside the company concerning this case?

To whom/when/what _____

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2

Avoiding Conflicts of Interest

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I. INTRODUCTION

§2.1 A. Scope of Chapter

This chapter examines conflicts of interest problems that arise in civil practice. It discusses governing law (see §§2.2-2.4) and avoiding conflicts situations (see §§2.5-2.10). It discusses the following types of conflicts:

- Attorney's adverse pecuniary interest (Cal Rules of Prof Cond 3-300) (see §2.11);
- Attorney's acceptance of compensation from a nonclient (Cal Rules of Prof Cond 3-310(F)) (see §2.12);
- Attorney's use of confidential information against present or former client (Cal Rules of Prof Cond 3-310(E)) (see §§2.13-2.24);
- Attorney or firm currently representing divergent client interests (Cal Rules of Prof Cond 3-310(C)) (see §§2.25-2.34);
- Conflicts arising from relationships with other persons (Cal Rules of Prof Cond 3-310(B), 3-320) (see §§2.35-2.42);
- Conflicts involving attorneys representing corporations (Cal Rules of Prof Cond 3-600) (see §§2.43-2.47); and
- Conflicts arising in the insurance context, including the insurer's duty to provide *Cumis* counsel (see *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 364, 208 CR 494) (see §§2.48-2.51).

This chapter also discusses:

- Limitations on an attorney acting as witness (see §§2.52-2.55);
- Client's consent to and waiver of conflicts (see §§2.56-2.58); and
- Attorney withdrawal and disqualification (see §§2.59-2.72).

It also includes forms of letter to client: adverse representation (see §2.73) and letter to corporate officer: dual representation (see §2.74).

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B. Governing Law

§2.2 1. Statutes, Rules, and Professional Standards

The California standards for professional conduct are set forth in the State Bar Act (Bus & P C §§6000-6238), the Rules of Professional Conduct, and local rules. Rules governing conflicts of interest in the California Rules of Professional Conduct are as follows:

- Attorney's adverse interests. Cal Rules of Prof Cond 3-300 (adverse pecuniary interest), 3-310(F) (accepting compensation from nonclient). See §§2.11-2.12.
- Attorney's representation of adverse interests. Cal Rules of Prof Cond 3-310(E) (use of confidential information) (see §§2.13-2.24), 3-310(C) (conflicting concurrent representation) (see §§2.25-2.34).
- Relationship with other party's lawyer. Cal Rules of Prof Cond 3-320. See §2.36.
- Organization as a client. Cal Rules of Prof Cond 3-600. See §§2.43-2.47.

NOTE: An attorney who provides short-term, noncontinuing legal representation to a client, under the auspices of a program sponsored by a court, nonprofit, law school or other organization, is not subject to Cal Rules of Prof Cond 3-310 unless the attorney knows that representation involves a conflict of interest. Cal Rules of Prof Cond 1-650. The attorney has an imputed conflict of interest only if the attorney knows that another lawyer associated with the attorney at a law firm would have a conflict of interest under Cal Rules of Prof Cond 3-310.

These rules apply to attorneys licensed to practice in California and to those litigating in California state courts. See Cal Rules of Prof Cond 1-100(D)(1)-(2). The rules also apply to lawyers representing clients in federal district courts in California whenever the district's local rules so provide. See, *e.g.,* Local Rules for the United States District Courts, ND Cal Local R 11-4 (members of the bar of the court and any attorney permitted to practice in the court must be familiar and comply with standards of professional conduct required of members of State Bar of California).

The American Bar Association also promulgates the ABA Model Rules of Prof Cond and the ABA Code of Prof Resp. Both are available on their website at www.abanet.org/cpr/mrpc/mrpc_home.html. The ABA Model Rules of Professional Conduct, however, do not establish ethical standards in California, because they have not been adopted in California and have no legal force of their own. *Hetos Inv., Ltd. v Kurtin* (2003) 110 CA4th 36, 46, 1 CR3d 472. Nevertheless, they are frequently cited in court opinions for guidance. See, *e.g., Hetos Inv., Ltd. v Kurtin*, *supra*.

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§2.3 2. Ethics Opinions

Attorneys are also bound by opinions of California courts, and although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Attorneys may also consider ethics opinions and rules and standards promulgated by other jurisdictions and bar associations. Cal Rules of Prof Cond 1-100(A). The ethics opinions of the State Bar Committee on Professional Responsibility and Conduct are set forth in www.calbar.ca.gov under Attorney Resources, Ethics Information, Ethics Opinions.

The State Bar and various local bar associations will assist attorneys in resolving ethical issues, including conflicts of interest questions. The State Bar maintains an "Ethics Hotline" during business hours at (800) 238-4427 (toll free within California) and (415) 538-2150 (outside California).

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§2.4 3. Rationale for Rules

The specific rules prohibiting conflicting representation flow from affirmative duties owed by the attorney and are designed to protect clients, attorneys, and the legal system. See Cal Rules of Prof Cond 1-100 (purpose for regulating professional conduct is "to protect the public and to promote respect and confidence in the legal profession"). An attorney's duties include the obligation to:

- Represent the client competently (Cal Rules of Prof Cond 3-110);
- Keep the client informed about significant developments (Cal Rules of Prof Cond 3-500);
- Preserve the client's confidences and secrets (Bus & P C §6068(e)); and
- Act with undivided loyalty on the client's behalf.

California State Bar Formal Ethics Opinion No. 1984-83; *Commercial Standard Title Co. v Superior Court* (1979) 92 CA3d 934, 945, 155 CR 393. See ABA Code Prof Resp EC 5-14 to 5-18, discussing the problematic impact of conflicts on the attorney's obligation to exercise independent judgment on the client's behalf.

Further, the relationship between attorney and client creates a fiduciary duty that limits the attorney's ability to take on the representation of clients whose interests may be at odds with those of existing clients, former clients, the attorney, or the attorney's firm. *Neel v Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C3d 176, 189, 98 CR 837. See ABA Code Prof Resp EC 5-1.

Conflicts of interest arise when the attorney's performance of these duties is inhibited. See, *e.g., Trone v Smith* (9th Cir 1980) 621 F2d 994, 998 (commitment of attorney to use skill and expend energy and resources in exercise of independent professional judgment on client's behalf would be endangered if attorney could switch sides later in a substantially related matter); *Yorn v Superior Court* (1979) 90 CA3d 669, 675, 153 CR 295.

The rules against representing conflicting interests also prevent attorneys from being placed in the untenable position of trying to reconcile the conflicts themselves, instead of devoting their full efforts to the enforcement of the interest that alone should be represented. *Anderson v Eaton* (1930) 211 C 113, 116, 293 P 788; *Woods v Superior Court* (1983) 149 CA3d 931, 936, 197 CR 185; *Yorn v Superior Court, supra*.

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II. AVOIDING CONFLICTS SITUATIONS

§2.5 A. Creating a Conflicts Check System

A conflicts check system allows the attorney to identify potential conflicts problems before agreeing to accept employment. The system should provide a means of checking for names of current and former clients, corporate parents and affiliates of current and former clients, principal officers and directors, fictitious business names, persons who have consulted with your firm, current or former adversaries, nonclients who have a substantial economic relationship with your firm (*e.g.,* CPAs), and companies or institutions for whom attorneys in the firm have served or are serving as directors, officers, or trustees. Many attorneys also include opposing counsel in pending matters on the conflict list. See §2.47 (attorneys serving as corporate directors).

NOTE: Find out whether a conflict or potential conflict exists during your initial telephone contact and *before* the initial interview.

Without a conflicts check system, the attorney might obtain confidential information from a potential new client that would disqualify him or her from continuing to represent an existing client, even if the attorney decides not to accept representation of the new client. *Flatt v Superior Court* (1994) 9 C4th 275, 36 CR2d 537; *Truck Ins. Exch. v Fireman's Fund Ins. Co.* (1992) 6 CA4th 1050, 8 CR2d 228 (attorney cannot prevent disqualification by ending representation of less favored existing client).

PRACTICE TIP: Several manual systems as well as computer software packages are available for tracking potential conflicts among existing and former clients. There are also periodicals and other publications that offer suggestions on this aspect of law office management.

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§2.6 B. Alternatives for Resolving Conflicts

Conflicts problems can be resolved in various ways, depending on the stage of recognition and the manner in which they are handled, including:

- Declining to accept representation of a prospective client whose interests may be adverse to another client.
- Full disclosure to the client (or former client) and the client's (or former client's) written consent to the employment despite the conflict or potential conflict (see §§2.56-2.58).
- The attorney's voluntary withdrawal (see §2.59).
- The attorney's forced withdrawal, *i.e.,* disqualification, if the court finds a conflicts situation and grants the motion for disqualification (see §§2.60-2.72).

PRACTICE TIP: When in doubt about the ethics of a potential conflict of interest, consider requesting information from the California State Bar's Ethics Hotline (see §2.2) or obtaining an opinion letter from private counsel specializing in legal ethics. Seeking an opinion from the county bar association ethics committee or from the State Bar Committee on Professional Responsibility and Conduct is another option, although this approach may take many months. An attorney's documented effort to obtain guidance from counsel or an ethics committee for an interpretation of a rule of conduct as it applies to a particular fact situation—and the attorney's subsequent compliance with that advice—will create a record showing that the attorney made a good faith effort to comply with professional standards, thus minimizing the chances of being disciplined for "willful breach" of the rules. See Cal Rules of Prof Cond 1-100.

See §§2.2-2.3 for governing law on conflicts of interest.

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C. Effect of Breaching Conflicts Rules

§2.7 1. Disqualification

An accusation of conflict of interest may cause embarrassment and damage to an attorney's reputation. A finding of a conflict of interest may result in disqualification (*i.e.,* forced withdrawal from further representation of the client in the particular matter) and may jeopardize the client's interests. See, *e.g., Thomas v Municipal Court* (9th Cir 1989) 878 F2d 285 (criminal client denied effective assistance of counsel owing to defense counsel's conflict of interest; ruling for retrial).

WARNING: Even the attorney who persuades the court that continued representation is appropriate may have to invest considerable time and expense in contesting a motion for disqualification by opposing counsel. Further, the situation could strain the relationship between the attorney and the client, especially if the client had not been informed previously of the conflicting or potentially conflicting interests in the case. A belated disclosure of adverse interests may damage the attorney-client relationship and may make the client or former client more likely to refuse to consent to the conflict. Finding new counsel midstream in the litigation is not only expensive, but also could substantively jeopardize the client's interests and expose the original attorney to tort liability.

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§2.8 2. State Bar Discipline

Willful breach of any of the rules against conflicts of interest may subject the attorney to State Bar disciplinary sanctions. See Cal Rules of Prof Cond 1-100, 1-110. See also Bus & P C §§6077-6078; Cal Rules of Ct 9.19. See generally 1 Witkin, California Procedure, *Attorneys* §558 (5th ed 2008). However, not every violation of the disciplinary rule necessarily results in disqualification, and not every disqualification supports the finding of an ethical breach. See Official Discussion to Cal Rules of Prof Cond 3-310.

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§2.9 3. Refunding Attorney Fees

The attorney or firm found to have breached conflict of interest rules can be required to return or forgo fees. See *Jeffry v Pounds* (1977) 67 CA3d 6, 136 CR 373 (law firm not entitled to fees for services rendered after date of firm's violation of former Cal Rules of Prof Cond 5-102(B) (now see Cal Rules of Prof Cond 3-310(C)), but entitled to compensation for services preceding the breach). See also *Anderson v Eaton* (1930) 211 C 113, 293 P 788 (contingency fee contract void as against public policy because of violation of duty of loyalty and duty to avoid conflict). The general rule is that an attorney disqualified for violating an ethical obligation is not entitled to fees. *A. I. Credit Corp. v Aguilar & Sebastinelli* (2003) 113 CA4th 1072, 1079, 6 CR3d 813.

Similarly, a retainer agreement may be voidable for public policy reasons if the attorney violates the rules proscribing representation adverse to a former client and disclosure of confidences. An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility. *Goldstein v Lees* (1975) 46 CA3d 614, 618, 120 CR 253. See *Birbrower, Montalbano, Condon & Frank v Superior Court* (1998) 17 C4th 119, 70 CR2d 304 (fees disallowed when attorney-client fee agreement was illegal because of violation of Bus & P C §6125). See also *David Welch Co. v Erskine & Tulley* (1988) 203 CA3d 884, 250 CR 339.

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§2.10 4. Tort Liability

An attorney who undertakes representation in violation of the conflict of interest rules may, in certain circumstances, be held liable in tort to pay the loss or additional expenses incurred as a proximate result of the improper conduct. See *Lysick v Walcom* (1968) 258 CA2d 136, 150, 65 CR 406 (attorney's breach of ethical obligations toward client was breach of duty of care owed by attorney). But see *Wilhelm v Pray, Price, Williams & Russell* (1986) 186 CA3d 1324, 1333, 231 CR 355 (fact that attorney engages in conduct that violates former Cal Rules of Prof Cond 7-103, concerning contact with represented party (see Cal Rules of Prof Cond 2-100), does not automatically give rise to civil cause of action).

One lawyer's breach of ethical duties of disclosure in a dual representation case (an uncontested divorce) justified allowing a claim by one client against the lawyer to recoup the loss of property a wife allegedly suffered owing to the attorney's failure to act diligently on her behalf. *Ishmael v Millington* (1966) 241 CA2d 520, 50 CR 592. See also *Klemm v Superior Court* (1977) 75 CA3d 893, 901, 142 CR 509 (dicta; attorney will be liable to client who suffers loss from lack of disclosure by attorney who undertakes to represent parties with divergent interests).

NOTE: An attorney's possible liability to a third party for negligence in, *e.g.*, drafting a will, does not create an attorney-client relationship between the attorney and the third party. *Baker Manock & Jensen v Superior Court* (2009) 175 CA4th 1414, 1422, 96 CR3d 785 (attorney who drafted will was not bound to beneficiary of will by duties of attorney to client).

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III. AVOIDING ADVERSE INTERESTS OR REPRESENTATION OF ADVERSE INTERESTS (CAL RULES OF PROF COND 3-300, 3-310)

§2.11 A. Attorney's Adverse Pecuniary Interest (Rule 3-300)

Conflicts rules apply when an attorney enters into a business transaction with a client or acquires some other pecuniary interest that may be adverse to the client's interest. A member shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied (Cal Rules of Prof Cond 3-300):

- The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that the client should reasonably have understood;
- The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so; and
- The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

PRACTICE TIP: The mandatory disclosure and written consent requirements imposed by Cal Rules of Prof Cond 3-300 apply to all transactions in which an attorney acquires the ability to extinguish a current client's interest in property. This is true even if the attorney's motive is to assist the client. The rule does not require that the client actually consult with independent counsel, but rather that the client be advised in writing that he or she has the right to do so, and is given a reasonable opportunity to decide whether to seek that advice.

In one case, an attorney entered into a transaction with clients that was fair and reasonable. However, because the attorney failed to advise the clients to seek the advice of an independent lawyer, the attorney violated former Cal Rules of Prof Cond 5-101 (now see Cal Rules of Prof Cond 3-300). *Ritter v State Bar* (1985) 40 C3d 595, 602, 221 CR 134; see *Brockway v State Bar* (1991) 53 C3d 51, 278 CR 836 (attorney took deed to property worth more than fee owed by client); *Sugarman v State Bar* (1990) 51 C3d 609, 274 CR 246 (attorney received loan from client in lieu of fee); *Connor v State Bar* (1990) 50 C3d 1047, 269 CR 742 (to help client avoid foreclosure, attorney took title to client's property and made false statements to lender); *Rose v State Bar* (1989) 49 C3d 646, 663, 262 CR 702 (attorney's statement implied that consultation with other counsel not needed).

NOTE: Counsel must consider the foregoing and be cautious in making arrangements with clients regarding attorney fees. The California Supreme Court has held that an attorney who secures payment of hourly fees through a charging lien against a client's future recovery has acquired an interest adverse to the client and must comply with Cal Rules of Prof Cond 3-300. The attorney must explain the transaction fully, offer fair and reasonable terms, provide a copy of the agreement, give the client the opportunity to seek independent counsel, and secure the client's written consent. *Fletcher v Davis* (2004) 33 C4th 61, 14 CR3d 58. See §3.25 for a sample Attorney's Lien Agreement. See also *Hawk v State Bar* (1988) 45 C3d 589, 598, 247 CR 599 (payment of attorney fees by note secured by deed of trust on client's property constituted attorney acquiring interest adverse to client; attorney disciplined). If the client gives informed consent to a fair transaction, the attorney should either insist that the client obtain independent legal advice, or document that, having been given a reasonable opportunity, the client has declined to do so.

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Source: Civil Litigation/California Civil Procedure Before Trial/2 Avoiding Conflicts of Interest/§2.12 B. Attorney Accepting Compensation From Nonclient (Rule 3-310(F))

§2.12 B. Attorney Accepting Compensation From Nonclient (Rule 3-310(F))

An attorney may not accept compensation for representing a client from anyone other than the client unless (Cal Rules of Prof Cond 3-310(F)):

- There is no interference with the attorney's independence of professional judgment or with the client-lawyer relationship;
- Information relating to representation of a client is protected as required by Bus & P C §6068(e); and
- The attorney obtains the client's informed written consent, as long as no disclosure or consent is required if:
- Such nondisclosure is otherwise authorized by law; or
- The member is rendering legal services on behalf of any public agency that provides legal services to other public agencies or the public.

PRACTICE TIP: Whether the nonclient payor of attorney fees is a relative, friend, or business affiliate of the client, Rule 3-310(F) requires disclosure and written consent from the client. It is wise to include in the disclosure that a nonclient is paying the attorney's fee both in the written fee agreement and in a separate writing. Even when consent to the payment of fees is given by the client, confidentiality must otherwise be strictly maintained.

Counsel should also consider Rule 3-310(F) before accepting dual representation of:

- An organization and its constituents when the organization would be paying the attorney fees and costs (see §2.12);
- A constituent alone when the organization would be paying the lawyer's fees and costs; and
- An insured when the insurer would be paying attorney fees and costs.

In each case, counsel should consider whether his or her independent judgment on behalf of the client whose representation is being paid for by another may be compromised or otherwise affected by the financial arrangement.

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C. Attorney's Use of Confidential Information Against Present or Former Client (Rule 3-310(E))

§2.13 1. Simultaneous Versus Successive Representation

Different standards have evolved for conflicts arising from *simultaneous* representation of clients with potentially adverse interests and for conflicts arising from *successive* representation of clients with adverse interests. *Metro-Goldwyn-Mayer v Tracinda Corp.* (1995) 36 CA4th 1832, 1839, 43 CR2d 327. When the representation is successive, *i.e.*, when an attorney is engaged to represent a party's interests that are adverse to a former client of the attorney's, courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality. *In re Charlisse C.* (2008) 45 C4th 145, 159, 84 CR3d 597; *Flatt v Superior Court* (1994) 9 C4th 275, 283, 36 CR2d 537; *Metro-Goldwyn Mayer v Tracinda Corp., supra*. The test for disqualification in those instances is whether there is a "substantial relationship" between the subjects of the former and current representations. *In re Charlisse C.*, *supra; Flatt v Superior Court, supra; Metro-Goldwyn Mayer v Tracinda Corp., supra*. See §§2.14-2.24.

However, when the potentially conflicting parties are simultaneously represented by the same attorney, the primary value at stake is the attorney's duty—and the client's legitimate expectation—of loyalty, rather than confidentiality. *In re Charlisse C., supra; Flatt v Superior Court*, *supra; Metro-Goldwyn Mayer v Tracinda Corp., supra.* On conflicting concurrent representation, see §§2.25-2.34.

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§2.14 2. Power to Disqualify Attorney

The court has the power, on a party's motion, to disqualify an opposing attorney from participating in a trial when, *e.g.*, the attorney improperly seeks to proceed against a former client. *City Nat'l Bank v Adams* (2002) 96 CA4th 315, 323, 117 CR2d 125. This prohibition is grounded in State Bar Rules of Professional Conduct and case law. Under Cal Rules of Prof Cond 3-310(E) an attorney shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client when, by reason of the representation of the client or former client, the attorney has obtained confidential information material to the employment. Additionally, the supreme court has held that an attorney, after severing a relationship with a client, may not do anything that will injuriously affect a former client in any matter in which he or she formerly represented him or her, nor may the attorney at any time use against the former client knowledge or information acquired by virtue of the previous relationship. *People ex rel Deukmejian v Brown* (1981) 29 C3d 150, 155, 172 CR 478; *Yorn v Superior Court* (1979) 90 CA3d 669, 675, 153 CR 295.

An attorney who accepts employment in violation of these rules is subject to disqualification on the motion of the former client. *Henriksen v Great Am. Sav. & Loan* (1992) 11 CA4th 109, 113, 14 CR2d 184.

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§2.15 3. Confidential Information Defined

The focus of the prohibition in Cal Rules of Prof Cond 3-310(E) is on the potential misuse of confidential information. See Bus & P C §6068(e); *Adams v Aerojet-General Corp.* (2001) 86 CA4th 1324, 1331, 104 CR2d 116. "Confidential information" probably includes both confidences and secrets. See Bus & P C §6068(e). The duty to maintain client "secrets" in confidence is broader than the evidentiary privileges in Evid C §§950-962. Thus, Rule 3-310(E), like Bus & P C §6068(e), appears to protect more than the communications protected by the attorney-client privilege. See *Goldstein v Lees* (1975) 46 CA3d 614, 621 n5, 120 CR 253. See also California State Bar Formal Ethics Opinion No. 1976-37.

Although confidential information need not be disclosed, the general nature of the conflict must be described. In a case involving an attorney's motion to withdraw as counsel based on an assertion of conflict, it was held that a trial court has a duty to inquire about the nature of the conflict, and counsel has a duty to respond to the court's inquiry within the confines of the privilege. *Manfredi & Levine v Superior Court* (1998) 66 CA4th 1128, 78 CR2d 494.

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§2.16 a. When No Confidential Information Given

The fact that the opposing party is the attorney's former client is not in itself sufficient to bar the attorney from accepting or continuing the case against that party if no confidential information relevant to the new case was given to the attorney, or if the former representation is so far in the past that any confidential information obtained would no longer be relevant. See *Johnson v Superior Court* (1984) 159 CA3d 573, 579, 205 CR 605.

Some nonjudicial ethics opinions suggest that even the possibility of using confidential information is a factor to be considered by the attorney in deciding whether to accept or continue representation. See, *e.g.,* California State Bar Formal Ethics Opinion No. 1980-52 (criminal defense counsel may not properly represent a defendant when a previous client of the attorney's office is a witness against the new client, and it is reasonably foreseeable that the former client's confidences may be, or may appear to be, used). However, case law holds that appearances of impropriety alone are not sufficient to require the attorney's withdrawal. See §2.72.

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§2.17 b. Information Not Confidential

Not all client disclosures to an attorney are made in confidence, and some courts applying the predecessor to Cal Rules of Prof Cond 3-310(E), former Cal Rules of Prof Cond 4-101, or its counterparts in other codes declined to disqualify attorneys or firms when the person or entity complaining of an alleged violation of the Rule had no legitimate expectation that the lawyer would preserve confidentiality or not use the information to another's benefit or against the disclosing person or entity. Decisions have applied this reasoning when the lawyer previously served two clients in a matter. See, *e.g., Allegaert v Perot* (2d Cir 1977) 565 F2d 246 (no expectation of confidentiality of information); *Trinity Ambulance Serv. v G & L Ambulance Serv.* (D Conn 1984) 578 F Supp 1280 (disqualification denied when it was unreasonable to assume that information shared among counsel for coparties in litigation would not be shared with clients). See also *Cornish v Superior Court* (1989) 209 CA3d 467, 476, 257 CR 383 (disqualification inappropriate when petitioner did not establish attorney-client relationship or that communications were made in confidence with expectation of nondisclosure to other party). For further discussion on representing corporations, see §§2.43-2.47.

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§2.18 c. Confidential Information Given to Nonattorney

The rules on possession of confidential information and automatic disqualification do not apply to nonlawyer clients who may have access to privileged matters. Rather, cases have held that a client's mere exposure to confidential information of the opposing party does not require disqualification of his or her attorney. Thus, an attorney, who represents a plaintiff in an existing suit, but is later retained by a former legal secretary for the defendant, is not disqualified from continuing to represent the plaintiff. The legal secretary had been fired for accessing a computer file containing information related to plaintiff's discrimination suit, and the trial court disqualified the attorney from representing the plaintiff based on its finding that the legal secretary likely shared confidential information with him. *Neal v Health Net, Inc.* (2002) 100 CA4th 831, 840, 123 CR2d 202.

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§2.19 d. Disclosures of Confidences Made by Attorney's Client

Disclosures of confidences of the adverse party made by the attorney's client do not support disqualification. "A party cannot 'improperly' disclose information to its own counsel in the prosecution of its own lawsuit." *Strasbourger Pearson Tulcin Wolff, Inc. v Wiz Technol., Inc.* (1999) 69 CA4th 1399, 1410, 82 CR2d 326 (citing *In re Complex Asbestos Litig.* (1991) 232 CA3d 572, 283 CR 732).

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§2.20 e. Disclosure Necessary to Prevent Criminal Act

Despite Bus & P C §6068(e)(1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. Bus & P C §6068(e)(2).

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4. The "Substantial Relationship" Test

§2.21 a. Test Defined

The substantial relationship test was adopted by California courts in a line of cases beginning with *Global Van Lines, Inc. v Superior Court* (1983) 144 CA3d 483, 192 CR 609, which held that when a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney's knowledge of confidential information is presumed. This is the rule by necessity, for it is not within the former client's power to prove what is in the attorney's mind. 144 CA3d at 489. The substantial relationship test as announced in *Global Van Lines* found wide acceptance among California courts. See, *e.g., Civil Serv. Comm'n v Superior Court* (1984) 163 CA3d 70, 80, 209 CR 159; *Dill v Superior* Court (1984) 158 CA3d 301, 304, 205 CR 671.

Another court noted, however, that problems might arise if courts inflexibly adhere to the conclusive presumption of the exchange of confidential information. The prophylactic approach to disqualification embodied in the substantial relationship test is "overinclusive[, and] may impose a significant hardship on the current client. It may unfairly limit the employment opportunities of lawyers. And, finally, it may stifle development of expertise in complex areas of law." *H. F. Ahmanson & Co. v Salomon Bros.* (1991) 229 CA3d 1445, 1453, 280 CR 614. The *Ahmanson* court established a "pragmatic approach, which focuses on the nature of the former representation," and does not compel disqualification "when there is no realistic chance that confidences were disclosed" in the prior representation. 229 CA3d at 1455. This pragmatic approach examines the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases. *H. F. Ahmanson & Co. v Salomon Bros.*, *supra*.

Several years after the *Ahmanson* decision, the Supreme Court adopted the substantial relationship test, stating that, when a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a "substantial relationship" between the subjects of the antecedent and current representations. When the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm. *In re Charlisse C.* (2008) 45 C4th 145, 159, 84 CR3d 597; *Flatt v Superior Court* (1994) 9 C4th 275, 283, 36 CR2d 537. See *People ex rel Dep't of Corps. v SpeeDee Oil Change Sys.* (1999) 20 C4th 1135, 86 CR2d 816 (reaffirming *Flatt*). See also *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 98 CR3d 422 (entire law firm disqualified from representing plaintiff in lawsuit when firm's associate formerly represented one of several defendants in same lawsuit). But see *Goldberg v Warner/Chappell Music, Inc.* (2005) 125 CA4th 752, 23 CR3d 116 (presumption is rebuttable; attorney's former firm disqualified only if evidence showed attorney had actually passed on confidential information about plaintiff to members of former firm).

Another court stated that the question of whether an attorney should be disqualified turns on two variables:

- The relationship between the legal problem involved in the former representation and the legal problem involved in the current representation; and
- The relationship between the attorney and the former client with respect to the legal problem involved in the former representation.

Jessen v Hartford Cas. Ins. Co. (2003) 111 CA4th 698, 709, 3 CR3d 877. In assessing lawyer disqualification in successive representation cases, the court must find out whether the lawyer's placement in former representation was direct and personal, in which event the only remaining question is whether the representations are connected. If they were not direct and personal, the court must assess whether the lawyer's position in the first case made it likely that he or she acquired confidential information relevant to current representation, given any similarities between the two. *Jessen v Hartford Cas. Ins. Co.*, *supra*.

In assessing whether there is a substantial relationship between the subject matter of the two representations, the issue is not whether the attorney performed the same specific tasks or services in the former representation, but rather the similarities between the legal problem involved in the former representation and that involved in the current case, *i.e.,* whether there is a substantial risk that the present representation will involve the use of confidential information

that was obtained during the prior representation. *Farris v Fireman's Fund Ins. Co.* (2004) 119 CA4th 671, 681, 14 CR3d 618.

If no substantial relationship exists between the subject matter of two representations, disqualification should not be ordered. *Health Maintenance Network v Blue Cross* (1988) 202 CA3d 1043, 1062, 249 CR 220 (rule does not apply when attorney accepts employment adverse to former client if matter bears no relationship to confidential information acquired by attorney as result of former attorney-client relationship). See also *Western Continental Operating Co. v Natural Gas Corp.* (1989) 212 CA3d 752, 759, 261 CR 100 (stating proposition); *Elliott v McFarland Unified Sch. Dist.* (1985) 165 CA3d 562, 572, 211 CR 802.

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§2.22 b. Case Law Refinements of Test

Analysis of case law involving successive representation of clients boils down as follows: First, if the nature of the representation is such that confidences could have been exchanged between the lawyer and the client, courts will conclusively presume they were exchanged, and disqualification will be required. *Adams v Aerojet-General Corp.* (2001) 86 CA4th 1324, 1331, 104 CR2d 116; *Rosenfeld Constr. Co. v Superior Court* (1991) 235 CA3d 566, 574, 286 CR 609; *H. F. Ahmanson & Co. v Salomon Bros.* (1991) 229 CA3d 1445, 1454, 280 CR 614; *Global Van Lines, Inc. v Superior Court* (1983) 144 CA3d 483, 489, 192 CR 609.

Second, there is a limited exception to this conclusive presumption in the instance in which the former attorney-client relationship was peripheral or attenuated. In such a situation, a "modified substantial relationship test" has been applied to determine whether it was "reasonably likely that [the attorney] would have acquired confidential information" material to the current representation. *Faughn v Perez* (2006) 145 CA4th 592, 610, 51 CR3d 692. See also *H. F. Ahmanson & Co. v Salomon Bros.* (1991) 229 CA3d 1445, 1455, 280 CR 614 (disqualification not required when there is no realistic chance that confidences were disclosed between lawyer and client); *Adams v Aerojet-General Corp.* (2001) 86 CA4th 1324, 1340, 104 CR2d 116 (attorney who switches law firms has burden of proving he or she had no exposure to confidential information relevant to current action while a member of firm representing current client's adversary); *Goldberg v Warner/Chappell Music, Inc.* (2005) 125 CA4th 752, 23 CR3d 116 (attorney's former firm disqualified only if evidence showed attorney had actually passed on confidential information about plaintiff to members of former firm); *Fremont Indem. Co. v Fremont Gen. Corp.* (2006) 143 CA4th 50, 49 CR3d 82 (no reasonable probability that confidential information had been obtained in previous legal malpractice action involving issues and circumstances unrelated to present insurance litigation).

Third, the limited exception is not available when the lawyer's former and current employment are on opposite sides of the same matter or when the current matter involves the work the lawyer performed for the former client. When the lawyer switches sides in an ongoing dispute, the nature of the former representation will always be such that the exchange of relevant confidences must be presumed. See *Civil Serv. Comm'n v Superior Court* (1984) 163 CA3d 70, 80, 209 CR 159 (county counsel may not represent county on precisely same matter as to which it previously advised county's adversary); *Henriksen v Great Am. Sav. & Loan* (1992) 11 CA4th 109, 115, 14 CR2d 184 (rule requiring disqualification of entire law firm is especially true when attorney's disqualification arose from his prior representation of opposing side in same lawsuit); *Dill v Superior Court* (1984) 158 CA3d 301, 306, 205 CR 671 (lawyer's former personal involvement on opposite side in identical action is compelling reason to disqualify entire law firm).

This rule springs from the fact that all attorney-client communications are presumptively confidential (Evid C §§917, 952) and any communications between the lawyer and the client in the first representation must necessarily have been material to ongoing matter in which the lawyer has switched sides. *Grove v Grove Valve & Regulator Co.* (1963) 213 CA2d 646, 653, 29 CR 150. This case involved the lawyer's duty of loyalty as well as confidentiality. The prohibition is in the disjunctive: The lawyer may not use information *or* do anything that will injuriously affect his or her former client. When the lawyer switches sides and represents the former client's adversary in the same matter, everything the lawyer does for the new client necessarily will injuriously affect the former client. *People ex rel Deukmejian v Brown* (1981) 29 C3d 150, 156, 172 CR 478.

NOTE: The "substantial relationship" test under Cal Rules of Prof Cond 3-310(E) prohibits an attorney from serving as an expert witness against a former client. *Brand v 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 CA4th 594, 602, 21 CR3d 380 (attorney who had been retained by insurance company to give opinions regarding coverage and bad faith claims could not serve as plaintiff's expert witness in bad faith lawsuit against former client).

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§2.23 c. Rationale for Test

There are sound reasons why the substantial relationship test continues to apply in disqualification proceedings. The test and presumption were developed in litigation over disqualification, rather than by application of the Rules of Professional Conduct, which are used to discipline attorneys. The standard applied to disqualification rulings is abuse of discretion. *In re Complex Asbestos Litig.* (1991) 232 CA3d 572, 585, 283 CR 732. A greater showing is required in disciplinary proceedings, which require clear and convincing evidence to a reasonable certainty. See generally Cal Rules of Prof Cond 1-100. See also *Gregori v Bank of America* (1989) 207 CA3d 291, 303, 254 CR 853 ("disciplinary rules promulgated by bar associations are not intended to be used as procedural weapons in disqualification cases").

The State Bar has cautioned that the rules are "not intended to supersede existing law relating to members in non-disciplinary contexts." Official Discussion to Rule 1-100. There is a difference in the objectives of the court-made disqualification procedures and the State Bar's Rules of Professional Conduct. In disciplinary proceedings potentially affecting a lawyer's right to continue to practice law, the threshold showing of impermissible conduct may rationally be higher than in litigation affecting a lawyer's right to continue to represent a particular client in a particular matter.

In motions to disqualify opposing counsel, the substantial relationship presumption narrows the scope of inquiry, conserving court resources. If a party moving to disqualify opposing counsel were required to reveal the privileged material in order to prove that opposing counsel had in fact received material confidential information, the goal of preserving confidences would necessarily be impaired—even were the disclosure (*i.e.,* the evidentiary showing in support of the motion) to be made to the court in camera. See *Civil Serv. Comm'n v Superior Court* (1984) 163 CA3d 70, 79, 209 CR 159 (actual confidential matters should not be revealed to court). See also *Trone v Smith* (9th Cir 1980) 621 F2d 994, 999. But see *Cornish v Superior Court* (1989) 209 CA3d 467, 479, 257 CR 383 (Evid C §915 does not prohibit court from referring disclosure of confidences issue to referee for in camera inspection).

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§2.24 d. Identifying Client Under Rule 3-310(E)

Before an attorney may be disqualified from representing a party in litigation because his representation of that party is adverse to the interest of a current or former client, it must first be established that the party seeking the attorney's disqualification was or is "represented" by the attorney in a manner giving rise to an attorney-client relationship. *Civil Serv. Comm'n v Superior Court* (1984) 163 CA3d 70, 76, 209 CR 159. See *In re Lee G.* (1991) 1 CA4th 17, 32 n10, 1 CR2d 375.

In a variety of settings, courts have upheld a putative "client's" expectation of confidentiality of communications with a lawyer even when no formal attorney-client relationship existed between them. See *Trone v Smith* (9th Cir 1980) 621 F2d 994, 1002 (fiduciary obligations and professional responsibilities may warrant disqualification of counsel even without strict contractual attorney-client relationship). A person who consults with an attorney, but does not formally retain that attorney, may be considered a "client" for purposes of Cal Rules of Prof Cond 3-310(E) to protect the prospective client's expectation of confidentiality even in such preliminary discussions. *Galardi v State Bar* (1987) 43 C3d 683, 238 CR 774 (attorney may be disciplined for breach of fiduciary duty to nonclient); *Yorn v Superior Court* (1979) 90 CA3d 669, 153 CR 295 (act of consultation is key to finding whether attorney-client relationship had existed for purposes of former Cal Rules of Prof Cond 4-101). See also Comment, *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv L Rev 1244, 1321 (1981) (test: Is person divulging confidences to attorney with intent to secure legal advice?).

The payment of attorney fees alone, however, does not determine an attorney-client relationship. When parties contract that attorney fees be borne by a particular person, the attorney is not necessarily in an attorney-client relationship with the payor. *Strasbourger Pearson Tulcin Wolff, Inc. v Wiz Technol., Inc.* (1999) 69 CA4th 1399, 82 CR2d 326.

EXAMPLE: A person had consulted an attorney several years previously about a potential lawsuit against Company. The attorney declined the representation. Under California State Bar Formal Ethics Opinion No. 1984-84, the attorney may not now represent Company in a suit against the person who consulted previously, because the person is considered a "former client" for purposes of former Cal Rules of Prof Cond 4-101 (now see Cal Rules of Prof Cond 3-310(E)), unless the attorney is "wholly satisfied that by virtue of the passage of time or the nature of the confidential information in his possession there is no reasonably foreseeable likelihood that the confidential information might be usable to the detriment of the Inquirer." But see *Flatt v Superior Court* (1994) 9 C4th 275, 36 CR2d 537, in which the attorney was found to owe no duty to the prospective client, in light of the duty of loyalty to the current client, against whom the prospective client sought advice in consulting with the attorney.

It follows that the more remote in time the consultation was, the more likely it is that the attorney no longer has "confidential information" harmful to the person interviewed. See *Johnson v Superior Court* (1984) 159 CA3d 573, 579, 205 CR 605 (passage of time may lessen significance of any confidential information given); *Westinghouse Elec. Corp. v Kerr-McGee Corp.* (7th Cir 1978) 580 F2d 1311, 1322 (no abuse of discretion in denying disqualification when 10 years had passed and the matters were not substantially related).

PRACTICE TIP: Before consulting initially with a prospective client, the attorney should ascertain the names of all parties involved or potentially involved from the prospective client and do a firm check of these names for conflicts. See §2.5. Otherwise, there is a risk that one attorney within the firm will learn relevant confidential information in the course of the initial interview, only to find out later that the firm already represents a party or prospective party to the dispute, which could require the firm to withdraw from its current representation and bar the firm from representing either the existing client or the new client in the matter.

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D. Same Attorney or Firm Currently Representing Divergent Client Interests (Rule 3-310(C))

§2.25 1. Rule Against Conflicting Concurrent Representation

An attorney may not, without the informed consent of each client (Cal Rules of Prof Cond 3-310(C); see also ABA Model Rules of Prof Cond 1.7):

- Accept representation of more than one client in a matter in which the interests of the clients potentially conflict (*In re Celine R.* (2003) 31 C4th 45, 56, 1 CR3d 432);
- Accept or continue representation of more than one client in a matter in which the clients' interests actually conflict (*Carroll v Superior Court* (2002) 101 CA4th 1423, 1428, 124 CR2d 891); or
- Represent a client in a matter and at the same time in a separate matter accept as a client a person or an entity whose interest in the first matter is adverse to the client in the first matter (*Hernandez v Paicius* (2003) 109 CA4th 452, 465, 134 CR2d 756); *Abbott v IRS* (9th Cir 2005) 399 F3d 1083 (no adverse client relationship existed when attorney who represented taxpayer client in estate proceeding against IRS had formerly represented IRS as a tax consultant in a totally unrelated matter).

Thus, Rule 3-310(C) states that, at the outset, an attorney may not accept representation if there is a *potential* conflict; it does not require an actual conflict. See *In re Celine R.* (2003) 31 C4th 45, 56, 1 CR3d 432.

In general, courts have interpreted Cal Rules of Prof Cond 3-310(C) to prohibit an attorney from accepting any case from a new client, Client A, in which the attorney would have to oppose another current client, Client B, in a lawsuit, unless both clients consent, whether or not the lawsuit is substantially related to the matter on which the attorney had represented or was currently representing Client B. See, *e.g.*, *Flatt v Superior Court* (1994) 9 C4th 275, 36 CR2d 537; *Jeffry v Pounds* (1977) 67 CA3d 6, 10, 136 CR 373; *In re California Canners & Growers* (Bankr ND Cal 1987) 74 BR 336, 342.

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§2.26 2. Duty of Loyalty

When a client engages a lawyer's services in a given piece of business, he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one on whom he looks as his advocate and his champion. The feeling of loyalty is necessarily destroyed if the lawyer accepts representation hostile to his client's interests. Because a lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter, the decisions condemn acceptance of employment adverse to a client even when the employment is unrelated to the existing representation. *Flatt v Superior Court* (1994) 9 C4th 275, 286, 36 CR2d 537; see *Hernandez v Paicius* (2003) 109 CA4th 452, 465, 134 CR2d 756. That is, in the litigation context, courts often apply the prohibition against representation adverse to a current client based on the duty of undivided loyalty to an existing client, without reference to or inquiry into potential breaches of confidentiality. *Jeffry v Pounds* (1977) 67 CA3d 6, 10, 136 CR 373.

In addition to the Rules of Professional Conduct, the duty of loyalty has been recognized in the common law: The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty that an attorney owes to his or her client. *Metro-Goldwyn-Mayer v Tracinda Corp.* (1995) 36 CA4th 1832, 1839, 43 CR2d 327; *Stanley v Richmond* (1995) 35 CA4th 1070, 1086, 41 CR2d 768. For discussion of concurrent representation of an organization and its constituents, see §2.47.

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§2.27 3. Automatic Disqualification

When the duty of loyalty applies, it requires an automatic disqualification in all but a few instances. *In re Charlisse C.* (2008) 45 C4th 145, 159, 84 CR3d 597; *Flatt v Superior Court* (1994) 9 C4th 275, 284, 36 CR2d 537; *Metro-Goldwyn-Mayer v Tracinda Corp.* (1995) 36 CA4th 1832, 1840, 43 CR2d 327. The reason for the per se rule is evident, even or perhaps especially to the nonattorney. A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter *wholly unrelated* to this one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All legal technicalities aside, few if any clients would be willing to suffer the prospect of their attorney's continuing to represent them in such circumstances. *Metro-Goldwyn-Mayer v Tracinda Corp., supra*.

Something seems radically out of place if a lawyer sues one of the lawyer's own present clients in behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer's *sense of loyalty* is askew. *Metro-Goldwyn-Mayer v Tracinda Corp., supra*. It is for that reason, and not out of concerns rooted in the obligation of client confidentiality, that courts and ethical codes alike prohibit an attorney from simultaneously representing two client adversaries, even when the substance of the representations are unrelated. *In re Charlisse C.,* 45 C4th at 159; *Flatt v Superior Court* (1994) 9 C4th 275, 285, 36 CR2d 537; *Metro-Goldwyn-Mayer v Tracinda Corp., supra*.

The *Flatt* opinion notes in a footnote that there are exceptions to this rule—for example, when corporate clients whose interests are adverse "as to unrelated matters" if full disclosure is made and both agree in writing to waive the conflict. *Flatt,* 9 C4th at 285 n4; *Metro-Goldwyn-Mayer v Tracinda Corp., supra*. See §2.29.

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§2.28 4. Existence of Attorney-Client Relationship

Before an attorney may be disqualified from representing a party in litigation because his representation of that party is adverse to the interest of a current or former client, in most cases it must first be established that the party seeking the attorney's disqualification was or is "represented" by the attorney in a manner giving rise to an attorney-client relationship. *Koo v Rubio's Restaurants, Inc.* (2003) 109 CA4th 719, 727, 135 CR2d 415. A trial court abused its discretion when it disqualified a law firm based on an attorney's misleading statement implying that he represented parties on both sides of a litigation, in absence of any evidence that the statement was true. *Koo v Rubio's Restaurants, Inc., supra*. California Rules of Professional Conduct 3-310(C), however, does not require an attorney-client relationship with both the current and former clients, and an attorney who acted as a Fed R Civ P 30(b)(6) representative for a party with interests adverse to a former client breached its fiduciary duty to that former client. *American Airlines, Inc. v Sheppard, Mullin, Richter & Hampton* (2002) 96 CA4th 1017, 1032, 117 CR2d 685.

A party seeking disqualification of an attorney need not always be a current or former client of that attorney. In *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 980, 98 CR3d 422, for example, attorneys representing various defendants shared confidential work product under a case management order that preserved the protections of the work product doctrine. When the attorney for one of the defendants (later dismissed from the case by plaintiff) joined the law firm representing plaintiff, the remaining defendants had standing to seek to disqualify the attorney and his firm. The court granted disqualification to protect the confidentiality of the work product created during defense counsels' joint defense efforts.

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§2.29 5. Multiple Representation Permitted in Transactional Matters

There are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. ABA Code Prof Resp EC 5-15. For example, dual representation of parties to a business transaction, *e.g.,* a lease or conveyance of property, establishing a business venture, a gift or a loan, is ordinarily not prohibited if it is "done in utmost good faith and with the full consent of all parties concerned." *Lessing v Gibbons* (1935) 6 CA2d 598, 606, 45 P2d 258.

A conflict of interest is not created merely because two clients seek to accomplish a common end and hire a single attorney to represent the joint enterprise. *Buehler v Sbardellati* (1995) 34 CA4th 1527, 41 CR2d 104. The Official Discussion to Cal Rules of Prof Cond 3-310 offers other examples of transactions, common enterprises, or legal relationships in which the parties may prefer to hire a single attorney "for the sake of convenience or economy": formation of a partnership for several partners or a corporation for several shareholders, preparation of an antenuptial agreement, joint or reciprocal wills for a husband and wife, or the resolution of an uncontested marital dissolution. All clients' informed written consent must be obtained. See, *e.g.*, *Marriage of Friedman* (2002) 100 CA4th 65, 71, 122 CR2d 412.

The Official Discussion to Rule 3-310 also emphasizes the requirement of full disclosure of the possible adverse consequences of joint representation. See *Day v Rosenthal* (1985) 170 CA3d 1125, 1148, 217 CR 89 (need for full disclosure). Full disclosure in this context requires the lawyer to inform parties of the areas of potential conflict, the option of seeking independent legal advice, and any potential adverse aspects of such multiple representation. See, *e.g.,* Evid C §962 (when clients have retained lawyer on matter of common interest, none may claim attorney-client privilege in any future lawsuit against each other). Attorneys should inform clients who enter into a transactional matter with potentially conflicting interests of their right to seek independent separate counsel. See *Ishmael v Millington* (1966) 241 CA2d 520, 50 CR 592.

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§2.30 6. When Dispute Later Arises From Transaction

The attorney representing both sides to a transaction is likely to be precluded from representing one of the parties to the deal against the other if a dispute about the deal develops later. *Civil Serv. Comm'n v Superior Court* (1984) 163 CA3d 70, 81, 209 CR 159. See *Western Continental Operating Co. v Natural Gas Corp.* (1989) 212 CA3d 752, 261 CR 100. The attorney is likely to have obtained valuable information from each party, and may face a Cal Rules of Prof Cond 3-310(E) problem. The type of advance disclosure and consent suggested in §§2.56-2.58 (and in the form in §2.73) may help solve this problem. See, *e.g.*, *Zador Corp. v Kwan* (1995) 31 CA4th 1285, 37 CR2d 754 (disqualification inappropriate when former client agreed in writing to joint representation and to attorney's continued and future representation of corporate client even if conflict existed); *Cornish v Superior Court* (1989) 209 CA3d 467, 257 CR 383 (in accepting defense of contractor on behalf of bonding company, law firm reserved right to continue representation of bonding company if bonding company and contractor became adversaries in future litigation). An argument can be made that, if the parties each knew that their information would be shared with the other and if each knew or had reason to know of the effect of Evid C §962 (neither of two clients may claim a privilege regarding communication with his common lawyer), the lawyer should not be disqualified under Rule 3-310(E) from later representing one against the other.

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§2.31 7. Nonapplicability of Substantial Interest Test; Scope of Consent

As noted above, the substantial relationship test determines whether client confidences were likely disclosed. Under the test, if there is a substantial relationship between the pending suit and the prior representation, then such disclosure is presumed. At this point, disqualification is justified. *Zador Corp. v Kwan* (1995) 31 CA4th 1285, 1292, 37 CR2d 754.

However, when the prior representation involves joint clients, and the subsequent action relates to the same matter, the substantial relationship test adds nothing to disqualification analysis. This is because a substantial relationship between the former representation and the subsequent action is *inherent* in such situations. In other words, clients A and B are jointly represented by C until C discovers a conflict between the legal position of A and B. Client B retains separate counsel. Client A then sues Client B. In these circumstances, a substantial relationship will always exist between C's prior representation of B and the litigation between A and B. Accordingly, in this situation, the substantial relationship test does not "test" anything. It should not determine whether C should be disqualified from representing A. *Zador Corp. v Kwan, supra*.

In addition, although the substantial relationship test determines whether confidences were likely disclosed, in a joint client situation, confidences are necessarily disclosed. In fact, the joint client relationship is an exception to the attorney-client privilege. When two or more clients have retained or consulted a lawyer on a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his or her successor in interest) and another of such clients (or his or her successor in interest). Evid C §962; *Zador Corp. v Kwan, supra*.

In California, the "joint client" or "common interest" exception to the attorney-client privilege applies only when two or more clients have retained or consulted a lawyer on a matter of common interest, in which event neither may claim the privilege in an action by one against the other. *Rockwell Int'l Corp. v Superior Court* (1994) 26 CA4th 1255, 1267, 32 CR2d 153. See also *Hecht v Superior Court* (1987) 192 CA3d 560, 567, 237 CR 528.

Accordingly, in such circumstances, the propriety of disqualification does not depend on the substantial relationship test. Rather, it generally turns on the scope of the clients' consent. *Zador Corp. v Kwan, supra*; see *Klemm v Superior Court* (1977) 75 CA3d 893, 899, 142 CR 509 (court approved dual representation, based on informed written consent, in uncontested divorce, but noted that if wife should later change her mind about child support, attorney would be precluded from representing either spouse in future contested hearings on that issue).

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8. Exceptions

§2.32 a. Written Consent

If an attorney represents in other matters two or more clients whose interests may or do conflict regarding a new matter in which one of those clients proposes to retain the attorney, before taking on the representation the attorney must obtain the client's informed, written consent and should ensure that the matters are sufficiently separate factually so that no confidence of either client will be violated. The attorney should fully disclose the potential conflict and its possible effect to each client to enable the client to make free and intelligent decisions on the subject matter of the representation. *Day v Rosenthal* (1985) 170 CA3d 1125, 1149, 217 CR 89 (quoting *Lysick v Walcom* (1968) 258 CA2d 136, 147, 65 CR 406). Representation in the new matter may be undertaken only if the affected clients give their informed, written consent. See form in §2.73.

If it is clear from the outset that a potential conflict is not remote but is likely to ripen into actual conflict, *e.g.,* the facts indicate that one codefendant is more culpable than another codefendant, or that one codefendant may need to confide in counsel and expect counsel to keep that information from the other codefendant, the attorney should probably not represent both clients even if they are willing to sign a waiver. See *Klemm v Superior Court* (1977) 75 CA3d 893, 898, 142 CR 509 ("common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other").

California law does not require that every possible consequence of a conflict be disclosed for a consent to be valid. *Zador Corp. v Kwan* (1995) 31 CA4th 1285, 1292, 37 CR2d 754. Waiver of the consequences of potential conflict was not inadequate simply because neither the court nor the agreement undertook the impossible burden of explaining separately every conceivable ramification. *Maxwell v Superior Court* (1982) 30 C3d 606, 622, 180 CR 177, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *Zador Corp. v Kwan, supra*.

The State Bar of California reached a similar conclusion. In California State Bar Formal Ethics Opinion No. 1989-115, the issue was whether a blanket waiver of the client's right to disqualify was ethically proper. The committee decided that such blanket waivers were not per se improper. The nature of the subsequent conflict of interest may range from simply representing two clients in entirely unrelated matters to actually representing both sides in the same dispute. Although a court would doubtless preclude a lawyer from representing both sides simultaneously, the committee believed that in this situation, if the original waiver was informed, local counsel could withdraw from its representation of lead counsel's client and continue to represent its own client even if otherwise confidential information would be used against that client. California State Bar Formal Ethics Opinion No 1989-115, p 2. See *Zador Corp. v Kwan, supra*.

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§2.33 b. Possible Exceptions to or Limits on Rule 3-310(C)

The court found no disqualifying conflict when the plaintiff's lawyer had discontinued representing the defendant on all related matters but still performed some services for the defendant in a separate field. There had been complete disclosure that the representation was dual, that there was no potential for disclosure of confidential information, and, most significant, that the defendant was estopped to complain by virtue of having initially provided the attorney's services to the plaintiff. *Health Maintenance Network v Blue Cross* (1988) 202 CA3d 1043, 1062, 249 CR 220. See also *Forrest v Baeza* (1997) 58 CA4th 65, 67 CR2d 857 (attorney's continuing representation of individual shareholder clients in derivative action permissible when functioning of corporation so intertwined with individual clients that any distinction between them is fictional). See also *Flatt v Superior Court* (1994) 9 C4th 275, 285 n4, 36 CR2d 537 (corporate clients whose interests are adverse *"as to unrelated matters"* if full disclosure is made and both agree in writing to waive the conflict).

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§2.34 c. Client's Consent May Be Inadequate When Actual Conflict Exists in Litigation

If an actual conflict develops during the course of representation, the attorney must immediately disclose the problem, explain the options to both clients and obtain their written consent to the attorney's continued representation. Cal Rules of Prof Cond 3-310(C). See Official Discussion to Cal Rules of Prof Cond 3-310 ("if the potential adversity should become actual, the member must obtain the further informed written consent of the clients").

Although Rule 3-310(C) applies in litigation as well as in other kinds of representation, it should come as no surprise that many courts disapprove of the practice of representing adverse parties in litigation, even when both parties consent. See, *e.g., Flatt v Superior Court* (1994) 9 C4th 275, 285 n4, 36 CR2d 537; *Klemm v Superior Court* (1977) 75 CA3d 893, 898, 142 CR 509.

Although withdrawal from representing one client may solve the dilemma of divided loyalties, it may not adequately protect the other client's right to confidentiality. In this situation, the attorney should withdraw from representation of both clients. *Klemm v Superior Court, supra*. See §2.59.

NOTE: Seldom, if ever, is it a good idea to continue representing either client in litigation after the discovery of an actual conflict of interest. First, the attorney may not be the best person to judge the magnitude of the conflict. Second, it is a situation ripe for further conflict, including malpractice litigation if one of the parties becomes disgruntled and decides that his or her consent was not truly informed.

Objections to an attorney's conflict of interest in litigation can come not just from the attorney's clients or former clients but from an opponent in the litigation. *Gilbert v National Corp. for Hous. Partnerships* (1999) 71 CA4th 1240, 84 CR2d 204 (trial court disqualified attorney because of perceived conflict of interest arising from representation of another employee who entered into confidential settlement agreement with defendant). But see *McPhearson v Michaels Co.* (2002) 96 CA4th 843, 117 CR2d 489 (appellate court reversed trial court's disqualification of plaintiff's attorney based on conflict of interest arising from attorney's prior representation of another employee who had entered into confidential settlement agreement with defendant in similar discrimination and sexual harassment action).

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IV. CONFLICTS ARISING FROM RELATIONSHIPS WITH OTHER PERSONS (RULES 3-310(B), 3-320)

§2.35 A. Interest in Subject Matter or Relationship With Another Party (Rule 3-310(B))

An attorney shall not accept or continue representation of a client without providing written disclosure to the client if:

- The attorney has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter (Cal Rules of Prof Cond 3-310(B)(1));
- The attorney knows or reasonably should know that he or she (1) previously had a legal business, financial, professional, or personal relationship with a party or witness in the same matter, and (2) the previous relationship would substantial affect the attorney's representation (Cal Rules of Prof Cond 3-310(B)(2));
- The attorney has or had a legal, business, financial, professional, or personal relationship with another person or entity the attorney knows or reasonably should know would be affected substantially by resolution of the matter (Cal Rules of Prof Cond 3-310(B)(3)); or
- The attorney has or had a legal, business, financial, or professional interest in the subject matter of the representation (Cal Rules of Prof Cond 3-310(B)(4)).

Rule 3-310(B) is a rule of disclosure only. No written consent from the client is required. Following full disclosure, the client decides whether to continue the attorney's engagement.

"Disclosure" is defined as "informing the client … of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client of the attorney's relationship to a party or witness in the client's particular matter." Cal Rules of Prof Cond 3-310(A).

Rule 3-310(B)(1) applies when the lawyer currently has any of five specified kinds of relationship with another party *or a witness* in the same matter in which the client has engaged the lawyer. In the litigation context, it is fairly easy to determine what is meant by "party" and "witness." Outside the litigation context, the definition of "witness" and a "party" is more difficult. In transactional matters, "parties" and "witnesses" may include the persons and entities most closely connected with or participating in the matter. There is little authority applying Rule 3-310(B) in either the litigation or transactional context.

Rule 3-310(B)(2) requires disclosure of the attorney's past legal, business, financial, professional, or personal relationships with the party or witness when the previous relationship would substantially affect the current representation. The standard is whether the lawyer knows or reasonably should know about the prior relationship and its effect on the current representation. Disclosure is required only to the existing client, not the former client. Consent is not required from either the current or former client unless confidential information material to the new employment was received in the former matter. Rule 3-310(E).

Disclosure to the client is also required under Rule 3-310(B)(3) when the lawyer has or had one of five specified kinds of relationships with another person the lawyer knows or reasonably should know would be substantially affected by a resolution of the matter. This rule applies to relationships with any person or entity, not only parties and witnesses.

Rule 3-310(B)(4) requires disclosure when the lawyer currently has or in the past had a legal, business, financial, or professional interest in the subject matter of the representation. This requirement "seeks to remove the possibility of 'self-dealing' that may arise when the lawyer has an interest in the subject matter of employment." California State Bar Formal Ethics Opinion No. 1987-92.

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§2.36 B. Relationship With Other Party's Lawyer (Rule 3-320)

An attorney's personal relationships sometimes raise conflicts issues. An attorney shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the attorney, lives with the attorney, is a client of the attorney, or has an intimate personal relationship with the attorney, unless the attorney informs the client in writing of the relationship. Cal Rules of Prof Cond 3-320. The Official Discussion to Rule 3-320 states that it is not intended to apply when the other lawyer is "merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter." See also Cal Rules of Prof Cond 3-310(B), discussed in §2.35.

NOTE: Written disclosure, not consent, is required.

The subject matter of intimate personal relationships was not specifically addressed in former Cal Rules of Prof Cond 4-101, the predecessor to Rule 3-320. Courts had, however, attempted to deal with such factual situations. In one case, an attorney, after the suit commenced, began dating opposing counsel's secretary. The evidence presented, however, did not show that the attorney discussed the substance of the case with the secretary. The court found that this relationship did not run afoul of former Rule 4-101, former Rule 7-103 (prohibiting ex parte contact with the opposing party), or the work product rule (CCP §§2018.010-2018.080): "[I]t is one thing to say [the attorney's] conduct was unprofessional and showed bad judgment and quite another to say … that it warrants his disqualification." *Gregori v Bank of America* (1989) 207 CA3d 291, 309, 254 CR 853.

NOTE: Rule 3-320 does not expressly require the client's consent to the conduct it purports to regulate.

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§2.37 C. Relationship With Successor Counsel and Co-counsel

Because it would violate the duty of undivided loyalty to clients, as a matter of public policy, a successor attorney owes no duty to predecessor counsel. There is no fiduciary relationship between successor and predecessor counsel representing the same client. See *Gibson, Dunn & Crutcher v Superior Court* (1979) 94 CA3d 347, 156 CR 326 (first lawyer has no right of indemnity, as defendant in malpractice action, against client's second, current lawyer).

The California Supreme Court has held that co-counsel do not owe a fiduciary duty to each other to protect the other's prospective interest in a contingency fee. Recognition of such a duty would be inconsistent with an attorney's overriding duty to the client, which should not be diluted by a duty owed to another person, such as another attorney. Co-counsel should not be obligated to conduct their joint representation so as not to diminish or eliminate the fees the other attorney expects to collect. *Beck v Wecht* (2002) 28 C4th 289, 290, 121 CR2d 384 (disapproving *Pollack v Lytle* (1981) 120 CA3d 931, 175 CR 81, which recognized fiduciary duty among co-counsel). See also *Saunders v Weissburg & Aronson* (1999) 74 CA4th 869, 874, 87 CR2d 405.

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§2.38 D. Relationship With Nonclients

Because a licensed attorney must conform to the highest professional standards in whatever capacity he or she may be acting (*Baron v City of Los Angeles* (1970) 2 C3d 535, 542, 86 CR 673), an attorney's personal relationship may give rise to charges of violating conflict of interest prohibitions, such as Cal Rules of Prof Cond 3-310(B) (attorney has relationship with another party interested in representation or interest in its subject matter) or even Rule 3-310(E) (attorney who received confidential material information from or about one client may not use it in subsequent representation of adverse party-client). Whenever an attorney undertakes a position of trust and confidence with a party, even if no attorney-client relationship exists, the attorney will be held to similar high standards of conduct. *Sodikoff v State Bar* (1975) 14 C3d 422, 121 CR 467.

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§2.39 1. Nonclient Family Members

An attorney did not owe a duty to a client's husband in a wrongful death action arising from the death of their daughter. *Hall v Superior Court* (2003) 108 CA4th 706, 708, 133 CR2d 806. A young girl drowned in a pool at the home of the paternal grandmother while the father and grandmother were present at the house, but the mother was not. The mother retained a lawyer to represent her in a wrongful death action against the grandmother, her husband's mother. The father never consulted with his wife's lawyer about the case against his own mother. Only after the mother recovered a settlement in that lawsuit did the father sue his now estranged spouse for half the recovery and her lawyer for malpractice and breach of fiduciary duty. *Hall v Superior Court, supra*.

The court held that the attorney faced a potential conflict of interest if he sought to represent the husband and the wife in this action because the husband was present when the daughter drowned. Further, the husband and wife did not consult the attorney together; the wife met with the attorney to discuss her own rights. *Hall v Superior Court, supra* (distinguishing *Meighan v Shore* (1995) 34 CA4th 1025, 40 CR2d 744 (husband and wife consulted attorney about injury to husband; attorney agreed to represent husband and failed to advise wife about her right to recover for loss of consortium)). The court noted that in *Ruttenberg v Ruttenberg* (1997) 53 CA4th 801, 62 CR2d 78, the court held that heirs who file a wrongful death action have a mandatory duty to join all omitted heirs in the action. Assuming that the husband in *Hall v Superior Court* should have been named as a nominal defendant in the wrongful death action, the duty imposed by *Ruttenberg* falls on the other heirs, not on their attorney. Thus the husband's claim is not against the attorney but against his wife. If he recovers against his wife for her failure to name him, she may be entitled to indemnity from her attorney. *Hall v Superior Court, supra*.

NOTE: Correspondingly, an attorney does not owe a duty to beneficiaries under a will to evaluate and ascertain the testamentary capacity of a client seeking to amend a will or make a new will. An attorney's duty of loyalty to a client may be compromised by imposing such a duty to the beneficiaries. *Moore v Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 CA4th 1287, 135 CR2d 888. California law has long permitted suits by intended beneficiaries who lose their testamentary rights as a result of attorney negligence. *Lucas v Hamm* (1961) 56 C2d 583, 15 CR 821. See *Osorino v Weingarten* (2004) 124 CA4th 304, 337, 21 CR3d 246 (attorney who failed to advise client that making her care custodian sole beneficiary under will would likely fail absent certificate of independent review breached duty of care owed to both client and care custodian).

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§2.40 2. Attorney as Public Officer

A conflict may arise if the attorney has served as a public office holder, or a corporate officer or director, and the public entity or corporation is now being sued by the attorney's firm. Fiduciary duties may arise in favor of nonclients because the attorney, by his or her actions or status, *e.g.,* as public servant or director, may be deemed to owe duties of trustworthiness, fealty, and honesty to a nonclient, even though an actual attorney-client relationship does not exist. See *William H. Raley Co. v Superior Court* (1983) 149 CA3d 1042, 1046, 197 CR 232.

In *Oaks Mgmt. Corp. v Superior Court* (2006) 145 CA4th 453, 51 CR3d 561, attorneys in a firm representing plaintiffs had previously acted as lenders to the defendant; the defendant sought to disqualify the firm under *Raley*. The court held that Cal Rules of Prof Cond 3-310 is inapplicable if there is no attorney-client relationship, and that there is no fiduciary relationship between a borrower and a lender. 145 CA4th at 465. Without an attorney-client relationship, exposure to confidential information alone is not sufficient to disqualify an attorney. 145 CA4th at 467. The moving party must show that a genuine likelihood exists that the status or misconduct of the attorney will affect the outcome of the proceedings. 145 CA4th at 467.

American Bar Association Code of Professional Responsibility Canon 9 concerns the lawyer's obligation to avoid even the appearance of impropriety, and ABA Code Prof Resp DR 9-101(B) provides that a lawyer shall not accept private employment in a matter for which he or she had substantial responsibility while a public employee. *Chambers v Superior Court* (1981) 121 CA3d 893, 898, 175 CR 575. Similarly, California State Bar Formal Ethics Opinion No. 1981-63 states that the law firm of a city council member cannot ethically represent tort claimants against the city, even with the council's informed consent.

As California State Bar Formal Ethics Opinion No. 1981-63 indicates, the principles of ABA Code Prof Resp EC 9 ("lawyer should avoid even the appearance of professional impropriety") may be even more important for attorneys who are public office holders than for nonpublic-servant lawyers. *William H. Raley Co.,* 149 CA3d at 1047 n2 (suggesting that cases involving lawyers who are or have been public officials are among the few in which appearance of impropriety is considered as basis for disqualification).

PRACTICE TIP: It is good practice to include in a conflicts check (see §2.5) the names of corporations, public entities, commissions, and boards to which the firm's attorneys have been elected or appointed. Whether the attorney is currently serving or served in the remote past is a factor that should be weighed in assessing potential conflicts and any appearance of impropriety. Consider requesting an ethics opinion from the State Bar or the appropriate county bar association committee in a close case.

There are also ethical rules uniquely applicable to the lawyer who serves in government for a period and then leaves to enter private law practice, and vice versa. See generally the Ethics in Government Act (18 USC §§207-208); ABA Model Rules of Prof Cond 1.11.

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§2.41 3. Attorney as Arbitrator

The State Bar Ethics Committee determined that an attorney who was currently representing a client on other legal matters could accept the client's nomination to serve on a three-member panel of arbitrators that, by agreement, was to be composed of two partisan (*i.e.,* party-chosen) arbitrators and a third "neutral" arbitrator. The Ethics Committee cautioned, however, that the attorney-client relationship must be fully disclosed to the other participants. See California State Bar Formal Ethics Opinion No. 1984-80.

According to the American Bar Association, an arbitrator who is selected as a partisan of a party in a multimember arbitration panel may later represent that party in another matter. See ABA Model Rules of Prof Cond 1.12(d).

In one case, however, a law firm that hired a retired judge who had presided over settlement proceedings in a still-pending action was disqualified from further representation of its client. Indeed, disqualification was ordered despite strict screening of the retired judge from any contact in the matter, based on the fact that confidences had actually been transmitted to the judge by the opposing party. *Cho v Superior Court* (1995) 39 CA4th 113, 45 CR2d 863 (distinguishing cases such as *Higdon v Superior Court* (1991) 227 CA3d 1667, 278 CR 588, which suggested that screening would suffice as long as the judicial officer had not actually received any confidential information).

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§2.42 4. Attorney as Trustee, Executor, Corporate Director, or Other Fiduciary

If an attorney acting in a nonlawyer capacity has a fiduciary relationship with a nonclient, the conflict of interest rules may apply when there is a question of divulgence of confidential information to the possible detriment of the nonclient. In one case, a law firm was disqualified from representing a plaintiff because one of its partners was currently serving on the board of directors of a bank that acted as trustee for the defendant and on the committee that oversaw the trusts administered by the bank. The court of appeal ruled that the defendant had a legitimate expectation that the lawyer, as director of (but not counsel for) a corporate trustee, owed the defendant a duty of fidelity and that it was error for the trial court not to have disqualified the law firm representing the plaintiff. *William H. Raley Co. v Superior Court* (1983) 149 CA3d 1042, 197 CR 232.

NOTE: An attorney may be disciplined by the State Bar for breach of a fiduciary duty owed to a nonclient. *Galardi v State Bar* (1987) 43 C3d 683, 238 CR 774.

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V. CONFLICTS INVOLVING LAWYERS REPRESENTING CORPORATIONS (CAL RULES OF PROF COND 3-600)

§2.43 A. Organization Is Attorney's Client

An attorney who represents corporations and other entities sometimes faces conflicts questions owing to differing interests of influential persons associated with the entity. In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement. Cal Rules of Prof Cond 3-600(A). Thus, shareholders, officers, and other "constituents" of a corporation are not considered "clients" for purposes of the Rules of Professional Conduct. See also *Meehan v Hopps* (1956) 144 CA2d 284, 301 P2d 10; *In re King Resources Co.* (D Colo 1982) 20 BR 191, 200 (lawyer for corporation or similar entity "owes his allegiance to the entity and not to the stockholder, director, officer, employee, representative or other person connected with the entity").

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B. Different Types of Conflicts

§2.44 1. Between Client Corporation and Parent Corporation

A parent corporation is not automatically considered the client of an attorney for a subsidiary. The attorney's duty of loyalty to a corporate client does not prevent the attorney from representing an interest adverse to the client's parent corporation unless their interests are sufficiently united that the parent is the alter ego of the subsidiary. *Brooklyn Navy Yard Cogeneration Partners v Superior Court* (1997) 60 CA4th 248, 70 CR2d 419. The attorney, however, may be deemed to be "representing" both entities when:

- The attorney's representation of a corporate client results in the disclosure of confidences relating to the affiliate of the client;
- The management of the two entities is so intertwined that they effectively operate as a single entity; or
- Other facts exist to demonstrate that the two entities have "unity of interest."

See *Morrison Knudsen Corp. v Hancock, Rothert & Bunshoft* (1999) 69 CA4th 223, 81 CR2d 425.

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§2.45 2. Between Client Corporation and Partnership

Whether an attorney who represents a partnership also represents individual partners depends on the nature and extent of the contacts between the attorney and the partners. *Johnson v Superior Court* (1995) 38 CA4th 463, 45 CR2d 312.

The conclusion may be different in the close corporation and general partnership context; *i.e.,* depending on the particular situation, the lawyer may be deemed to represent the "constituents" of a close corporation or a general partnership. Whether an attorney-client relationship exists depends on finding an express or implied agreement that the attorney also represents the partners. *Responsible Citizens v Superior Court* (1993) 16 CA4th 1717, 20 CR2d 756 (remanded to determine whether attorney-client relationship between attorney and individual partners was implied from totality of circumstances). The court distinguished *Woods v Superior Court* (1983) 149 CA3d 931, 936, 197 CR 185, in which the court held that an attorney for a family-owned corporation may not represent the husband in a divorce proceeding when the corporation is a primary focus of dispute in the divorce. In such a situation, the attorney represents both spouse-shareholders and therefore should not take sides in a controversy over the control of the corporation.

Although representation of a partnership does not per se result in representation of each of the partners, when the partners are the intended beneficiaries of the attorney's services, a duty to the partners may arise. *Johnson v Superior Court* (1995) 38 CA4th 463, 45 CR2d 312. An attorney who breaches a duty owed to the intended beneficiary partner may be liable for damages for the breach.

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§2.46 3. Between Client Corporation and Its Constituents

A separate problem arises when, in the course of representing the corporation or other organization, the attorney discovers that a conflict or potential conflict exists between the interests of the organization and one or more of its directors, officers, employees, or other agents. See *Forrest v Baeza* (1997) 58 CA4th 65, 67 CR2d 857. For example, the attorney might learn that a high-ranking officer has engaged in conduct that could expose the company to litigation and liability. When dealing with directors, shareholders, officers, employees, or other "constituents" of an organization, an attorney must explain the identity of the client for whom the attorney acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituents with whom the attorney is dealing. Cal Rules of Prof Cond 3-600(D). See also Cal Rules of Prof Cond 3-600(A).

There are ethical limitations on the organization's attorney's freedom to communicate with or obtain information or help for the organization from the constituent if there is a potential or actual conflict. The attorney shall not mislead such a constituent into believing that the constituent may communicate confidential information to the attorney in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent. Cal Rules of Prof Cond 3-600(D). Thus, in dealings with a constituent whose interests are or may be adverse to the entity, the attorney should inform the constituent of the attorney's representation of the organization, and, depending on the situation, the existence of a potential or actual conflict, the fact that the conversation may not be privileged, and the fact that the constituent may need to consult his or her own attorney. See Comment to ABA Model Rule 1.13 (when the interests of the organization and one or more of its agents come into conflict, the attorney for the organization should remind the agent that the attorney represents the organization, not the agent, and specifically advise the agent that communications between them may be outside of the attorney-client privilege).

NOTE: In *Meehan v Hopps* (1956) 144 CA2d 284, 290, 301 P2d 10, the court refused to order disqualification of the lawyer from representing the corporation in an action by one of its officers and expressly approved the corporation's lawyer's use of information previously gained from the officer because the officer was duty-bound to relay that information to the organization's attorney. If the lawyer in *Meehan* had misled the officer, Rule 3-600(D) may have changed the outcome if it had been in effect at that time.

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§2.47 C. Dual Representation of Organization and Constituent

California Rules of Professional Conduct 3-600(E) permits the dual representation of an organization and any of its officers, directors, employees, members, shareholders, or other "constituents," subject to the provisions of Cal Rules of Prof Cond 3-310 relating to conflicting interests. Thus, the nature of the attorney's existing and past relationship to the organization must be disclosed in order to receive the informed written consent of a constituent-client. See Cal Rules of Prof Cond 3-310(B), 3-600(D).

If an organization's consent to dual representation is required by Cal Rules of Prof Cond 3-310(C), consent must be given by the shareholders or organization members, or by an appropriate constituent of the organization who is not one of the officers to be represented. Cal Rules of Prof Cond 3-600(E). See, *e.g.*, *Forrest v Baeza* (1997) 58 CA4th 65, 67 CR2d 857 (directors who are defendants in derivative action may not consent to dual representation in their capacity as shareholders or directors). But see California State Bar Formal Ethics Opinion No. 1999-153 (in case other than derivative action, one of two shareholders in closely held corporation may provide consent on behalf of corporate entity to concurrent representation of both corporation and that shareholder). See also *Pringle v La Chapelle* (1999) 73 CA4th 1000, 87 CR2d 90 (attorney fee award upheld even though officer executed fee agreement on his own behalf and on behalf of corporation despite potential conflict of interest, when there was no evidence attorney had seriously violated Cal Rules of Prof Cond 3-600(E)). The attorney must fully disclose the nature and extent of any conflict or potential conflict to all those affected. Cal Rules of Prof Cond 3-310(A)-(C).

PRACTICE TIP: An attorney who is considering dual representation of an organization and its constituents in litigation when their interests potentially conflict should proceed with great caution. It is good practice for the attorney to put all important disclosures to the organization's officers or employees in writing. Unlike Cal Rules of Prof Cond 3-300 regarding transactions between lawyer and client (see §2.11), Cal Rules of Prof Cond 3-600 does not require that the client-constituent be advised in writing of the right to seek independent legal advice. But under circumstances that could give rise to a conflict, the attorney should at least consider advising the constituent in writing to seek independent counsel and wait until the constituent has had an opportunity to do so before proceeding with the dual representation.

For an example of a disclosure/engagement letter when the attorney is asked to represent both the entity and its officers in a situation in which their interests potentially conflict, see §2.73.

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VI. CONFLICTS ARISING IN INSURANCE CONTEXT

§2.48 A. Dual Representation of Insurer and Insured

Most liability insurance policies state that the insurer will provide a defense for covered claims. When a covered claim arises and proceeds to litigation, the insurer typically hires counsel of its choosing to represent the insured. Thus, in the usual tripartite relationship existing between insurer, insured, and counsel, there is a single common interest shared among them. Dual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to a third party is the same. *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 364, 208 CR 494.

In such circumstances, the lawyer retained by the insurer has two clients and owes a fiduciary duty to both the insured and the insurer. *Employers Ins. of Wausau v Albert D. Seeno Constr. Co.* (ND Cal 1988) 692 F Supp 1150; *Purdy v Pacific Auto. Ins. Co.* (1984) 157 CA3d 59, 76, 203 CR 524; *American Mut. Liab. Ins. Co. v Superior Court* (1974) 38 CA3d 579, 591, 113 CR 561. The defense counsel retained by the insurance company owes the same unqualified loyalty to the insured as if he or she had been personally retained by the insured. *American Mut. Liab. Ins. Co. v Superior Court, supra*.

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§2.49 B. Conflicts Between Insurer and Insured

When some allegations in the suit against the insured fall outside the scope of the insurance coverage, the standard insurance company practice is to defend under a reservation of rights, whereby the insurer promises to defend but states that it may not indemnify the insured if liability is found, depending on a subsequent determination of the coverage issued. *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 364, 208 CR 494. In that situation, a conflict of interest usually exists between the insurer and the insured, because it is in the insurer's interest for the third party action to establish that liability, if any, is outside the coverage of the policy, while it is in the insured's interest to show the opposite.

EXAMPLE: If an insurance policy covers damage from unintentional but not intentional acts, it is in the insurer's interest that the third party action find either no liability or liability based on an intentional act, while it is in the insured's interest that either no liability or liability based on an unintentional act be found. In such situations, the duty to preserve a client's confidences (see Bus & P C §6068(e)) may pose a substantial dilemma for the lawyer.

In handling the ethical dilemma facing counsel hired by the insurer to defend the insured, the *Cumis* court found that counsel must explain to both the insured and the insurer (162 CA3d at 375; see also *Executive Aviation, Inc. v National Ins. Underwriters* (1971) 16 CA3d 799, 809, 94 CR 347):

- The full implications of joint representation in situations in which the insurer has reserved its rights;
- That if the insured does not then consent to joint representation, counsel must withdraw; and
- That the insurer must pay the reasonable cost of independent counsel (selected by the insured) for the insured.

In another case, attendance of counsel for insurer that had a conflict of interest of which it was unaware, at depositions for *Cumis* counsel's firm, was an insufficient basis for extending vicarious disqualification of counsel to *Cumis* counsel; disqualification would require double imputation of knowledge of confidential information—first from one member of insurer's law firm to another member of that firm, and second from the latter attorney to a different law firm. *Frazier v Superior Court* (2002) 97 CA4th 23, 118 CR2d 129.

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§2.50 1. Insurer's Duty to Provide Independent Counsel to Insured (*Cumis* Counsel)

Civil Code §2860, sometimes called the *Cumis* statute, defines conflict of interest in the context of insurance defense and sets forth an insurer's obligations in defending an insured when a conflict arises. It provides that:

- A conflict of interest "creates a duty on the part of the insurer to provide independent counsel" unless a written waiver is obtained from the insured (CC §2860(a));
- A conflict of interest may exist when the insurer has reserved the right to litigate the issue of coverage and the outcome of the coverage issue can be controlled by the attorney first retained by the insurer (CC §2860(b));
- A conflict of interest does not exist
- As to allegations or facts in the litigation for which the insurer denies coverage;
- As to claims for punitive damages; or
- Solely because of a claim for damages in excess of policy limits (CC §2860(b));
- The insurer may insist on minimum qualifications for independent counsel (CC §2860(c));
- The insurer's liability for the attorney fees of independent counsel is limited to the rates it actually pays to attorneys it retains to defend similar actions in the community in which the dispute arose (CC §2860(c));
- Disputes over setting a standard respecting rates, and other disputes over fees of independent counsel, must be arbitrated (CC §2860(c));
- Independent counsel has a duty to disclose all relevant information to the insurer except privileged information on coverage issues (CC §2860(d));
- Both sets of counsel—independent/insured's and insurer's—are entitled to participate in all aspects of the litigation and must cooperate in the exchange of information "consistent with each counsel's ethical and legal obligation to the insured" (CC §2860(f)); and
- The insured may waive the right to independent counsel by signing the waiver statement included in the statute (CC §2860(e)).

NOTE: When a dispute exists about the insurer's duty to provide independent counsel (*e.g.*, the scope of coverage, the existence of a conflict of interest, the insurer's duty to defend), §2860 does not apply. See *Handy v First Interstate Bank* (1993) 13 CA4th 917, 16 CR2d 770 (trial court could not order arbitration of foundational issues of conflict of interest or duty to defend under §2860); *Truck Ins. Exch. v Dynamic Concepts, Inc.* (1992) 9 CA4th 1147, 11 CR2d 873 (absent contractual agreement to arbitrate, §2860 did not require arbitration of dispute over whether its provisions applied). See §5.11 on the *Cumis* exception to applicability of the California mandatory fee arbitration law.

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§2.51 2. Independent Counsel Owes Fiduciary Duty to Insured

Apart from the express obligations imposed on counsel by CC §2860, independent counsel, retained when there is a conflict or potential conflict between the insured and the insurer, owes a fiduciary duty only to the insured and does not represent the insurer. See *Employers Ins. of Wausau v Albert D. Seeno Constr. Co.* (ND Cal 1988) 692 F Supp 1150, 1157 (independent counsel may ethically represent insured in coverage action against insurer, and insurer need not pay for lawyer's work in coverage action). See *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 374, 208 CR 494; *Executive Aviation, Inc. v National Ins. Underwriters* (1971) 16 CA3d 799, 809, 94 CR 347 (independent counsel may also represent insured in coverage action against insurer).

The "counsel provided by the insurer," however, who has a right to participate in the litigation under CC §2860, has a dual duty to both the insurer and the insured. CC §2860(c); *Employers Ins. of Wausau,* 692 F Supp at 1160 n14. The insurance company may retain its own counsel to solely represent its interests, and that counsel owes no duty of fidelity to the insured. 692 F Supp at 1160 (emphasizing importance of disclosing identity of party to whom attorney owes duty of loyalty). See also *Bogard v Employers Cas. Co.* (1985) 164 CA3d 602, 614, 210 CR 578; *Executive Aviation, Inc. v National Ins. Underwriters, supra*; *Lysick v Walcom* (1968) 258 CA2d 136, 149, 65 CR 406. But such counsel cannot be the same as the counsel provided by the insurer referred to in CC §2860(a), (f). *Employers Ins. of Wausau v Albert D. Seeno Constr. Co., supra*.

In light of the dual fiduciary duties owed by appointed insurance defense counsel to both insured and insurer, appointed counsel must scrupulously avoid taking any action adverse to the insured. For example, if a coverage dispute arises after representation has commenced, or if the insured reveals that a noncovered act has occurred, appointed counsel is precluded from breaching confidentiality by disclosing the information to the carrier. If a conflict arises between the interests of the insured and the insurer, appointed counsel may be ethically compelled to withdraw from further representation of both and to maintain the information in complete confidence. See California State Bar Formal Ethics Opinion No. 1995-139.

Similarly, counsel owes fiduciary duties to an insurer arising from representation of an insured that preclude concurrent acceptance of employment adverse to the insurer in a completely separate matter, absent written consent. See *State Farm Mut. Auto. Ins. Co. v Federal Ins. Co.* (1999) 72 CA4th 1422, 86 CR2d 20.

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VII. LIMITATIONS ON ATTORNEY ACTING AS WITNESS (RULE 5-210)

§2.52 A. When Attorney May Serve as Witness

An attorney acting as advocate can serve as a witness before a jury without the client's informed, written consent if (Cal Rules of Prof Cond 5-210):

- The testimony relates to an uncontested matter;
- The testimony relates to the nature and value of legal services rendered in the case; or
- The attorney has the client's informed, written consent (see *Smith, Smith & Kring v Superior Court* (1997) 60 CA4th 573, 580, 70 CR2d 507).

An attorney acting as both advocate and witness in a client's case is tolerable. Under Cal Rules of Prof Cond 5-210 a law firm may act as both advocate and witness because the firm obtained the client's consent and the fact that the client has consented to the dual capacity must be given great weight. *Smith, Smith & Kring v Superior Court, supra.*

The rule on the attorney-advocate serving as a witness applies only to jury trials, not to trials before a judge or to nonadversarial proceedings, *e.g.,* hearings before a legislative body. See Official Discussion following Cal Rules of Prof Cond 5-210.

The principal rationale for the attorney-advocate not serving as a witness in a jury trial is that any damage to the attorney's credibility in the role of witness may reflect on the cause the attorney is representing. See *People ex rel Younger v Superior Court* (1978) 86 CA3d 180, 197, 150 CR 156 (describing various reasons underlying prohibition of former Cal Rules of Prof Cond 2-111(A)(4)). Combining the roles of advocate and witness can prejudice the tribunal and the opposing party. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. See Comment to ABA Model Rules of Prof Cond 3.7.

NOTE: An attorney should use caution in such situations: He or she should fully disclose the drawbacks to continuing the representation and should give the client an opportunity to seek the advice of independent counsel. The attorney should also consider withdrawing.

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§2.53 B. Informed, Written Consent

If the client gives informed, written consent to having the attorney testify, the court retains discretion to grant a motion for disqualification made by the opposing party only when it is clear that important interests must be protected from palpable prejudice. *Lyle v Superior Court* (1981) 122 CA3d 470, 482, 175 CR 918 (in balancing interests, trial court in close cases should favor client's right to attorney of choice, even if this means less effective representation, unless there is convincing demonstration of detriment to opponent or injury to integrity of judicial process). See also Comment to ABA Model Rules of Prof Cond 3.7 (rule calls for balancing interests of client and opposing party; even if there is risk of prejudice to opposing party, "due regard must be given to the effect of disqualification on client").

If the attorney represents a governmental entity, the consent must be obtained from the head of the office or a designee of the head of the office by which the attorney is employed and must be consistent with principles of recusal (*i.e.,* disqualification). Cal Rules of Prof Cond 5-210. See also ABA Model Rules of Prof Cond 3.7 (lawyer as witness).

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§2.54 C. Another Attorney in Firm as Witness

Under the present rule, neither withdrawal nor the client's consent is necessary when a partner or an associate in the attorney-advocate's firm serves as a witness, presumably because a person other than the trial attorney is testifying, which is less likely to confuse a jury or impair the client's representation. See Official Discussion following Cal Rules of Prof Cond 5-210. See also ABA Model Rules of Prof Cond 3.7 (lawyer may act as advocate in trial in which another lawyer in the lawyer's firm is likely to be called as a witness). Before former Cal Rules of Prof Cond 2-111 was amended in 1979, an attorney was obliged to withdraw, unless the client's informed, written consent was obtained, when the attorney became aware that he or she, *or* another lawyer in the firm, "ought" to be called as a witness on behalf of the client. See *Comden v Superior Court* (1978) 20 C3d 906, 913, 145 CR 9.

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§2.55 D. Attorney as Witness for Opposing Party

California Rules of Professional Conduct 5-210 does not explicitly cover the situation in which a trial attorney is called to be a witness *against* the client. Former Cal Rules of Prof Cond 2-111(A)(5) stated that an attorney may continue to represent a client after it is obvious that the attorney may be called as a witness other than on behalf of the client until it is apparent that the attorney's testimony may be prejudicial to the client. Case law supports this view. See, *e.g., Graphic Process Co. v Superior Court* (1979) 95 CA3d 43, 156 CR 841 (counsel called to testify by adverse party is not disqualified unless it is established that client will be prejudiced by testimony); *Brown v De Rugeris* (1979) 92 CA3d 895, 155 CR 301 (attorney called to testify during trial by adverse party under Evid C §776 was not disqualified from continuing to represent client when testimony was in no way prejudicial to client). See Comment to ABA Model Rules of Prof Cond 3.7 (similar problem can arise "whether the lawyer is called as a witness on behalf of the client or is called by the opposing party").

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VIII. CLIENT'S CONSENT TO AND WAIVER OF CONFLICTS

§2.56 A. Consent Must Be Informed, in Writing

Consenting to an attorney's acceptance of adverse employment means that the client or former client knowingly waives "the right to object." *Health Maintenance Network v Blue Cross* (1988) 202 CA3d 1043, 1064, 249 CR 220. To be valid, a client's consent to a conflict must be informed and in writing. Cal Rules of Prof Cond 3-310(A). See sample client consents in §§2.73-2.74.

An "informed written consent" is a client's agreement that follows a written disclosure by the attorney; "disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences; and "written" means any writing described in Evid C §250. Cal Rules of Prof Cond 3-310(A). The attorney's disclosure must be sufficient to enable the client to make free and intelligent decisions regarding the representation. *Day v Rosenthal* (1985) 170 CA3d 1125, 1149, 217 CR 89.

PRACTICE TIP: Consent should always be obtained in writing, even when not specifically required. It is important to document the attorney's disclosure of conflicting interests in writing, *e.g.,* by a letter to the client. The writing should set forth the facts and concerns and the implications of the attorney's representing potentially conflicting interests. It should rarely be necessary or appropriate to obtain a sworn consent. The client's or former client's authorized, signed acknowledgment of the salient facts and agreement to the representation at issue should be sufficient. See forms in §§2.73-2.74.

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§2.57 B. Complete Disclosure

The attorney should explain the conflict and disclose fully all facts relevant to the client's decision on whether to waive the conflict. In doing so, the attorney must be careful not to disclose any confidences gained from the attorney's relationship with the other party/client. The length and scope of the explanation and disclosure needed to adequately inform the client will vary, depending on the circumstances. For example, sophisticated in-house counsel for a client company may require a less thorough discourse on the significance of the conflict than does an individual who has rarely encountered lawyers or litigation. A meeting or a teleconference in which the attorney can offer necessary explanations and the client can ask questions can be helpful.

The courts generally construe waivers strictly and place the burden on the attorney to demonstrate that all relevant facts have been disclosed and explained. *Civil Serv. Comm'n v Superior Court* (1984) 163 CA3d 70, 209 CR 159. In one case, the court found the waiver to be valid when the client was advised of the conflict and the right to seek independent counsel by a detailed written disclosure, reviewed the document for 20 minutes, and consented to the attorney's continued representation of the corporate client "notwithstanding any adversity that may develop." *Zador Corp. v Kwan* (1995) 31 CA4th 1285, 1301, 37 CR2d 754. When adversity did develop, the former client reaffirmed his consent to the continued representation. 31 CA4th at 1301. See also *Health Maintenance Network v Blue Cross* (1988) 202 CA3d 1043, 249 CR 220 (consent to attorney's adverse employment may be implied from conduct).

Not every possible consequence of a conflict must be disclosed for the consent to be valid. *Maxwell v Superior Court* (1982) 30 C3d 606, 180 CR 177, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *Zador Corp. v Kwan, supra*. Waiver of the consequences of potential conflict is not inadequate simply because neither the court nor the agreement undertake the impossible burden of explaining separately every conceivable ramification. 30 C3d at 622. Courts have recognized, however, that it is impossible to predict "every possible consequence of a conflict," and knowing waivers will be upheld even if certain adverse ramifications of the waiver were not enumerated. *Maxwell v Superior Court, supra*; *Zador Corp. v Kwan, supra*.

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§2.58 C. Implied Waiver and Consent

Although both former and present professional rules in California require that the client's or former client's written consent be given, some courts have found an implied waiver and consent to an attorney's acceptance of adverse employment when there is a lengthy and unreasonable delay by the client or former client in raising such an objection. See, *e.g., River West, Inc. v Nickel* (1987) 188 CA3d 1297, 1309, 234 CR 33 (inordinate delay in making motion to disqualify, together with other factors, held to constitute waiver of right to object to representation). See also *Trust Corp. v Piper Aircraft Corp.* (9th Cir 1983) 701 F2d 85, 87; *Employers Ins. of Wausau v Albert D. Seeno Constr. Co.* (ND Cal 1988) 692 F Supp 1150, 1165 (delay and prejudice led to denial of disqualification motion). But see *State Farm Mut. Auto. Ins. Co. v Federal Ins. Co.* (1999) 72 CA4th 1422, 1435, 86 CR2d 20 (client cannot impliedly consent to conflicted representation with other current clients of attorney in that burden to avoid conflict is on attorney, not client).

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IX. ATTORNEY WITHDRAWAL AND DISQUALIFICATION

§2.59 A. Withdrawal

The California Rules of Professional Conduct require that an attorney who knows or should know that continued representation *will* result in a violation of the State Bar Rules of Professional Conduct or the State Bar Act must withdraw from representation. Cal Rules of Prof Cond 3-700(B)(2) (mandatory withdrawal). The Rules allow the attorney to withdraw (subject to the possible need for court approval) when continued representation is *likely* to result in a violation of another rule or of the Act. Cal Rules of Prof Cond 3-700(C)(2) (permissive withdrawal).

The duty to withdraw, thus terminating the attorney-client relationship, may arise whenever counsel for a party to an action has reason to believe that discharge of his or her duties to that party will conflict with discharge of his or her duties to a third party. The same duty arises when an attorney is faced with the situation of representing inconsistent claims of two parties because the attorney must be capable of devoting his or her entire energies in the client's interests and on the client's behalf. *Health Maintenance Network v Blue Cross* (1988) 202 CA3d 1043, 1063, 249 CR 220, citing *Hammett v McIntyre* (1952) 114 CA2d 148, 249 P2d 885.

In effect, the reasons for not accepting a case because of actual or potential conflicting interests are the same reasons for which the attorney may have a duty to withdraw. For further discussion on mandatory and permissive withdrawal under the California Rules of Professional Conduct, as well as the procedures concerning motions to withdraw, see chap 4 (changes in representation). See also Opening a Law Office: A Handbook for Starting Your Own Business, chap 6 (6th ed Cal CEB 2002).

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§2.60 B. Disqualification

The right of a party to be represented in litigation by the attorney of his or her choice is a significant right, and disqualification of that attorney will not be required merely because that attorney has represented the opposing party in the past. *Adams v Aerojet-General Corp.* (2001) 86 CA4th 1324, 1334, 104 CR2d 116. Violation or threatened violation of one of the ethical rules must be shown. *Johnson v Superior Court* (1984) 159 CA3d 573, 578, 205 CR 605.

Most disqualification motions are brought on the ground that the "tainted" attorney has obtained knowledge of otherwise confidential information that could be used unfairly to the disadvantage of the moving client or former client. See Cal Rules of Prof Cond 3-310(E). There is precedent for seeking disqualification for alleged violation of other ethical rules, *e.g.,* the rule limiting an attorney's ability to testify at a hearing or trial on behalf of his or her client: *Comden v Superior Court* (1978) 20 C3d 906, 145 CR 9 (motion granted under former Cal Rules of Prof Cond 2-111(A)(4)); *Lyle v Superior Court* (1981) 122 CA3d 470, 175 CR 918 (motion denied under revised version of former Rule 2-111(A)(4)) and the rule restricting an attorney's ability to communicate directly with a party represented by counsel: *Mills Land & Water Co. v Golden W. Ref. Co.* (1986) 186 CA3d 116, 136, 230 CR 461 (motion granted); *Chronometrics, Inc. v Sysgen, Inc.* (1980) 110 CA3d 597, 168 CR 196 (motion granted). See *Smith, Smith & Kring v Superior Court* (1997) 60 CA4th 573, 70 CR2d 507.

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§2.61 1. Motions for Disqualification or Recusal in General

A motion for disqualification may be made by a person who would be affected by the representation at any time while the action is pending. *Earl Scheib, Inc. v Superior Court* (1967) 253 CA2d 703, 709, 61 CR 386. The parties moving for disqualification must have standing. See *Machado v Superior Court* (2007) 148 CA4th 875, 880, 55 CR3d 902 (nonnamed party may move to disqualify attorney if named party seeks to avoid prior disqualification order). In *DCH Health Servs. Corp. v Waite* (2002) 95 CA4th 829, 115 CR2d 847, a hospital, a foundation related to the hospital, and concerned individuals brought an action against a citizens group and an individual. The individual plaintiffs sought to disqualify the individual defendant's attorney because his wife formerly served on the foundation's board. The appellate court held that the motion for attorney disqualification was erroneously granted because the plaintiffs lacked standing to bring the motion. The attorney's wife may have owed a duty of confidentiality to the foundation, but she did not owe a duty to the individual plaintiffs. Only a party with an expectation of confidentiality can disqualify an attorney. 95 CA4th at 832.

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§2.62 a. Delay in Filing Motion

The motion will not be denied merely because the former client has delayed in filing the motion. *Earl Scheib, Inc. v Superior Court* (1967) 253 CA2d 703, 709, 61 CR 386 (4-month delay) (criticized in *River West, Inc. v Nickel* (1987) 188 CA3d 1297, 1305, 234 CR 33, to the extent that *Earl Scheib* states a rule that laches is irrelevant to a motion to disqualify). However, waiver of the right to disqualify counsel may be implied when inexcusable delay in bringing the motion causes substantial prejudice to the current client. *River West, Inc. v Nickel, supra* (47-month delay). In determining whether a delay is unreasonable, the court will consider:

- How long the former client has known of the potential conflict;
- Whether the former client has been represented by counsel since it discovered the potential conflict;
- Whether anyone stopped the former client from filing the motion earlier, and if so, how; and
- Whether an earlier motion would have been inappropriate or futile and why.

188 CA3d at 1309.

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§2.63 b. Effect of Making Motion Close to Trial

Courts are sensitive to the burden of changing counsel during litigation, as well as to the tactical motivations for an opposing party making the motion and are therefore more likely to deny disqualification motions made close to trial. The length of the delay in bringing a motion to disqualify is important but not dispositive. It is also appropriate to consider such factors as when the movant learned of the conflict; whether the movant was represented by counsel during the delay; why the delay occurred and in particular whether the motion was delayed for tactical reasons; and whether disqualification would result in prejudice to the nonmoving party. See *Employers Ins. of Wausau v Albert D. Seeno Constr. Co.* (ND Cal 1988) 692 F Supp 1150, 1165. The judge may properly consider the possibility that the disqualification motion was brought as tactical device to delay litigation. *Comden v Superior Court* (1978) 20 C3d 906, 915, 145 CR 9. See also *Western Continental Operating Co. v Natural Gas Corp.* (1989) 212 CA3d 752, 763, 261 CR 100; *Maruman Integrated Circuits, Inc. v Consortium Co.* (1985) 166 CA3d 443, 450, 212 CR 497.

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§2.64 c. Review by Appeal or Writ of Mandate

The party aggrieved by an erroneous ruling on a motion to disqualify opposing counsel may petition for a writ of mandate (see, *e.g., Klein v Superior Court* (1988) 198 CA3d 894, 905, 244 CR 226) or may directly appeal the ruling as soon as it is entered (see, *e.g., Maruman Integrated Circuits, Inc. v Consortium Co.* (1985) 166 CA3d 443, 445, 212 CR 497; *Jacuzzi v Jacuzzi Bros.* (1963) 218 CA2d 24, 32 CR 188).

Appellate courts defer to the trial judge's ruling absent an abuse of discretion. *Metro-Goldwyn-Mayer v Tracinda Corp.* (1995) 36 CA4th 1832, 43 CR2d 327; *Klein v Superior Court* (1988) 198 CA3d 894, 908, 244 CR 226; *Maruman Integrated Circuits, Inc. v Consortium Co.* (1985) 166 CA3d 443, 450, 212 CR 497. On procedures for motions for disqualification, see chap 4 (changes in representation).

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2. Imputed or Vicarious Disqualification of Attorney's Firm

§2.65 a. In General

When an attorney is disqualified from representation because of an ethical conflict, the disqualification extends to the entire firm, *i.e.,* the firm is vicariously disqualified (*In re Charlisse C.* (2008) 45 C4th 145, 159, 84 CR3d 597; *Flatt v Superior Court* (1994) 9 C4th 275, 286, 36 CR2d 537; *Henriksen v Great Am. Sav. & Loan* (1992) 11 CA4th 109, 114, 14 CR2d 184), at least when an effective ethical screen has not been established (*People ex rel Dep't of Corps. v SpeeDee Oil Change Sys.* (1999) 20 C4th 1135, 1151, 86 CR2d 816). The rule of vicarious disqualification is based on the doctrine of imputed knowledge; the knowledge by any member of a law firm is knowledge by all attorneys in the firm, partners as well as associates. *Rosenfeld Constr. Co. v. Superior Court* (1991) 235 CA3d 566, 575, 286 CR 609.

Courts have based this rule on the practical impossibility of a private law firm's creating an "ethical wall" around an attorney who has been exposed to confidential information about the former client by screening him off from the firm's representation of the former client's adversary. See *Henriksen v Great Am. Sav. & Loan* (1992) 11 CA4th 109, 115, 14 CR2d 184. Therefore, once the attorney is shown to have had probable access to former client confidences, the court will impute such knowledge to the entire firm, prohibiting all members of the firm from participating in the case. 11 CA4th at 117; *Galbraith v State Bar* (1933) 218 C 329, 332, 23 P2d 291; *Dill v Superior* Court (1984) 158 CA3d 301, 305, 205 CR 671.

Despite the increased willingness of California courts to use a flexible approach to vicarious disqualification in the public sector context (see §§2.67-2.68), including the use of an "ethical wall," the rule of vicarious disqualification has often been strictly applied in the private sector. See, *e.g.*, *Hitachi, Ltd. v Tatung Co*. (ND Cal 2006) 419 F Supp 2d 1158, 1164 (vicarious disqualification is "the established law in California"; disqualification of firm was warranted because two actions were nearly identical, firm's intellectual property department was small, and there was substantial contact between associate and firm's attorney handling present case).

NOTE: In some instances, the problem can be avoided by obtaining informed, written consent. See Cal Rules of Prof Cond 3-310(A), 3-310(E). See §2.56.

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§2.66 b. Exceptions to Imputed Disqualification Rule

Because the rationale for imputed disqualification rests on the danger of shared confidences, disqualification of a whole firm is generally unnecessary if only one attorney in a firm has violated an ethical rule that does not pertain to potential breach of client confidences. See, *e.g., Mills Land & Water Co. v Golden W. Ref. Co.* (1986) 186 CA3d 116, 230 CR 461 (individual lawyer, not firm, disqualified for violation of former Cal Rules of Prof Cond 7-107 (now see Cal Rules of Prof Cond 2-100 (communication with represented party)). But see *Papanicolaou v Chase Manhattan Bank, N.A.* (SD NY 1989) 720 F Supp 1080, 1086 (attorney's conduct warranted disqualification of entire firm).

NOTE: The Official Discussion to Cal Rules of Prof Cond 5-210 (lawyer as witness) states that it is not intended to apply to the situation in which a partner or associate in the advocate's firm will be a witness. Nor is an attorney obligated "to advise the client of a relationship with another member who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter." See Official Discussion to Cal Rules of Prof Cond 3-320 (attorney's relationship with other party's lawyer).

In addition, the imputed disqualification doctrine raises substantial difficulties in today's environment of increased attorney mobility. If the presumptions discussed above—(1) that relevant, confidential information was disclosed if the two matters are "substantially related," and (2) that all lawyers in a firm share their clients' confidences—are construed as conclusive, an associate's (or a partner's) change of employment could necessitate withdrawal by the new firm if the new firm and old firm are on opposite sides of a lawsuit, even if the circumstances do not evidence any significant risk of improper disclosure of confidential information.

Recognizing the harshness of presuming the existence of a conflict even when no conflict actually exists, in *Adams v Aerojet-General Corp.* (2001) 86 CA4th 1324, 1333, 104 CR2d 116, the appellate court declined to require automatic disqualification of the plaintiff's attorney, who was formerly associated with a law firm that had represented the defendant, even though the subject matter of the former representation was substantially related to the subject matter of the lawsuit. Noting that "[d]isqualification based on a conclusive presumption of imputed knowledge derived from a lawyer's past association with a law firm is out of touch with the present day practice of law" (86 CA4th at 1336), the court remanded the case to the trial court to ascertain "whether confidential information material to the current representation would normally have been imparted to the attorney during his tenure at the old firm." 86 CA4th at 1340. See also *Goldberg v Warner/Chappell Music, Inc.* (2005) 125 CA4th 752, 23 CR3d 116 (attorney's former firm disqualified only if evidence showed attorney had actually passed on confidential information about plaintiff to members of former firm); *Rhaburn v Superior Court* (2006) 140 CA4th 1566, 1581, 45 CR3d 464 (courts should use flexible approach that considers the totality of circumstances to determine whether confidential information has been obtained).

There is also precedent for seeking disqualification of a firm when *nonlawyers* employed by counsel on one side switch jobs to work on the staff of the opposing counsel. See *In re Complex Asbestos Litig.* (1991) 232 CA3d 572, 283 CR 732, in which a paralegal who worked closely with lawyers defending asbestos manufacturers switched jobs to work with an asbestos plaintiffs' attorney firm. The court disqualified the second firm in those cases in which the paralegal had access to confidential material, declining to apply the substantial relationship rule to a nonlawyer but holding that disqualification was proper because the evidence showed that the paralegal possessed confidential attorney-client information *materially* related to the proceedings and had not been carefully isolated from work on the matters. See *Gregori v Bank of America* (1989) 207 CA3d 291, 302, 254 CR 853 (social relationship between attorney and opposing lawyer's secretary, without evidence that confidential information was passed, did not require disqualification of attorney; secretary could, however, be deposed).

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§2.67 c. Building an Ethical Wall

A law firm may seek to avoid an imputed disqualification by "building an ethical wall" or erecting a screen between the newly acquired attorney (whose former connection with another firm gives rise to the possibility of a conflict) and all other lawyers in the new firm who might learn something from the new attorney that could harm a client of either firm. Typical elements of such an ethical wall are physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; procedures preventing a disqualified attorney from sharing in the profits of the representation; and continuing education in professional responsibility. *Henriksen v Great Am. Sav. & Loan* (1992) 11 CA4th 109, 116 n6, 14 CR2d 184.

The California Supreme Court, though it has not expressly altered the established rule of vicarious disqualification, appears to have signaled its willingness to consider relaxing the rule of automatic disqualification if a law firm can show that it has built an effective ethical wall around the attorney with the conflict. See *People ex rel Dep't of Corps. v SpeeDee Oil Change Sys.* (1999) 20 C4th 1135, 1151, 86 CR2d 816; *Adams v Aerojet-General Corp.* (2001) 86 CA4th 1324, 1333, 104 CR2d 116.

Courts of appeal have not been receptive to the argument that, by sequestering the "tainted" attorney from the other lawyers in the firm, a firm can escape imputed disqualification. See *Henriksen*, 11 CA4th at 115 (ethical wall concept inapplicable when attorney moves from firm that represents one litigant to firm that represents opponent in pending litigation matter; entire second firm disqualified). See also *Klein v Superior Court* (1988) 198 CA3d 894, 912, 244 CR 226 ("aside from two limited exceptions… no California case appears to have permitted disqualification of the individual attorney for a conflict without disqualifying his law firm"); *William H. Raley Co. v Superior Court* (1983) 149 CA3d 1042, 197 CR 232 (disqualification of firm required even though attorney had tried, in apparent good faith, to isolate himself entirely from case that presented conflict).

NOTE: Federal courts have been more willing than have California courts to recognize ethical walls to avoid disqualification of the entire firm. See, *e.g., Employers Ins. of Wausau v Albert D. Seeno Constr. Co.* (ND Cal 1988) 692 F Supp 1150, 1164; *U.S. v Titan Pac. Constr. Corp.* (WD Wash 1986) 637 F Supp 1556, 1564.

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§2.68 (1) Public Sector and Junior Attorneys

The ethical wall concept has had limited acceptance in California as a method to avoid what might be the unduly harsh result of vicarious disqualification of an entire firm. That acceptance generally has been in the arena of former government attorneys who go into private practice, and the former government attorney has not had access to confidential information on the subject matter of the litigation (see, *e.g.*, *Chambers v Superior Court* (1981) 121 CA3d 893, 903, 175 CR 575). *Henriksen v Great Am. Sav. & Loan* (1992) 11 CA4th 109, 112, 14 CR2d 184.

The acceptance of an ethical wall has also occurred in the reverse situation as well, *e.g.*, that of former private attorneys now working for the government. *City of Santa Barbara v Superior Court* (2004) 122 CA4th 17, 23, 18 CR3d 403. In *City of Santa Barbara,* the court held that vicarious disqualification of the entire city attorney's office was not required if the city attorney, who had worked as a private attorney on a previous case against the city, was not involved in the case and had no managerial duties, and the office constructed an ethical wall to prevent disclosure of confidential information.

The California Supreme Court reached the opposite conclusion, though, in *City & County of San Francisco v Cobra Solutions, Inc.* (2006) 38 C4th 839, 43 CR3d 771. In that case, the city was in litigation with a company that the city attorney had previously represented while in private practice, and the current litigation was substantially related to the prior representation. Under these circumstances, the court found an ethical screen was insufficient; there was no reason to believe that the city attorney knew of the company's alleged kickback scheme but, as head of the government law office, the city attorney's entire office had to be disqualified.

Courts appear more willing to accept the ethical wall solution in situations involving junior attorneys and government lawyers to avoid unduly restricting their career mobility. *Higdon v Superior Court* (1991) 227 CA3d 1667, 278 CR 588 (court of appeal approved use of evidence of ethical walls to rebut presumption of shared confidence that might otherwise have resulted in disqualification of law firm that recently hired former court commissioner who had heard case). See *Chambers v Superior Court, supra* (disqualification of plaintiff's firm, which had hired attorney formerly employed by defendant government agency, not warranted absent evidence that attorney had acquired confidential information on case or had any responsibility over relevant matters). See also *In re Complex Asbestos Litig.* (1991) 232 CA3d 572, 283 CR 732 (ethical wall solution, termed "cone of silence," appropriate for transferring paralegals).

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§2.69 (2) Wall Must Be Erected When Conflict Is Discovered

The "ethical" mechanism cannot adequately protect against disclosure of material confidences unless the "wall" is erected as soon as the potential conflict is or should have been discovered and before any potential transfer of confidences. See *Atasi Corp. v Seagate Technol.* (Fed Cir 1988) 847 F2d 826, 831. See also *Klein v Superior Court* (1988) 198 CA3d 894, 913, 244 CR 226. Although noting that California decisions to date have followed the rule of automatic vicarious disqualification fairly consistently, the *Klein* decision suggests the development of an exception to allow the firm to continue representation when the conflict problem arises only because one attorney at the firm had a previous association with a firm representing the other side and the attorney can demonstrate that he or she was not substantially involved in the matters at issue while at the other firm.

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§2.70 (3) Remoteness of Attorney's Contact With Subject Matter

The more remote the attorney's contact with the subject matter while employed at the first firm, the more willing courts should be to validate the "ethical wall" solution. See §2.67. See *Kesselhaut v U.S.* (Ct Cl 1977) 555 F2d 791 (test of whether screening device will suffice is whether individual attorney had any responsibility over matters related to instant action). But see *Atasi Corp. v Seagate Technol.* (Fed Cir 1988) 847 F2d 826, 829 (under Ninth Circuit law, although attorney's minimal personal involvement in matter while at first firm would not disqualify entire second firm, significant involvement—drafting brief and conducting part of fact investigation—would).

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§2.71 3. Balancing Test on Disqualification for Possible Improper Use of Confidential Material Information

California decisions are divided on the question of whether, once the court finds that a conflict of interest exists, the court should or is even permitted to weigh that conflict (and the risks it poses) against other factors, *e.g.,* the burden imposed by switching lawyers, in deciding whether to disqualify counsel. The court must weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel, and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest. *William H. Raley Co. v Superior Court* (1983) 149 CA3d 1042, 1048, 197 CR 232. See also *Oaks Mgmt. Corp. v Superior Court* (2006) 145 CA4th 453, 468, 51 CR3d 561 (attorneys in firm representing plaintiffs previously acted as lenders to defendant; disqualification was improper).

However, another court stated that the "substantial relationship" test is a strict, prophylactic rule. Therefore, if a timely motion to disqualify is made, the trial court should not enlarge its inquiry by balancing the parties' competing interests under its equity jurisdiction. If a substantial relationship is established, the discussion should ordinarily end. The rights and interests of the former client will prevail. Conflict will be presumed; disqualification will be ordered. *River West, Inc. v Nickel* (1987) 188 CA3d 1297, 1308, 234 CR 33.

PRACTICE TIP: An appropriate balancing test should protect against conflicts of interest while protecting the right to choose counsel. When imputed or vicarious disqualification is sought based on one lawyer's past representation of another party, a balancing test should measure, first, the probability that the "tainted" lawyer previously acquired from Client A confidential information that is material to the dispute with Client B, and, second, the risk that the "tainted" lawyer will disclose or use that confidential, material information adversely to Client A. Relevant factors to consider include the closeness of the connection between the two matters, the nature of the "tainted" lawyer's work on the matters, and the adequacy of an "ethical wall" as a means of protecting against prohibited disclosure.

After thus assessing the likelihood of improper use of confidential, material information, the court may consider whether the complaining client is estopped or has impliedly waived the right to complain by, for example, delaying for such a long time in bringing the motion that the other side would face an unreasonable burden or hardship in retaining and training new counsel. The greater the risk of improper use of confidential, material information, the less likely that the challenged representation should be allowed to continue.

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§2.72 4. Appearance of Impropriety Not a Basis for Disqualification

California courts have declined to hold that the "appearance of impropriety" alone is a basis for disqualification. See *Hetos Inv., Ltd. v Kurtin* (2003) 110 CA4th 36, 40, 1 CR3d 472. One court observed that "there is no California case in which an attorney has been disqualified *solely* on this basis." *Gregori v Bank of America* (1989) 207 CA3d 291, 306, 254 CR 853. See *William H. Raley Co. v Superior Court* (1983) 149 CA3d 1042, 1047 n2, 197 CR 232 (suggesting that concerns for appearance of impropriety apply in California only to situations involving lawyers who are or were public officials and lawyers who will be called as witnesses).

The court should presume that, unless proven otherwise, lawyers will act ethically, and the court should not assume that they will violate confidences merely because they are in a marital relationship. *DCH Health Servs. Corp. v Waite* (2002) 95 CA4th 829, 834, 115 CR2d 847 (trial court erroneously granted motion for disqualification to avoid appearance of impropriety arising from "unique nature of the marital relationship" of two attorneys). See also *Addam v Superior Court* (2004) 116 CA4th 368, 371, 10 CR3d 39 (sibling relationship between lawyer and opposing party's physician is insufficient, standing alone, to preclude lawyer from representing client); *Derivi Constr. & Architecture, Inc. v Wong* (2004) 118 CA4th 1268, 1273, 14 CR3d 329 (attorney should not be disqualified from case solely because he is married to attorney at another firm that was previously disqualified in same case).

By contrast, ABA Code Prof Resp Canon 9 sets forth a duty to avoid even the appearance of professional impropriety. A few courts applying California law have taken that duty into account in ordering disqualification in civil cases. See, *e.g., Woods v Superior Court* (1983) 149 CA3d 931, 936, 197 CR 185 (court upheld disqualification in part based on appearance of impropriety).

In another case, however, the court of appeal criticized the lawyer for poor judgment in initiating a social relationship with the secretary of the opposing lawyer's partner, but the court found no violation of former Cal Rules of Prof Cond Rules 4-101 and 7-103 (now see Cal Rules of Prof Cond 3-310(E) and 2-100) and declined to apply ABA Code of Prof Resp Canon 9 to require disqualification for two reasons: First, precedent showed only that Canon 9 has been applied by California courts when a violation of one of the California Rules of Professional Conduct also existed. Second, the "appearance of impropriety" test "is too imprecise to furnish a reliable judicial guideline" because it is unclear as to whom the conduct must appear improper, and it is difficult for judges to measure the views of any particular group on the question. *Gregori v Bank of America* (1989) 207 CA3d 291, 307, 254 CR 853. See *People v Lopez* (1984) 155 CA3d 813, 823, 202 CR 333 ("appearance of impropriety … is a malleable factor having the chameleon-like quality of reflecting the subjective views of the percipient" and is therefore not a sound basis for decisionmaking); *Chambers v Superior Court* (1981) 121 CA3d 893, 902, 175 CR 575 (notion of appearance of impropriety is "too vaporous" to support disqualification order).

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X. FORMS

§2.73 A. Sample Letter to Client: Adverse Representation

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[*Letterhead*]

_ _[*Date*]_ _
_ _[*Name and address*]_ _
Re: _ _[*Case name*]_ _
Dear _ _[*name of officer of XYZ Corp.*]_ _**:**

As you know, this firm ("Firm") represents XYZ Corp. in a civil suit brought by ABC Co. currently pending in the Superior Court, County of Los Angeles (*ABC Co. v XYZ Corp., et al.,* CV 00-000 XXX). I have been the attorney at Firm in charge of that representation since its inception.

One of Firm's other long-time and important clients, STU Corp., has recently been named a defendant in a suit brought by XYZ Corp. in the Superior Court, County of Los Angeles (*XYZ Corp. v STU Corp., et al.,* CV 00000 YYY). STU Corp. has asked Firm to represent it in that proceeding. As you may know, XYZ Corp. is represented by the law firm of Smith & Jones in that case. It is my understanding that the *XYZ Corp. v STU Corp.* litigation concerns _ _[*specify*]_ _, and arises from events that occurred _ _[*date*]_ _. That suit is thus totally unrelated to the matter of *ABC Co. v XYZ Corp.* Still, this Firm's representation of STU Corp. in the Superior Court action might raise an apparent conflict with our representation of XYZ Corp. in the Superior Court action in that Firm would be representing XYZ Corp. in one action and representing a client adverse to XYZ Corp. in another.

This letter will confirm our conversation of _ _[*date*]_ _, in which you advised that XYZ Corp. waives the conflict described above, and has no objection to Firm's representation of STU Corp. in the Superior Court action. Please sign the duplicate original of this letter in the place indicated below and return it in the enclosed stamped, addressed envelope at your earliest convenience. Thank you for your courtesy and cooperation in this matter.

Very truly yours,

__[*Signature*]__
_ _[*Typed name of attorney*]_ _

Agreed and Accepted:

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name of officer*]_ _

Comment: See discussion of the requirements concerning disclosure in §§2.56-2.58.

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§2.74 B. Sample Letter to Corporate Officer: Dual Representation

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To download **WordPerfect** version, right click and choose *Save Target As*

[*Letterhead*]

_ _[*Date*]_ _
_ _[*Name and address*]_ _
Re: _ _[*Case name*]_ _
Dear _ _[*name of officer of XYZ Corp.*]_ _:

This letter concerns this firm's representation of you and XYZ Corp. in connection with _ _[*describe specific nature of litigation, e.g., a claim by HIJ Co. under a contract dated _ _ _ _ _ _*]_ _. We understand, as you do, that the activities of XYZ during 2001 relating to this matter in which you may have been involved, or may have obtained knowledge as an officer of XYZ Co., are, along with other events, subjects of the HIJ lawsuit now pending.

We know of no conflict of interest between you and XYZ that would disqualify us from representing both you and XYZ. Based on the information we have, we believe that your interests and XYZ's interests are united in this matter. If we learn of facts that establish a conflict, or if we are convinced that such a conflict is imminent, we will advise you immediately and suggest that you retain separate counsel. We do not think it likely, based on what we know now, that such a conflict will develop.

You should understand that information disclosed by you relating to this matter may be shared by this firm with XYZ. If it later develops that your and XYZ's interests conflict in this matter, such disclosed information might be used in a way that would assist XYZ.

[*Optional*]

If such a conflict should develop, XYZ has authorized us, based on the facts we know, to tell you that XYZ will pay the reasonable fees and expenses of competent counsel hired to represent you separately. This firm would continue to represent XYZ.

[*Continue*]

At your and XYZ's request, and without expense to you, because XYZ will pay all of our fees and moneys expended in your behalf, we have agreed to represent both you and XYZ in connection with this litigation on the foregoing terms.

If the foregoing is acceptable, we are pleased to represent you and ask that you sign and return a copy of this letter to us at your earliest convenience. A return envelope is enclosed for that purpose.

Very truly yours,

__[*Signature*]__
_ _[*Typed name of attorney*]_ _

Agreed and Accepted:

__[*Signature*]__
_ _[*Typed name of officer*]_ _

Date: _ _ _ _ _ _

Comment: For discussion of dual representation of an organization and constituent, see §2.47.

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3

Representation Agreements

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I. INTRODUCTION

§3.1 A. Scope of Chapter

This chapter discusses representation agreements between attorneys and clients. Attorney fees are an integral part of representation agreements and warrant special care and attention.

Because of the great body of law involving fee agreements, the chapter concentrates on the rules applicable to various fee arrangements. See §§3.3-3.21. Listed briefly in checklist form are the types of optional matters that the attorney may wish to include in a client's representation agreement. See §3.21. The major fee types (*e.g.,* contingent, fixed, retainer, hourly) are discussed in §§3.22-3.36.

Except when there are statutory restrictions, attorneys may negotiate a combination of fee types in a single agreement. See §§3.37-3.43 (limitations on ability to negotiate fees). The forms in §§3.44-3.47 illustrate different types of representation agreements. For additional forms, see Fee Agreement Forms Manual (2d ed Cal CEB 2007). For discussion of fee disputes when either the attorney or the client is alleged to have breached the representation agreement, see chap 5. On changes in representation, see chap 4.

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§3.2 B. Governing Law

The general rule for fee agreements is that, absent statutory constraint, the measure and mode of an attorney's compensation is left to the agreement, express or implied, of the parties. CCP §1021. However, statutes substantially limit this general rule, as do case law, ethics, public policy, and rules of professional conduct.

In particular, most agreements between California attorneys and their clients are governed by Bus & P C §§6146-6149. Other statutes also limit the fee arrangements in certain types of cases. See §§3.37-3.43 (limitations on ability to negotiate fees).

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II. FEE AND REPRESENTATION AGREEMENTS

§3.3 A. Basic Rules

Generally, contract law governs the validity and enforceability of written, oral, or implied fee agreements. Certain contracts, however, entered into when the attorney's ability to negotiate fees is restricted by statute or ethical rule, can be repudiated by the client, leaving the attorney without an action for damages and entitled only to recover in quantum meruit. Bus & P C §6147(b). See §§3.37-3.43. Practitioners vary in their methods for setting fees, measuring fees, and determining when fees are payable and in what amounts, and in the conditions that must be met in order to make a fee payable.

Although the terms "fee agreements" and "representation agreements" are often used interchangeably, representation agreements must also meet other statutory requirements in addition to specifying the fee arrangement agreed on by attorney and client (*e.g.,* a written description of the general nature of the legal services to be provided).

For discussion of fee agreements, see Opening a Law Office: A Handbook for Starting Your Own Business §§5.29-5.31, 6.40 (6th ed Cal CEB 2002).

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1. When Written Agreement Required

§3.4 a. Contingent Fees

Contingent fee agreements must normally be in writing to be enforceable, except those for the recovery of workers' compensation benefits or certain merchants' claims. Bus & P C §§6147-6147.5. Now, Bus & P C §6147 covers all clients, not just plaintiffs. Before §6147 was amended, the court in *Franklin v Appel* (1992) 8 CA4th 875, 10 CR2d 759, had construed it to apply only to plaintiffs in litigation matters.

In addition to a description of the contingencies entitling the attorney to a fee, the agreement must specify such matters as the fee rate agreed on, how the costs will affect the fee and the client's recovery, and a statement that the fee is negotiable. Bus & P C §6147. Additional requirements must be met for a medical malpractice claim. See Bus & P C §§6146-6147. See §§3.20A-3.20C, 3.23-3.24.

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§3.5 b. Other Types of Fees

With limited exceptions (see §§3.7-3.13), representation agreements for noncontingent fee agreements must be in writing and contain any bases of compensation, including hourly rates, statutory fees, or flat fees, and other standard rates, including fees and charges applicable to the case. Bus & P C §6148(a)(1). See §3.29 (billing requirements).

PRACTICE TIP: Counsel should be sure to have a written agreement with a client. If a fee dispute arises over terms, an oral agreement is dependent on the memories of the parties and the accuracy with which they describe them. When a dispute involves a written fee agreement, even though the care with which it was drafted and its applicability to the services rendered may be tested, the original expectations of the parties are more likely to be protected. In multiparty cases, a written agreement also serves the function of identifying the client whom the attorney is representing.

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§3.6 c. Effect of Failure to Have Written Agreement

The failure to have a written fee agreement when required by Bus & P C §6147 (contingent fee agreements) or Bus & P C §6148 (all other written fee agreements) renders the fee agreement voidable at the client's option. If the agreement is voided by the client, the attorney is entitled to collect a reasonable fee. Bus & P C §§6147(b), 6148(c). Furthermore, an oral agreement is subject to a 2-year statute of limitations (CCP §339), as opposed to the 4-year limitation period applicable to written instruments (CCP §337). See *Iverson, Yoakum, Papiano & Hatch v Berwald* (1999) 76 CA4th 990, 90 CR2d 665.

In a lawsuit over fees or fee arbitration, the attorney's proof will generally support the argument that the fees agreed on were recognized by both parties as reasonable. A presumption of undue influence often arises, however, in a dispute between attorney and client over fees when the agreement is entered into during the fiduciary relationship. The proof then requires an independent showing that the transaction was fair and entered into voluntarily by the client with full knowledge of the facts. See *Gleason v Klamer* (1980) 103 CA3d 782, 787, 163 CR 483. Failure to overcome a presumption of undue influence requires an independent showing of a reasonable fee to which the attorney is entitled. See chap 5.

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/ 2. When Oral Fee Agreement Sufficient/§3.7 a. Total Costs and Fees Under $1000

2. When Oral Fee Agreement Sufficient

§3.7 a. Total Costs and Fees Under $1000

When it is reasonably foreseeable that the total expense to the client, adding fees and costs, will not exceed $1000, a written fee agreement is not required. Bus & P C §6148(a).

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§3.8 b. Claims Between Merchants

Claims between merchants (as described in Com C §2104) arising from the sale or lease of goods, services rendered, or money lent for use in conducting a business or profession do not require written fee agreements if the merchant contracting for the services employs ten or more individuals. Fees for these services, in the absence of a written fee agreement, are limited to those in Bus & P C §6147.5. Generally, these fees range from 13 to 20 percent of the amount collected.

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.9 c. Emergencies

§3.9 c. Emergencies

When foreseeable prejudice to the rights or interests of a client present an emergency need for legal services, or when a writing is otherwise impracticable, the requirement of a written fee agreement does not apply. Bus & P C §6148(d)(1).

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.10 d. Similar Services Paid for by Client

§3.10 d. Similar Services Paid for by Client

When an agreement on fees can be implied by the fact that the attorney previously rendered services of the same general kind and the client paid for them, a written fee agreement is not required. Bus & P C §6148(d)(2).

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§3.11 e. Client's Written Waiver of Bus & P C §6148

If, after full disclosure of Bus & P C §6148, the client knowingly states in writing that a written fee agreement is not required, the requirement is dispensed with. Bus & P C §6148(d)(3).

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§3.12 f. Agreements Made Before January 1, 1987

If an oral fee agreement was entered into before January 1, 1987, and was otherwise enforceable, it remains so. See Bus & P C §6148(e).

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.13 g. Corporation as Client

§3.13 g. Corporation as Client

It is not necessary to have a written fee agreement with a corporate client. Bus & P C §6148(d)(4). This fact does not excuse the requirement of a written fee agreement if the attorney accepts work on a contingency fee basis. Bus & P C §6147.

PRACTICE TIP: Be cautious in assuming that a particular case falls under a recognized exception. Have a written fee agreement to simplify later disputes. If it is impossible to begin the case with a written agreement, put the fee arrangement in writing as soon as practicable.

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§3.14 B. Confidentiality

A written fee agreement is deemed a confidential communication between client and attorney. Bus & P C §6149. The attorney has a duty, even "at every peril to himself or herself to preserve the secrets, of his or her client." Bus & P C §6068(e)(1). Despite §6068(e)(1), an attorney may, but need not, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that is likely to result in death of, or substantial bodily harm to, an individual. Bus & P C §6068(e)(2).

The agreement is privileged against disclosure in evidence (Evid C §952) unless it is relevant to the issue of a breach by the attorney or client of a duty arising from their relationship (Evid C §958).

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C. Form of Agreement

§3.15 1. Contract or Letter

A fee agreement can be put in letter form, confirming the understanding between attorney and client. This approach makes for an informal tone and may be suited to a client for whom many matters are handled or to one who might be intimidated by a lengthy or complicated contract. The client must date and sign the letter to show concurrence with its terms.

The agreement between attorney and client may be a contract tailored to the individual client through the inclusion (or omission) of separable paragraphs. These paragraphs can be assembled into one document shortly before the document is signed. Many attorneys who prefer the contract form feel it impresses the client with the seriousness of the relationship and can be useful later in resolving any client dissatisfaction or misunderstanding. See sample form in §§3.44-3.45.

Some attorneys prefer a preprinted contract, particularly in contingent fee cases, so that it is clear to the client that all clients are being treated similarly. It is usually considered good practice to leave blanks for the contingent fee percentages to be filled in before the client signs the contract, to help demonstrate, if necessary in a later fee dispute, that the rates were negotiated rather than set by the attorney. See Fee Agreement Forms Manual (2d ed Cal CEB 2007) for examples of preprinted contracts.

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.16 2. General Nature of Legal Services

§3.16 2. General Nature of Legal Services

The general nature of the legal services to be provided to the client (Bus & P C §6148(a)(2)) and the respective responsibilities of the attorney and client in performing the agreement (Bus & P C §6148(a)(3)) must also be in writing.

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.17 3. Duplicate Copy of Signed Contract

§3.17 3. Duplicate Copy of Signed Contract

At the time the contract is entered into, the attorney must give the client or the client's guardian or representative a duplicate copy of the signed contract. Bus & P C §6148(a).

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§3.18 4. Develop Written Forms That Can Be Adapted

To give attorney-client agreements the attention they require, the practitioner should develop a variety of appropriate forms and procedures in advance. Agreement forms should be readily adaptable to the majority of the cases the attorney is likely to handle. Whether the attorney prefers the agreement to be in letter or contract form, the terms may be thought out and drafted beforehand for the law practice as a whole. It is then merely a matter of choosing the proper combination of clauses or filling in the blanks as appropriate for the particular client and case. For attorneys whose practices lend themselves to preprinted forms, several variations may also be prepared ahead of time. See samples of terms and agreement forms in Fee Agreement Forms Manual (2d ed Cal CEB 2007).

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.19 D. Disclosure of Professional Liability Insurance

§3.19 D. Disclosure of Professional Liability Insurance

Attorneys practicing in California who know or should know that they do not have professional liability insurance must inform clients of this fact in writing at the time of engagement. Cal Rules of Prof Cond 3-410. Disclosure is required whenever it is reasonably foreseeable that the attorney's legal representation of the client will exceed 4 hours. This disclosure must be made to both new clients and returning clients who have new matters to address.

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.20 E. Income Tax Issues

§3.20 E. Income Tax Issues

The United States Supreme Court has held that when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee. *Commissioner v Banks* (2005) 543 US 426, 160 L Ed 2d 859, 866, 125 S Ct 826. See also *Sinyard v Commissioner* (9th Cir 2001) 268 F3d 756; *Benci-Woodward v Commissioner* (9th Cir 2000) 219 F3d 941; *Coady v Commissioner* (9th Cir 2000) 213 F3d 1187. In *Banks*, the Supreme Court agreed with the Commissioner that a contingent fee agreement "should be viewed as an anticipatory assignment to the attorney of a portion of the client's income from any litigation recovery." *Banks,* 160 L Ed 2d at 869. Anticipatory assignments are ineffective as exclusions from income. See *Lucas v Earl* (1930) 281 US 111, 114, 74 L Ed 731, 50 S Ct 241; *Helvering v Horst* (1940) 311 US 112, 85 L Ed 75, 61 S Ct 144; *Commissioner v Sunnen* (1948) 333 US 591, 604, 92 L Ed 898, 68 S Ct 715. Although in *Banks* the plaintiff brought his claims under federal statutes that authorize fee awards, he settled his case and paid his attorneys according to a private contingent fee contract, thus the Supreme Court declined to address court-awarded fees or attorney fees awarded under a fee-shifting statute.

Even if the taxpayer reports the fees as income, they are usually deductible as miscellaneous itemized deductions. IRC §67(b). In *Sinyard*, however, the income from the judgment made the plaintiff-taxpayers subject to the Alternative Minimum Tax (AMT) provisions of the Internal Revenue Code (IRC §§55-59). Because miscellaneous deductions are not allowable in computing AMT liability (IRC §56(b)(1)(A)(i)), the taxpayers had to pay tax on the entire amount of their recovery, including fees and costs, with no offsetting deduction. *Sinyard v Commissioner* (9th Cir 2001) 268 F3d 756, 759.

The Sinyards were members of a class age-discrimination action in which the class members agreed to pay their lawyers one-third of their recovery. The case settled with a lump-sum recovery of $35 mil lion, allocated one-third to taxable wage loss, one-third to nontaxable personal injury recovery, and one-third to attorney fees. The Ninth Circuit, citing the fee-shifting provisions of the Age Discrimination in Employment Act of 1967 (ADEA) (29 USC §§621-634), which holds that the right to attorney fees belongs to the client, not the attorney, held that the fees were taxable income to the Sinyards, even though the check was paid directly to the attorneys. *Sinyard,* 268 F3d at 757.

A California Supreme Court case, *Flannery v Prentice* (2001) 26 C4th 572, 575, 110 CR2d 809, may offer a counterargument in certain circumstances not addressed by the *Banks* opinion. In *Flannery*, the California Supreme Court held that, in the absence of an agreement to the contrary between attorney and client, the attorney owns any fee awarded under the California Fair Employment and Housing Act (Govt C §§12900-12996). *Flannery v Prentice, supra*; Govt C §12965(b). Because the client has no ownership interest in attorney fees awarded under a California fee-shifting provision, an argument can be made that the fee award is *not* income to the client. See IRC §61(a). For further discussion, see Pearl, Flannery v Prentice*: Shifting Attitudes Toward Fee Agreements and Fee Shifting Statutes*, 23 CEB Civ Litigation Rep 220 (Nov. 2001).

It may therefore be advisable for the plaintiff's attorney to:

- Ascertain whether a new or prospective client's claim will result in a taxable recovery;
- Ascertain whether an attorney fees award will have undesirable tax consequences for the client, *e.g.,* if the AMT will apply to the client's financial situation; and
- Advise the client of the importance of obtaining advice on the matter from a tax practitioner. For example, it may be advantageous to explore the possibility of a structured settlement that may spread the recovery over more than one tax year or to allocate portions of the settlement recovery to nonincome items such as injunctive relief or damages for physical injury, if possible.

It is uncertain whether the issues in federal court tax cases can be resolved by contract or even by a dispositive ruling on state law. *Flannery* does suggest a contractual solution to the attorney fee issue at least for fees awarded under a California fee-shifting statute. Thus, the attorney might include a clause in the fee agreement stating that any statutory fees belong to the attorney. In *Banks*, however, the Supreme Court stated that the attorney-client relationship

is fundamentally that of principal-agent, thus the portion of the recovery paid to the attorney is not excludable from the client's gross income despite language in the attorney-client contract or any state laws that purport to confer special rights or to provide the attorney with a security interest in a contingency fee. *Banks,* 160 L Ed 2d at 871.

This possible solution, however, does not resolve the problem of lump-sum settlements. One approach might be to have the lump-sum settlement deposited into the client's trust fund account and the attorney to pay himself or herself the amount of the fees, while paying the remainder to the client. This method may not avoid income taxation of the attorney fees, however, because *Sinyard* involved attorney fees that were paid directly from the defendants to the attorneys. *Sinyard* involved a federal fee-shifting statute that stated that the right to claim attorney fees belonged to the clients, not the attorneys, which may not be the case with fees awarded under a California fee-shifting statute similar to the situation in *Flannery v Prentice, supra*. See *Sinyard,* 268 F3d at 757. *Commissioner v Banks, supra,* does not address fee-shifting statutes.

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F. Attorney's Lien

§3.20A 1. Right to Lien

A lien is a charge imposed on specific property to make it security for the performance of an act. CC §2872. An attorney's lien on the client's recovery in a lawsuit can be created by express contract or implied from retainer agreement provisions showing that the attorney is to look to the recovery to pay his or her fees and costs. *Gilman v Dalby* (2009) 176 CA4th 606, 616 n1, 98 CR3d 231.

The attorney may file a notice of lien in the pending action (*Hansen v Jacobsen* (1986) 186 CA3d 350, 355, 230 CR 580), which the parties and the subsequent attorney should honor. If they do not, the attorney must ordinarily bring an independent action to establish the amount of the lien and to enforce it. *Brown v Superior Court* (2004) 116 CA4th 320, 9 CR3d 912. See *Gilman v Dalby* (2009) 176 CA4th 606, 619, 98 CR3d 231 (attorney's lien had priority over medical lien, regardless of which was first in time); *Waltrip v Kimberlin* (2008) 164 CA4th 517, 525, 79 CR3d 460 (attorney lien had priority over bank lien). See also *Siciliano v Fireman's Fund Ins. Co.* (1976) 62 CA3d 745, 133 CR 376 (attorney stated cause of action against insurer for interference with prospective economic advantage, when an insurer paid money to attorney's former client with knowledge of attorney's contractual lien).

When the client is a minor or a person with a disability (as defined in Prob C §3603), the attorney need not file a notice of lien or bring another action to enforce his or her lien. See Prob C §§3600-3605 (regulating actions involving minors and persons with disabilities). Under Prob C §3601(a), the court making judgment or approving a settlement in such an action is required to order the payment of reasonable attorney fees (and other expenses) from the money or other property that is to be paid to the minor or person with a disability in the action. Thus, when the client is a minor and former counsel files a lien in the underlying action, it is proper for the court making judgment or approving a settlement to determine the reasonable amount of attorney fees. *Curtis v Estate of Fagan* (2000) 82 CA4th 270, 276, 98 CR2d 84.

An attorney who abandons a case has no right to a lien. *Hensel v Cohen* (1984) 155 CA3d 563, 202 CR 85 (attorney withdrew without good cause and thus was not entitled to lien or fees in contingency fee case).

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§3.20B 2. Agreeing to Lien

The attorney may negotiate additional clauses in any fee agreement in an attempt to provide for alternative arrangements for fees and costs if the client discharges the attorney before recovery. See, *e.g.,* Fee Agreement Forms Manual §1.38 (2d ed Cal CEB 2007) (attorney's lien on recovery); *Weiss v Marcus* (1975) 51 CA3d 590, 124 CR 297 (lien survives attorney's discharge by client; attorney entitled to reasonable value of services rendered before discharge).

A lien may also be implied in the absence of a formal lien clause when the fee agreement indicates that the attorney fees will be paid out of any judgment obtained in the case. See *Gilman v Dalby* (2009) 176 CA4th 606, 616 n1, 98 CR3d 231; *Hansen v Jacobsen* (1986) 186 CA3d 350, 230 CR 580; *Cetenko v United Cal. Bank* (1982) 30 C3d 528, 531, 179 CR 902. No lien can be claimed, however, if a valid contract does not exist (see *Isrin v Superior Court* (1965) 63 C2d 153, 45 CR 320) or because the attorney performed services in the case. *Trimble v Steinfeldt* (1986) 178 CA3d 646, 224 CR 195 (lawyer who was never attorney of record and had no contract with client not entitled to lien).

PRACTICE TIP: An attorney who has been discharged should file a notice of lien in the pending action. Doing so will usually prevent the plaintiff from bypassing the lien securing a former attorney's fees because the defendant or insurer, once put on notice of the lien, will generally make a settlement payment payable to the client and the present attorney as well as the former attorney. See *Siciliano v Fireman's Fund Ins. Co.* (1976) 62 CA3d 745, 756, 133 CR 376 (money should be held until agreement reached on how it should be divided or until one party brings independent action for declaratory relief).

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§3.20C 3. Ethical Requirements

An attorney's lien creates a right adverse to the client and, as such, is subject to the requirements of Cal Rules of Prof Cond 3-300, which requires that an attorney who wants to obtain a lien must explain the transaction fully, offer fair and reasonable terms, provide a copy of the agreement, give the client the opportunity to seek independent counsel, and secure the client's written consent. *Fletcher v Davis* (2004) 33 C4th 61, 14 CR3d 58. Although *Fletcher* involved an hourly fee agreement and the court did not address whether its holding applies to contingent fee cases, there is no reason to suppose it will not.

To comply with Cal Rules of Prof Cond 3-300, the attorney's lien may be a separate paragraph in the representation agreement, which attorney and client both sign, or it may be a separate document, in which case it should be dated and signed by both attorney and client. See §§3.44-3.45 for examples of lien clauses integrated into fee agreements and §3.48 for an example of a separate lien agreement document.

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§3.21 G. Optional Terms

Drafting a fee agreement offers an opportunity to reach an understanding on matters that might eventually prove troublesome. Many of the optional terms that can be incorporated into a representation agreement require information that assists in establishing good client relations. Drafted samples of such optional terms can be found in Fee Agreement Forms Manual (2d ed Cal CEB 2007).

The following lists possible additional provisions that the attorney might incorporate into a representation agreement:

- Attorney's right to withdraw (see chap 4);
- Client's right to discharge attorney (see chap 4);
- Client's fee obligation on discharge of attorney (see §3.24);
- Right to reasonable notice of discharge or withdrawal (see chap 4);
- Mandatory arbitration of fee disputes under Bus & P C §§6200-6206 (see chap 5);
- Solicitation of prompt correction of billing errors (see §3.29);
- Events that might affect the contingent fee agreement (*e.g.,* recovery on settlement or after trial) (see §3.22);
- Right to withdraw trust funds held for fee/cost payments (see §3.27);
- Payment of forwarding or referral fee (see §3.35); and
- Late charges, interest, or discounts (see §3.34).

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III. TYPES OF FEES

§3.22 A. Contingent Fee

Contingent fee agreements call for payment of attorney fees only on the happening of a specific event. Commonly, the event is the recovery of damages for a client in a personal injury matter, but a contingency could be agreed on for other types of claims unless barred on public policy grounds (*e.g.,* family law cases; see §3.40).

Because a contingent fee payment is uncertain as to the time and amount of payment, and because there is no certainty of payment, the agreement may call for greater compensation than would ordinarily be considered reasonable. *Estate of Raphael* (1951) 103 CA2d 792, 796, 230 P2d 436.

Contingent fee agreements take many forms. For example, different percentages may apply to different parts of the recovery (a lower percentage on amounts above $100,000) or at the point in which recovery is obtained (a higher percentage after the case has gone to trial, a lower percentage if recovery is the result of settlement negotiations). An agreement may also combine an hourly fee to a maximum amount or a contingency fee, whichever is greater. The agreement may obligate the client, the attorney, or both to pay costs (client up to a certain amount, then attorney to advance costs). See sample form in §3.44.

A contingent fee agreement to represent a client that must be in writing (see §3.4) must contain, in addition to a description of the contingencies entitling the attorney to a fee:

- The fee agreed on;
- A statement of the client's obligation, if any, to pay fees for related matters not covered by the contingent fee agreement; and
- If not a medical malpractice claim, a statement that the fee is not set by law, but is negotiable (see §3.4) (if a medical malpractice claim, see §3.23).

A duplicate copy of the contingent fee agreement must be provided to the client at the time the agreement is made, signed by both attorney and client or the client's guardian or representative. Bus & P C §6147.

PRACTICE TIP: Specify in the fee agreement whether the client is to pay costs, and that, in the event of withdrawal or discharge by the client, costs are payable "on demand," if the attorney has agreed to advance costs.

For discussion of attorney fees, see Opening a Law Office: A Handbook for Starting Your Own Business §§5.29-5.38 (6th ed Cal CEB 2002).

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§3.23 1. Medical Malpractice Cases

The fee agreement for a plaintiff's medical malpractice claim must state that the rates in Bus & P C §6146 are maximum fee rates, which are subject to negotiation for lower rates. Bus & P C §6147(a)(5). The maximum limits are 40 percent for the first $50,000 recovered, 33-1/3 percent of the next $50,000, and 25 percent for the next $500,000. Attorney fees are limited to 15 percent for any amounts recovered exceeding $600,000. These limitations apply whether recovery is by settlement, arbitration, or judgment.

Special rules apply to the method of calculating the fee in a medical malpractice case in which periodic payments are awarded to the client. See Bus & P C §6146(b) (court must take total value of periodic payments based on plaintiff's projected life expectancy to compute total award from which attorney fees are calculated).

In a case that joins claims that are and are not based on medical malpractice, the limitations under §6146 apply only to the recovery attributable to the medical malpractice. If the case is settled without specifying the theory of recovery, the §6146 limitations do not apply at all. *Waters v Bourhis* (1985) 40 C3d 424, 437, 220 CR 666.

A client may not waive the §6146 fee limits (*Fineberg v Harney & Moore* (1989) 207 CA3d 1049, 255 CR 299), and the court may not award extraordinary fees exceeding those limits (*Hathaway v Baldwin Park Community Hosp.* (1986) 186 CA3d 1247, 231 CR 334). An attorney who charges an unlawful fee by obtaining a waiver of the §6146 limits may be liable for malpractice (*Schultz v Harney* (1994) 27 CA4th 1611, 33 CR2d 276) and may be subject to disciplinary proceedings (see, *e.g.*, *In re Harney* (1955) 3 Cal State Bar Ct Rep 266).

PRACTICE TIP: Attach a copy of Bus & P C §6146 to any fee agreement involving a medical malpractice claim. In the event of a fee dispute, this will ensure that strong evidence can be offered to prove that the client was informed that the rates were maximum limits that could be negotiated.

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§3.24 2. "Reasonable Fee" If Agreement Voided

Failure to comply with any provision of Bus & P C §6147 renders the agreement voidable at the client's option. If the client chooses to void the agreement, the attorney will be entitled to collect a reasonable fee. Bus & P C §6147(b); *Alderman v Hamilton* (1988) 205 CA3d 1033, 252 CR 845. See *Martino v Denevi* (1986) 182 CA3d 553, 227 CR 354 (expert opinion by other lawyers as to what is "reasonable fee" may be presented, but attorney's own testimony as to time worked is sufficient evidence to support award of attorney fees).

There is a measure of fragility inherent in a contingent fee agreement because it must comply with all the provisions of Bus & P C §6147 and because the client can repudiate the agreement and seek other counsel before the contingency occurs. *Fracasse v Brent* (1972) 6 C3d 784, 790, 100 CR 385 (attorney-client relationship requires that employment be terminable at will of client, with or without cause; such discharge is not a breach of contract). See discussion in chap 4.

The attorney is entitled to a "reasonable fee" when the contingency occurs, however, in either the case of noncompliance with the fee agreement statute (Bus & P C §6147(b)) or the client's discharge of the attorney (6 C3d at 792). An attorney who abandons a case is not entitled to a fee. See *Hensel v Cohen* (1984) 155 CA3d 563, 202 CR 85 (attorney withdrew without good cause and was thus not entitled to lien or fees in contingency fee case).

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.25 3. Attorney's Lien [Deleted]

§3.25 3. Attorney's Lien [Deleted]

This section has been deleted and its substance moved to §§3.20A-3.20C.

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B. Retainer

§3.26 1. Nonrefundable, Not Credited on Fee

A retainer fee is generally considered to be the act by which a client engages an attorney to manage the client's cause and to secure the attorney's services. See *Hart v Spaulding* (1850) 1 C 213.

A true retainer is a nonrefundable payment to commit an attorney to represent a client in a specific matter or series of matters; it does not compensate the attorney for services to be rendered. Cal Rules of Prof Cond 3-700(D)(2); *Knight v Russ* (1888) 77 C 410, 412, 19 P 698, 699.

For discussion of retainers and attorney fees, see Opening a Law Office: A Handbook for Starting Your Own Business §§5.29-5.38 (6th ed Cal CEB 2002).

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.27 2. Refundable, Less Fees Earned

§3.27 2. Refundable, Less Fees Earned

Many retainer fees are in reality deposits to secure payment for present and future fees earned on an hourly or other basis. In this sense, a retainer is generally considered a fund held in trust by the attorney.

The attorney deposits such a retainer in the client trust account, paying him- or herself as the fees are earned. If the fees charged do not exhaust the "retainer," the client is entitled to a return of the remaining funds. The right to withdraw fees as earned from the attorney's trust account is most likely implied but is best covered in the representation agreement.

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§3.28 3. Nonrefundable: Minimum Fee

The nonrefundable minimum fee is a variation of the refundable retainer. This retainer prepays a certain agreed-on series of services, but if there is no need for all the services contemplated, the attorney is nevertheless entitled to the full retainer.

If, however, the fee for services exceeds the agreed-on amount, the client agrees to replenish the retainer or pay additional fees as earned and billed.

Nonrefundable minimum fees have been criticized because they might restrain the client's absolute right to discharge counsel (see chap 4) by imposing an impermissible economic burden on a client who wishes to do so.

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C. Hourly or Other Noncontingent Fees

§3.29 1. Billing Requirements

The fee agreements statute requires that in any case not coming within the contingent fee provisions of Bus & P C §6147, any basis of compensation, including hourly rates, statutory fees, or flat fees, and other standard rates, fees, and charges applicable to the case must be detailed in the written representation agreement. A signed copy of the agreement must be given to the client. Bus & P C §6148.

When specific hourly rates are quoted, unilateral changes in those rates during representation are not permitted under an agreement that provides for payment of the firm's "regular hourly rates" without prior notice of the increased rates. *Severson & Werson v Bolinger* (1991) 235 CA3d 1569, 1 CR2d 531.

A bill must be furnished to the client within 10 days following the client's request, although the attorney need send a bill no more often than every 31 days. Bus & P C §6148(b). All bills for services rendered to a client must "clearly state the basis thereof," including:

- The amount, rate, basis for calculation, or other method of determining the attorney fees and costs; and
- The amount and nature of costs and expenses. Bus & P C §6148(b).

The extent to which one must go in order to "clearly state the basis thereof" has not been clarified by the courts. The more informative the billing, however, the less likely for it to fail to comply with the statute. The amount of any charges, *e.g.,* for copying, office staff overtime, that are passed on to the client for more than actual cost should be specified. A suggested model of a fee agreement based on an hourly rate appears in §3.45.

Failure to comply with the billing requirements of the statute renders the representation agreement voidable at the election of the client. The attorney is then entitled to collect a reasonable fee for legal services. Bus & P C §6148(c).

For discussion of attorney fees, see Opening a Law Office: A Handbook for Starting Your Own Business §§5.29-5.38 (6th ed Cal CEB 2002).

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§3.30 2. Description of Legal Services

In addition to billing requirements (see §3.29), the representation agreement must describe the general nature of the legal services to be provided to the client. Bus & P C §6148(a)(2).

EXAMPLE: Compliance in some agreements will be ensured by a simple agreement, *e.g.,* "Legal advice, including client conferences and telephone calls; research and drafting of partnership agreement for accountants."

When complex litigation is contemplated, there are no guidelines to the extent of description a reviewing court would find necessary in the event of a fee dispute. A reasonably informative description, however, referring to research, drafting of pleadings, matters of law, litigation, discovery, trial, negotiations in all aspects of the matter, and other acts necessary to manage the case properly would appear to constitute compliance. See sample agreements in Fee Agreement Forms Manual (2d ed Cal CEB 2007).

Attorney fees for services not contemplated when the representation agreement was executed may not be recoverable except on a quantum meruit basis. Bus & P C §6148(c). If the agreement calls for a flat or fixed fee, the unanticipated services are probably not compensable. If it becomes apparent that unanticipated attorney fees are necessary, the attorney should notify the client of the intent to bill for the services before they are rendered. See *Lavenson v Wise* (1901) 131 C 369, 375, 63 P 622; *Baldie v Bank of America* (1950) 97 CA2d 70, 73, 217 P2d 111. The attorney can prepare a letter agreement that describes the unexpected need for additional legal services and makes all necessary disclosures, along with the request that the client sign and return the letter if in agreement.

Failure to comply with the description provision of the statute renders the fee agreement voidable at the client's election. If declared void by the client, the attorney is nevertheless entitled to a reasonable fee. Bus & P C §6148(c).

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§3.31 3. Attorney's Responsibilities

The fee agreements statute requires that the attorney's responsibilities be described in writing. Bus & P C §6148(a)(3). It is advisable to itemize services that are not within the scope of the representation agreement and are specifically excluded, *e.g.,* investigations, motions for new trial, appeals, retrial. See sample forms of agreement in §§3.44-3.45.

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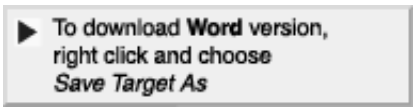
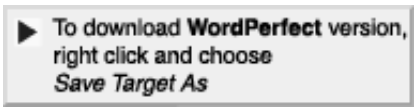
§3.32 4. Client's Responsibilities





The fee agreements statute also requires a written description of the client's responsibilities. Bus & P C §6148(a)(3). The attorney can effectively use this requirement as an opportunity to impress on the client the importance of full and responsive cooperation.

A representation agreement might include the language:

Client shall be responsible for fully and accurately disclosing to attorney all facts necessary for a proper representation of client, keeping all appointments or promptly notifying attorney of the inability to do so, promptly responding to any inquiry from attorney, notifying the attorney of any changes in residence address, employment, or telephone numbers, paying all billings for fees and costs as agreed, promptly communicating with attorney, correcting errors in billing, or factual errors made by attorney that client is aware of, and attending all court appearances when requested.

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.33 D. Fixed or Flat Fee

§3.33 D. Fixed or Flat Fee

When the attorney agrees to represent a client in handling a matter for a single specified sum of money, without adjustment because of unanticipated ease or difficulty in the representation, the fee is generally referred to as a fixed or flat fee.

PRACTICE TIP: An attorney without experience in a specific area should be cautious of agreeing to flat fees. The task may take longer than anticipated; unexpected legal work may be necessary. Attorneys with practices limited to a certain type of case can sometimes handle them successfully on a flat fee basis, assuming that complicated cases will be offset by those that run smoothly. When agreeing to perform legal services for a flat fee, the attorney should carefully specify the scope of representation, spelling out the services to be performed and those not covered under the contract.

For discussion of attorney fees, see Opening a Law Office: A Handbook for Starting Your Own Business §§5.29-5.38 (6th ed Cal CEB 2002).

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.34 E. Advance on Fees, Balance in Installments

§3.34 E. Advance on Fees, Balance in Installments

Special care should be taken in drafting a representation agreement that calls for an initial payment toward the fee and provides for installment payments of the balance. If the services to be rendered are consumer related (*i.e.,* not for commercial or business purposes), and call for more than four installments, or for any interest or finance charge, or for a lower price if paid in cash, or with any bonus for cash, compliance with the Unruh Retail Installment Sales Act will be required. See CC §§1801.1-1812.20. The Federal Truth in Lending Act (15 USC §§1601-1693) should be studied if a consumer-related credit transaction not falling within the state statute is attempted. See 15 USC §1666j(b).

Compliance with these provisions is so complex that most practitioners do not attempt to charge interest or finance charges in such cases. Similarly, late charges or delinquency charges can be troublesome. See CC §1803.6.

Agreements to provide services for commercial or business purposes payable in installments are subject to general contract and usury laws, but they may pose ethical considerations if interest, finance charges, or discounts are involved.

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§3.35 F. Forwarding or Referral Fee

For a time, the practice of paying a referring attorney a forwarding or referral fee was considered to be contrary to public policy and agreements to make such payments were unenforceable. See *Moran v Harris* (1982) 131 CA3d 913, 916, 182 CR 519. Such agreements, although not actually encouraged, are no longer prohibited. 131 CA3d at 922. See form in §3.46. See also *Dietz v Meisenheimer & Herron* (2009) 177 CA4th 771, 798, 99 CR3d 464 (upholding trial court's rejection of defendant law firm's argument that referring attorney's suit to recover promised referral fee based on a share of any contingent recovery should be dismissed because it might require disclosure of attorney-client communications regarding fee agreement).

Under Cal Rules of Prof Cond 2-200, an attorney cannot divide a fee for legal services with a lawyer who is not a partner, associate, or shareholder with the attorney unless:

- The client has given written consent after full disclosure stating that a division of fees will be made and giving the terms of the division; and
- The total fee charged by all attorneys is not unconscionable and not increased due to the fee-dividing provision.

The last sentence of Rule 2-200(B) reads:

> A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm, shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

In *Moran v Harris, supra,* the court said:

> Our expressed views should not be interpreted as an encouragement of referral fee agreements. Nevertheless, there is considerable distance between prohibition and encouragement. That distance may be the "breathing space" necessary to accommodate both the public nature of the legal profession and commercial milieu within which it must survive.

A fee-sharing agreement that does not comply with Cal Rules of Prof Cond 2-200 is unenforceable. *Margolin v Shemaria* (2000) 85 CA4th 891, 102 CR2d 502. In *Mink v Maccabee* (2004) 121 CA4th 835, 17 CR3d 486, the court held that Rule 2-200 requires only that the client's written consent be obtained before any division of fees. Thus, although it is preferable that written consent be obtained early in the process, the rule does not invalidate a written consent as long as it is obtained before any division of fees. Further, Rule 2-200 does not require that any fee-splitting agreement between attorneys be in writing. 121 CA4th at 838.

Rule 2-200 is not limited to fees paid to a referring attorney, but applies also to an agreement between attorneys who actually worked on a case. If the attorneys do not obtain their client's written consent to their fee-sharing agreement, it is not enforceable; however, an attorney may be entitled to quantum meruit. *Huskinson & Brown, LLP v Wolf* (2004) 32 C4th 453, 9 CR3d 693 (in absence of valid written client consent to share fees, law firm may still recover in quantum meruit for reasonable value of services rendered); *Chambers v Kay* (2002) 29 C4th 142, 148, 126 CR2d 536.

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§3.36 G. Fees to Associate Counsel

California Rules of Professional Conduct 2-200 imposes client written disclosure and consent requirements when an agreement divides a fee with an attorney who is *not* a partner, associate, or shareholder of the client's attorney. See §3.36. In some cases, the applicability of the written disclosure and consent requirements may turn on whether an outside attorney is an "associate" of the attorney sharing the fee. Rule 2-200 does not define "associate." Courts, however, have looked for interpretation to Cal Rules of Prof Cond 1-100(B)(4), which defines an associate as "an employee or fellow employee who is employed as an lawyer." *Sims v Charness* (2001) 86 CA4th 884, 890, 103 CR2d 619, disapproved on other grounds in *Chambers v Kay* (2002) 29 C4th 142, 154 n7, 126 CR2d 536.

In *Sims,* the court noted that there was nothing in the history of Rule 2-200 indicating it was targeted at compensation arrangements made on a nonreferral basis, involving outside lawyers functioning on a particular matter essentially on the same basis as an employee of a law office. The California Supreme Court reached a contrary conclusion, however, in *Chambers v Kay*, *supra,* holding that Rule 2-200(A)(1) was binding on an attorney who sought to divide contingent fees from the successful prosecution of a client's lawsuit against third parties without written client consent. The supreme court acknowledged that the primary aim of Rule 2-200 is to address concerns over referral fees, but found that the rule, as interpreted by California State Bar Formal Ethics Opinion No. 1994-138, is not limited to such arrangements. 29 C4th at 154.

A fee-sharing agreement that does not comply with Rule 2-200 is unenforceable. *Margolin v Shemaria* (2000) 85 CA4th 891, 102 CR2d 502. An attorney, however, may be entitled to a recovery in quantum meruit against another attorney with whom the fee-sharing agreement was made. *Huskinson & Brown, LLP v Wolf* (2004) 32 C4th 453, 9 CR3d 693. If the client did not request services from the attorney, the attorney may not recover in quantum meruit from the client. *Strong v Beydoun* (2008) 166 CA4th 1398, 1403, 83 CR3d 632.

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IV. LIMITATIONS ON ABILITY TO AGREE ON FEES

§3.37 A. Fees Set or Limited by Statute

In many instances the ability to negotiate attorney fees is prohibited or limited by statute. Examples include:

- **Probate proceedings.** Attorney fees in a probate proceeding are strictly statutory and do not arise from contract. *Estate of Lee* (1981) 124 CA3d 687, 693, 177 CR 229. See Prob C §§10800, 10810, 13660, and, with respect to estate administrations begun before July 1, 1991, former Prob C §§900, 910. An attorney may agree to charge, or to receive, less than the amount permitted by statute.
- **Indigent defendants.** Attorney fees for counsel assigned to represent indigent criminal defendants are set by the trial court (Pen C §987.2) or by the court of appeals in appellate matters (Pen C §1241).
- **Judicial foreclosures.** Attorney fees in judicial foreclosure matters are set by the trial court, regardless of any contrary provision in the mortgage or deed of trust. CCP §730.
- **Workers' compensation.** Attorney fees for representation in Workers' Compensation Appeals Board matters are set by the Appeals Board (Lab C §5801) and by the Court or Appeals Board in third party matters (Lab C §3860(f)). However, fee agreements for a reasonable amount will be enforced if the amount agreed on coincides with the Appeals Board's determination of a reasonable fee. Lab C §4906.
- **Contingent fees under federal law.** A representation agreement with a plaintiff under the Federal Tort Claims Act calling for a contingent fee in excess of 20 percent of any compromise, award, or settlement, or more than 25 percent of any judgment is not only void, but is an offense punishable by a fine of $2000 and/or one year in jail. 28 USC §2678. See also, *e.g.,* 42 USC §406 (maximum fee for representing plaintiff in Social Security Administration proceedings is 25 percent of past due benefits; attempt to collect fee in excess of maximum is misdemeanor).
- **Contingent fees in medical malpractice cases.** Maximum fee limits have been set under Bus & P C §6146. See discussion in §3.23.

NOTE: Numerous statutes limit attorney fees, and it is beyond the scope of this chapter to describe all situations in which fee agreement restrictions exist. When accepting employment in an unfamiliar area of law, attorneys should investigate possible limitations on the ability to negotiate fees.

For discussion of statutory attorney fees, see Opening a Law Office: A Handbook for Starting Your Own Business §5.38 (6th ed Cal CEB 2002).

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.38 B. Fees Subject to Court Approval

§3.38 B. Fees Subject to Court Approval

Court approval of fee agreements is required in some instances, *e.g.,* the compromise of the claim of a minor or a person with a disability (as defined by Prob C §3603). Prob C §3601(a). Attorney fees for representing a special administrator are fixed by the court (Prob C §8547) as are fees for extraordinary services rendered by a special administrator (Prob C §8547(d)).

Court approval or Appeals Board approval of an attorney fee agreement is also required in workers' compensation third party actions (Lab C §3860(f)), while workers' compensation matters require the approval of the Appeals Board as to any fee agreement between attorney and client (Lab C §5801).

NOTE: These examples of fee agreements requiring approval of some tribunal or governing body are not exhaustive, but merely illustrative of fee agreements that are enforceable only after review and approval.

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/ C. Illegal Fee Contracts/ §3.39 1. Against Public Policy or Violate Ethical Standards

C. Illegal Fee Contracts

§3.39 1. Against Public Policy or Violate Ethical Standards

Fee agreements that are prohibited generally fall in the area of con tracts that are against public policy or that violate ethical standards or rules. Fee agreements that are contrary to public policy, even if not explicitly in violation of an ethical canon or rule, will not be enforced. See, *e.g., Moran v Harris* (1982) 131 CA3d 913, 919, 182 CR 519.

Fee agreements that violate California State Bar Rules of Professional Conduct are not enforceable. The Rules include prohibitions against:

- Charging an unconscionable fee (Cal Rules of Prof Cond 4-200);
- Advising a client to violate the law (Cal Rules of Prof Cond 3-210);
- Communicating with jurors before trial (Cal Rules of Prof Cond 5-320(A));
- Failing to act competently (Cal Rules of Prof Cond 3-110);
- Agreeing to share fees between an attorney and a nonattorney (Cal Rules of Prof Cond 1-320) (*McIntosh v Mills* (2004) 121 CA4th 333, 17 CR3d 66);
- Limiting liability to a client (Cal Rules of Prof Cond 3-400); and
- Representing an interest adverse to a client or former client (Cal Rules of Prof Cond 3-300, 3-310).

The attorney may recover fees earned before the violation of a rule of conduct, the amount to be determined by the court, most likely on a quantum meruit basis. *Jeffry v Pounds* (1977) 67 CA3d 6, 12, 136 CR 373. Even if a client benefits from representation that violates a rule of conduct or that is unethical, the client can successfully resist payment for that representation under the fee agreement. *Goldstein v Lees* (1975) 46 CA3d 614, 618, 120 CR 253.

Attorneys should be alert to the many examples of "illegal" and thus unenforceable fee agreements, in family law dissolution and child custody cases, as well as other areas.

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§3.40 2. Family Law Cases

Contingent fees in family law matters were formerly prohibited as offering "a strong inducement … to induce and advise the dissolution of the marriage." *Newman v Freitas* (1900) 129 C 283, 292, 61 P 907. This relatively simple evaluation has been modified by later judicial examinations of the public policies involved: "There should not be a dogmatic condemnation of every contingent fee in a divorce action regardless of distinguishable circumstances." *Krieger v Bulpitt* (1953) 40 C2d 97, 100, 251 P2d 673.

Each family law contingent fee agreement is now individually scrutinized, using guidelines similar to those in *Krieger v Bulpitt, supra.* Although no longer universally condemned, "the contingency fee contract is still considered a problematic area for the family law practitioner." Martin, *Contingency Fees and Family Law*, 5 Cal Law 23 (July 1985). Payment of fees of 45 percent of the amount of child support collected contingent on obtaining a child support award in a paternity action has been held to be contrary to public policy and the agreement unenforceable. *Kyne v Kyne* (1943) 60 CA2d 326, 329, 140 P2d 886. It was not only the large amount of the fee in *Kyne* that caused disapproval of the contingent fee agreement; the major deciding factor was the concept of paying the fee out of the money not specifically awarded as attorney fees but designated by the court as the amount required to support the child. 60 CA2d at 331.

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§3.41 3. Other Examples

A void contingent fee agreement calling for an unconscionable fee cannot be made enforceable by the client's ratification. *Blattman v Gadd* (1931) 112 CA 76, 86, 296 P 681. A contingent fee agreement with the personal representative of a decedent's estate was ruled contrary to public policy and unenforceable in *Estate of Hastings* (1952) 108 CA2d 713, 717, 239 P2d 684 (superseded by Prob C §10811(c)). A representation agreement for professional services secured by any attorney in California through the services of a runner or capper is void. Bus & P C §6154.

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§3.42 D. Representation Agreements Acquiring an Adverse Interest

Fee agreements for services adverse to a former client are unenforceable. *Goldstein v Lees* (1975) 46 CA3d 614, 618, 120 CR 253. The rule is designed to protect the former confidential relationship. When the attorney's employment is adverse to a former client but bears no relationship to confidential information acquired by the attorneys from that relationship, the rule does not apply. *Ward v Superior Court* (1977) 70 CA3d 23, 34, 138 CR 532; *In re Charles Willie L.* (1976) 63 CA3d 760, 763, 132 CR 840. For further discussion, see generally chap 2 (conflicts of interest).

The rule applies not only when an attorney *will* be called on to use confidential information obtained from a former client, but also when the attorney *could* be called on to use the information. *Ward,* 70 CA3d at 31. Similarly, the attorney is deemed to have an interest adverse to the client when the attorney has reason to believe that the duties owed to the client will conflict with duties owed to a third person. *Hammett v McIntyre* (1952) 114 CA2d 148, 153, 249 P2d 885.

All dealings between an attorney and a client that are beneficial to the attorney will be closely scrutinized. *Hawk v State Bar* (1988) 45 C3d 589, 598, 247 CR 599. For example, the securing of a debt owed for attorney fees by the delivery to the attorney of a deed of trust to the client's property is the acquisition of an interest adverse to the client. *Ames v State Bar* (1973) 8 C3d 910, 918, 106 CR 489. The ability to summarily extinguish the client's interest in property makes the acquisition adverse. *Hawk v State Bar* (1988) 45 C3d 589, 599, 247 CR 599. Similarly, an attorney who secures payment of hourly fees through a charging lien against client's future recovery has acquired an interest adverse to the client and must comply with Cal Rules of Prof Cond 3-300. The attorney must explain the transaction fully, offer fair and reasonable terms, provide a copy of the agreement, give the client the opportunity to seek independent counsel, and secure the client's written consent. *Fletcher v Davis* (2004) 33 C4th 61, 14 CR3d 58. See §3.48 for a sample Attorney's Lien Agreement.

When an attorney negotiates a separate settlement of damages and attorney fees, there is an inherent conflict of interest between the client's and the attorney's interests. Such a settlement must be approved by an impartial tribunal, which is required to decide whether the settlement negotiations reflect a fair and reasonable balancing of the conflicting interests. *Ramirez v Sturdevant* (1994) 21 CA4th 904, 26 CR2d 554. The settlement can be reviewed by the court at a settlement conference or on the motion of a party.

Whenever the issue of a possible conflict is raised, there will be a presumption of injury to the former client from the attempted representation of conflicting interests. *Earl Scheib, Inc. v Superior Court* (1967) 253 CA2d 703, 709, 61 CR 386. Consent to an attorney representing interests adverse to a former client will not be presumed merely from the client's delay in raising the objection. *Kraus v Davis* (1970) 6 CA3d 484, 85 CR 846. Nor does absence of injury to the client preclude a determination that the attorney violated the rule against acquiring an adverse interest. *Ames v State Bar* (1973) 8 C3d 910, 106 CR 489. On rules for mandatory and permissive withdrawal, and factors that must be considered for protecting the client, see chap 4.

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Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.43 E. Unconscionable Fees

§3.43 E. Unconscionable Fees

California Rules of Professional Conduct 4-200 prohibits agreeing to, charging, or collecting an unconscionable fee. The rule defines an unconscionable fee, and sets forth 11 areas of inquiry to determine whether a fee is unconscionable. Former Cal Rules of Prof Cond 2-107(B) defined an unconscionable fee as "so exorbitant and wholly disproportionate to the services performed as to shock the conscience of lawyers of ordinary prudence practicing in the same community." The factors to be considered under the present rule (Cal Rules of Prof Cond 4-200) include:

- The amount of the fee in proportion to the value of the services performed;
- The relative sophistication of the attorney and the client;
- The novelty and difficulty of the questions involved, and the skill needed to render proper legal service;
- If apparent to the client, the likelihood that the attorney's acceptance of employment will preclude other employment;
- The amount involved and the results obtained;
- The time limitations imposed by the client or the circumstances;
- The nature and length of the professional relationship with the client;
- The experience, reputation, and ability of the attorney performing the service;
- Whether the fee is fixed or contingent;
- The time and labor required; and
- Whether the client gave informed consent to the fee agreement.

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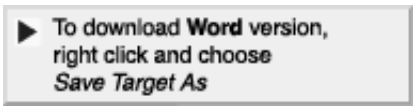
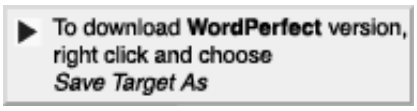
Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/ V. FORMS/§3.44 A. Form: Sample Contingent Fee Agreement

V. FORMS

§3.44 A. Form: Sample Contingent Fee Agreement





LEGAL SERVICES AGREEMENT

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between JEAN R. ROGERS, hereafter referred to as "Attorney," and MARIA GONZALES, hereafter referred to as "Client."

This agreement is required by Business and Professions Code §6147 and is intended to fulfill the requirements of that section.

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: Representation of Client with respect to her claim for damages for personal injuries arising out of the automobile accident of September 15, 1992.

3. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are not to be provided by Attorney under this agreement specifically include, but are not limited to, the following: Representation with respect to (a) any claim for property damage arising out of the accident, (b) any dispute with a medical care provider about amounts owed by Client for services received, or (c) any appeal in which Client is an appellant from a court judgment on Client's personal injury claim (*i.e.,* Attorney's obligation to represent Client under this agreement extends to an appeal only if Client is a respondent).

If Client wishes that Attorney provide any legal services not to be provided under this agreement, a separate written agreement between Attorney and Client will be required.

4. RESPONSIBILITIES OF ATTORNEY AND CLIENT. Attorney will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries and communications. Client will be truthful and cooperative with Attorney and keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts.

5. ATTORNEY FEES. The amount Attorney will receive for attorney fees for the legal services to be provided under this agreement will be:

(a) _ _ percent of the net recovery if the recovery is obtained before the filing of a lawsuit;

(b) _ _ percent of the net recovery if the recovery is obtained after the filing of a lawsuit but before the arbitration hearing, settlement conference, or trial, whichever occurs first;

(c) _ _ percent of the net recovery if the recovery is obtained at or after the arbitration hearing, settlement conference, or trial, whichever occurs first, but before the filing of Client's brief in an appeal from a court judgment; and

(d) _ _ percent of the net recovery if the recovery is obtained after the filing of Client's brief in an appeal from a court judgment.

"Net recovery" means the amount remaining after the total amount received (whether by settlement, arbitration award, or court judgment) has been reduced by the sum of all "costs," as defined in Paragraph 7 of this agreement.

If payment of all or any part of the amount to be received will be deferred (such as in the case of an annuity,

a structured settlement, or periodic payments), the "total amount received," for purposes of calculating the attorney fees, will be the initial lump-sum payment plus the present value, as of the time of the settlement, final arbitration award, or final judgment, of the payments to be received thereafter. The attorney fees will be paid out of the initial lump-sum payment. If the payment is insufficient to pay the attorney fees in full, the balance will be paid from subsequent payments of the recovery before any distribution to Client.

Client is informed that this Attorney fee is not set by law but rather is negotiable between the Attorney and the Client.

If there is no net recovery, Attorney will receive no attorney fees.

Any attorney fees awarded from the other party are the property of the attorney and should be paid directly to the attorney.

6. DIVISION OF ATTORNEY FEES. Attorney will divide the attorney fees received for the legal services provided under this agreement with Margaret Andover. The terms of the division are as follows: Attorney will pay to Margaret Andover one third of all attorney fees received. Client is informed that, under the Rules of Professional Conduct of the State Bar of California, such a division may be made only with the Client's written consent after a full disclosure to the Client in writing that a division of fees will be made and of the terms of such division. Client hereby expressly consents to the division.

7. COSTS. Attorney will advance all "costs" in connection with Attorney's representation of Client under this agreement. Attorney will be reimbursed out of the recovery before any distribution of fees to Attorney or any distribution to Client. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss. Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees. Items that are not to be considered costs, and that must be paid by Client without being either advanced or contributed to by Attorney, include, but are not limited to, Client's medical expenses and other parties' costs, if any, that Client is ultimately required to pay.

8. REPRESENTATION OF ADVERSE INTERESTS. Client is informed that the Rules of Professional Conduct of the State Bar of California require the Client's informed written consent before an Attorney may begin or continue to represent the Client when the attorney has or had a relationship with another party interested in the subject matter of the Attorney's proposed representation of the client. Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services for Client under this agreement. As long as Attorney's services for Client continue under this agreement, Attorney will not agree to provide legal services for any such party without Client's prior written consent.

9. SETTLEMENT. Attorney will not settle Client's claim without the approval of Client, who will have the absolute right to accept or reject any settlement. Attorney will notify Client promptly of the terms of any settlement offer received by Attorney.

10. ATTORNEY'S LIEN. By signing and returning this fee agreement to Attorney, Client grants Attorney a lien for all unpaid attorney fees and costs advanced on all claims and causes of action that are the subject of Attorney's representation of Client under this agreement and on all proceeds of any recovery obtained, whether by settlement, award, order, or judgment.

Client is aware, and acknowledges, that this lien may significantly impair Client's interest because Attorney may be able to delay payment of any recovery or settlement funds to Client until any disputes with Attorney about unpaid attorney fees and costs advanced have been resolved. Client acknowledges that Client has been advised to seek independent legal advice about granting Attorney this lien and has had a reasonable opportunity to do so. By signing this fee agreement and returning it to Attorney, Client represents that Client has either obtained legal advice about this lien or has decided that it was unnecessary to do so.

11. DISCHARGE OF ATTORNEY. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is Client's attorney of record in any proceeding, Client will execute and return a substitution-of-attorney form immediately on its receipt from Attorney. Despite the discharge, Client will be obligated to pay Attorney from the recovery a reasonable attorney fee for all services provided and to reimburse Attorney from the recovery for all costs

advanced. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss.

12. WITHDRAWAL OF ATTORNEY. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) The client consents, and (b) the client's conduct renders it unreasonably difficult for the attorney to carry out the employment effectively. Despite Attorney's withdrawal, Client will be obligated to pay Attorney from the recovery a reasonable attorney fee for all services provided, and to reimburse Attorney from the recovery for all costs advanced, before the withdrawal. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss.

13. RELEASE OF CLIENT'S PAPERS AND PROPERTY. At the termination of services under this agreement, Attorney will release promptly to Client on request all of Client's papers and property. "Client's papers and property" include correspondence, deposition transcripts, exhibits, experts' reports, legal documents, physical evidence, and other items reasonably necessary to Client's representation, whether Client has paid for them or not.

14. DISCLAIMER OF GUARANTY. Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

15. ENTIRE AGREEMENT. This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

16. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

17. MODIFICATION BY SUBSEQUENT AGREEMENT. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out.

18. ARBITRATION OF FEE DISPUTE. If a dispute arises between Attorney and Client regarding attorney fees under this agreement and Attorney files suit in any court other than small claims court, Client will have the right to stay that suit by timely electing to arbitrate the dispute under Business and Professions Code §§6200-6206, in which event Attorney must submit the matter to such arbitration.

19. ATTORNEY FEES AND COSTS IN ACTION ON AGREEMENT. The prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney fees and costs incurred in that action or proceeding or in efforts to negotiate the matter.

20. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date when, having been executed by Client, one copy of the agreement is received by Attorney, as long as the copy is received on or before February 1, 2009, or Attorney accepts late receipt.

The foregoing is agreed to by:

Date: _ _ _ _ _ _ **_____**
Client

Date: _ _ _ _ _ _ **_____**
Attorney

Copies: Duplicate signed copies for attorney and client.

Comment: For discussion of contingent fee agreements, see §§3.22-3.25. For tax issues, see §3.20. This sample agreement is meant to be illustrative only. Counsel should consider what provisions should be included, and what modifications should be made, in a particular fee agreement. See Bus & P C §6147.

For additional sample fee agreements, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).

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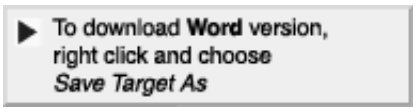
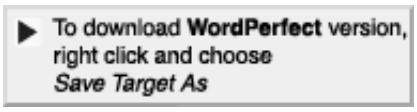
Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.45 B. Form: Sample Fee Agreement Based on Hourly Rate for Services

§3.45 B. Form: Sample Fee Agreement Based on Hourly Rate for Services





LEGAL SERVICES AGREEMENT

1. IDENTIFICATION OF PARTIES. This agreement, executed in triplicate with each party receiving an executed original, is made between LAW OFFICES OF LYN SMITH, hereafter referred to as "Law Firm," and ARTHUR C. LEWIS and BARBARA K. LEWIS, hereafter referred to as "Clients."

This agreement is required by Business and Professions Code §6148 and is intended to fulfill the requirements of that section.

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Law Firm to Clients are as follows: Representation of Clients through judgment in *Blew v Redd, et al.*, Green County Superior Court No. 12345.

3. RESPONSIBILITIES OF LAW FIRM AND CLIENTS. Law Firm will perform the legal services called for under this agreement, keep Clients informed of progress and developments, and respond promptly to Clients' inquiries and communications. Clients will be truthful and cooperative with Law Firm; keep Law Firm reasonably informed of developments and of Clients' address, telephone numbers, and whereabouts; and timely make any payments required by this agreement.

4. ATTORNEY FEES. Clients will pay Law Firm for attorney fees for the legal services provided under this agreement at the respective hourly rates of the individuals providing the services. The rates fall within the following ranges: $_ _ _ _ _ _ to $_ _ _ _ _ _ per hour for partners, $_ _ _ _ _ _ to $_ _ _ _ _ _ per hour for associates, $_ _ _ _ _ _ to $_ _ _ _ _ _ per hour for law clerks, and $_ _ _ _ _ _ to $_ _ _ _ _ _ per hour for paralegals. Law Firm will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest one tenth of an hour. The minimum time charged for any particular activity will be one tenth of an hour.

Law Firm will charge for all activities undertaken in providing legal services to Clients under this agreement, including, but not limited to, the following: conferences, court sessions, and depositions (preparation and participation); correspondence and legal documents (review and preparation); legal research; and telephone conversations. When two or more of Law Firm's personnel work on the matter at the same time, such as in conferences between them, the hourly rate of each will be charged.

If, while this agreement is in effect, Law Firm increases the hourly rates being charged to clients generally for attorney fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided 30 days or more after written notice of the increase is mailed to Clients. If Clients choose not to consent to the increased rates, Clients may terminate Law Firm's services under this agreement by written notice effective when received by Law Firm, as long as Clients execute and return a substitution-of-attorney form immediately on its receipt from Law Firm if Law Firm is Clients' attorney of record in any proceeding.

Clients acknowledge that Law Firm has made no promises about the total amount of attorney fees to be incurred by Clients under this agreement.

5. COSTS. Clients will pay all "costs" in connection with Law Firm's representation of Clients under this agreement. Costs will be advanced by Law Firm and then billed to Clients unless the costs can be met out of client deposits that are applicable toward costs. Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees.

6. DEPOSIT FOR FEES. Clients will pay to Law Firm an initial deposit of $_ _ _ _ _ _, to be received by Law

Firm by _ _[*date*]_ _, and to be applied against attorney fees incurred by Clients. Of this amount, $_ _ _ _ _ _ is nonrefundable and $_ _ _ _ _ _ is refundable. The nonrefundable portion will be applied against attorney fees first. The refundable portion will be deposited by Law Firm in an interest-bearing trust account. Clients authorize Law Firm to withdraw the principal from the trust account to pay attorney fees in excess of the nonrefundable portion as they are incurred by Clients. Any interest earned will be paid to Client. If, at the termination of services under this agreement, the total amount incurred by Clients for attorney fees is less than the amount of the initial deposit, the difference, to a maximum of the refundable portion of the deposit, will be refunded to Clients.

Law Firm will notify Clients whenever the full amount of any deposit has been applied to attorney fees incurred by Clients. Within 15 days after each notification is mailed, Clients will pay to Law Firm an additional deposit in the same amount as the initial one. Deposit of such additional amounts and payment of any interest earned will be made in the same manner as for the refundable portion of the initial deposit. Clients authorize Law Firm to withdraw the principal from the trust account to pay attorney fees as they are incurred by Clients. Such additional deposits will be fully refundable. If, at the termination of services under this agreement, there have been two or more deposits and the total amount incurred by Clients for attorney fees is less than the total amount of all deposits, the difference will be refunded to Clients.

7. DEPOSIT FOR COSTS. Clients will pay to Law Firm an initial deposit of $_ _ _ _ _ _, to be received by Law Firm by _ _[*date*]_ _, and to be applied against costs incurred by Clients. This amount will be deposited by Law Firm in an interest-bearing trust account. Clients authorize Law Firm to withdraw the principal from the trust account to pay costs as they are incurred by Clients. Any interest earned will be paid to Clients. The initial deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Clients for costs is less than the amount of the initial deposit, the difference will be refunded to Clients.

Law Firm will notify Clients whenever the full amount of any deposit has been applied to costs incurred by Clients. Within 15 days after each notification is mailed, Clients will pay to Law Firm an additional deposit in the same amount, and to be applied in the same manner, as the initial one. Deposit of such additional amounts and payment of any interest earned will be made in the same manner as for the initial deposit. Clients authorize Law Firm to withdraw the principal from the trust account to pay costs as they are incurred by Clients. Such additional deposits will also be refundable. If, at the termination of services under this agreement, the total amount incurred by Clients for costs is less than the total amount of all deposits, the difference will be refunded to Clients.

8. STATEMENTS AND PAYMENTS. Law Firm will send Clients monthly statements indicating attorney fees and costs incurred and their basis, any amounts applied from deposits, and any current balance owed. If no attorney fees or costs are incurred for a particular month, or if they are minimal, the statement may be held and combined with that for the following month. Any balance must be paid in full within 30 days after the statement is mailed.

9. ATTORNEY'S LIEN. By signing and returning this fee agreement to Attorney, Client grants Attorney a lien for all unpaid attorney fees and costs advanced on all claims and causes of action that are the subject of Attorney's representation of Client under this agreement and on all proceeds of any recovery obtained, whether by settlement, award, order, or judgment.

Client is aware, and acknowledges, that this lien may significantly impair Client's interest because Attorney may be able to delay payment of any recovery or settlement funds to Client until any disputes with Attorney about unpaid attorney fees and costs advanced have been resolved. Client acknowledges that Client has been advised to seek independent legal advice about granting Attorney this lien and has had a reasonable opportunity to do so. By signing this fee agreement and returning it to Attorney, Client represents that Client has either obtained legal advice about this lien or has decided that it was unnecessary to do so.

10. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date when it is executed by the third of the parties to do so.

The foregoing is agreed to by:

Date: _ _ _ _ _ _ **_____**

Client

Date: _ _ _ _ _ _ **_____**

Client

Date: _ _ _ _ _ _

LAW OFFICES OF LYN SMITH
By Whitney Watson

Copies: Duplicate signed copies for attorney and clients.

Comment: For discussion of hourly fee agreements, see §§3.29-3.32. This sample agreement is meant to be illustrative only. For additional sample fee agreements, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).

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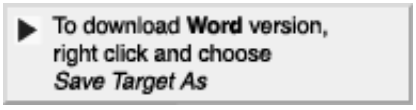
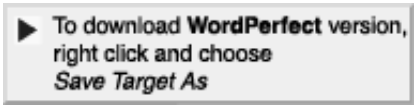
Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.46 C. Form: Disclosure and Consent on Fee Splitting (Referral)

§3.46 C. Form: Disclosure and Consent on Fee Splitting (Referral)





DISCLOSURE AND CONSENT

1. _ _[*Name of firm*]_ _ was retained on _ _[*date*]_ _, by _ _[*name of client*]_ _ to _ _[*describe services to be performed*]_ _.

2. The representation is under the terms of _ _[*a written/an oral*]_ _ agreement that provides, among other things, that the fee for the service will be $_ _[*state amount or describe basis on which fee will be computed*]_ _. _ _[*A copy of the agreement is attached.*]_ _

3. _ _[*Name of firm*]_ _ desires to refer the matter to _ _[*name of new firm*]_ _ to represent _ _[*name of client*]_ _ _ _[*on the same terms and conditions/describe new terms and conditions*]_ _.

4. _ _[*Name of new firm*]_ _ will pay _ _[*name of old firm*]_ _ _ _[*state amount or describe method of computing amount, e.g., 10 percent of net recovery*]_ _ for _ _[*describe services rendered by old firm*]_ _.

5. The payment will be at the expense of _ _[*name of new firm*]_ _, and the change in representation will not be the cause of any increase in fees.

Date: _ _ _ _ _ _

_ _[*Typed name of old firm*]_ _
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Date: _ _ _ _ _ _

_ _[*Typed name of new firm*]_ _
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

I understand that my case is being referred to _ _[*name of new firm*]_ _ and that _ _[*name of new firm*]_ _ will pay _ _[*name of old firm*]_ _ _ _[*state amount or describe method of computing amount, e.g., 10 percent of net recovery*]_ _. I consent to the referral and fee splitting.

Date: _ _ _ _ _ _

__[*Signature of client*]__
_ _[*Typed name*]_ _

Copies: Original (one for each signer).

Comment: The referring attorney's right to receive a contingent fee referral matures only on the agreed contingency, *e.g.,* judgment or settlement in favor of the client. On contingent fee agreements, see §§3.22-3.25. If the client's legal fees may increase, not solely because of the referral but because additional or broader services will be provided, the attorney and the client should agree to a provision concerning this possibility in the disclosure and consent form. The client should be given an opportunity to seek the advice of independent legal counsel on the matter. See §3.35.

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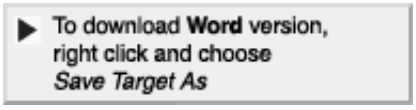
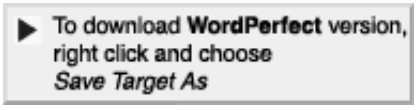
Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.47 D. Form: Disclosure and Consent on Fee Splitting (Association)

§3.47 D. Form: Disclosure and Consent on Fee Splitting (Association)





DISCLOSURE AND CONSENT

1. _ _[*Name of firm*]_ _ was retained on _ _[*date*]_ _, by _ _[*name of client*]_ _ to _ _[*describe services to be performed*]_ _.

2. The representation is under the terms of _ _[*a written/an oral*]_ _ agreement that provides, among other things, that the fee for the services will be $_ _[*state amount or describe basis on which fee will be computed*]_ _. _ _[*A copy of the agreement is attached.*]_ _

3. _ _[*Name of firm*]_ _ desires to associate _ _[*name of associate firm*]_ _ to _ _[*describe duties, e.g., conduct the trial*]_ _.

4. _ _[*Name of firm*]_ _ will pay _ _[*name of associate firm*]_ _ _ _[*state amount or describe method of computing amount, e.g., 10 percent of net recovery*]_ _ for the services of the associate firm.

5. The payment will be at the expense of _ _[*name of firm*]_ _, and the association will not be the cause for any increase in fees.

Date: _ _ _ _ _ _ _ _[*Typed name of firm*]_ _
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Date: _ _ _ _ _ _ _ _[*Typed name of associate firm*]_ _
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for_ _[*name*]_ _

I understand that _ _[*name of associate firm*]_ _ is being associated with my case and that _ _[*name of firm*]_ _ will pay _ _[*name of associate firm*]_ _ _ _[*state amount or describe method of computing amount, e.g., 10 percent of net recovery*]_ _. I consent to the association and fee splitting.

Date: _ _ _ _ _ _ __[*Signature of client*]__
_ _[*Typed name*]_ _

Copies: Original (one for each signer).

Comment: On splitting fees between associate counsel when one is not a partner, associate, or shareholder of the other, see §3.36. See Comment in §3.46.

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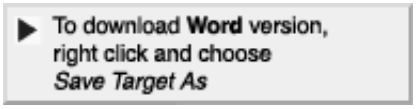
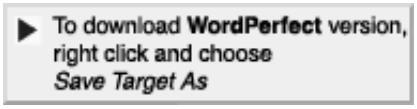
Source: Civil Litigation/California Civil Procedure Before Trial/3 Representation Agreements/§3.48 E. Form: Attorney's Lien Agreement

§3.48 E. Form: Attorney's Lien Agreement





ATTORNEY'S LIEN AGREEMENT

By signing and returning this lien agreement to Attorney, Client grants Attorney a lien for all unpaid attorney fees and costs advanced on all claims and causes of action that are the subject of Attorney's representation of Client under the written fee agreement executed between Client and Attorney on _ _[*date*]_ _ and on all proceeds of any recovery obtained, whether by settlement, award, order, or judgment.

Client is aware, and acknowledges, that this lien may significantly impair Client's interest because Attorney may be able to delay payment of any recovery or settlement funds to Client until any disputes with Attorney about unpaid attorney fees and costs advanced have been resolved. Client acknowledges that Client has been advised to seek independent legal advice about granting Attorney this lien and has had a reasonable opportunity to do so. By signing this lien agreement and returning it to Attorney, Client represents that Client has either obtained legal advice about this lien or has decided that it was unnecessary to do so.

The foregoing is agreed to by:

Date: _ _ _ _ _ _ _____
Client

Date: _ _ _ _ _ _ _____
Client

Date: _ _ _ _ _ _ _____
LAW OFFICES OF _ _[*name of law firm*]_ _
By _ _[*name of attorney*]_ _

Copies: Duplicate signed copies for attorney and client.

Comment: For discussion of attorney's liens, see §3.20A. To comply with Cal Rules of Prof Cond 3-300, the attorney's lien may be a separate paragraph in the representation agreement, which attorney and client both sign, or it may be a separate document, in which case it should be dated and signed by both attorney and client. See §§3.44-3.45 for attorney lien clauses integrated into contingent and hourly fee agreement forms.

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4

Changing Representation During Suit

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I. INTRODUCTION

§4.1 A. Scope of Chapter

This chapter discusses changes in representation, with and without the client's consent, in civil proceedings in California courts. Becoming an attorney of record, substitution, and association of attorneys are discussed in §§4.3-4.18. The rules on permissive and mandatory withdrawal are discussed in §§4.19-4.35. Abandonment of client is discussed in §4.36. Changes in attorneys of record after the death, suspension, or disability of the former attorney are included in §§4.37-4.51, and motions for disqualification are discussed in §§4.52-4.54. For discussion of rules governing attorneys' conflicts of interest with clients, see chap 2.

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§4.2 B. Governing Law

Substitution of attorneys is governed by CCP §284 (trial court), and by Cal Rules of Ct 8.36 (supreme court or court of appeal). An attorney's withdrawal is governed by Cal Rules of Prof Cond 3-700. Notice of cessation of law practice is governed by Bus & P C §6180, and the court's power to disqualify an attorney is based on CCP §128.

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II. BECOMING ATTORNEY OF RECORD

§4.3 A. Initial Appearance in Action or Proceeding

In civil litigation, the attorney-client relationship is usually created by mutual agreement. See chap 3 (representation agreements). Often, however, the relationship is established by an insurer, employer, or other person or organization selecting and compensating the client's attorney. But see Cal Rules of Prof Cond 3-310 (prohibiting interference with attorney's independence or attorney-client relationship if compensation is received from anyone other than client).

In a lawsuit or legal proceeding, there are many points at which a lawyer will become the new "attorney of record" (*e.g.,* after the death or disability of the original attorney). The act of becoming the attorney of record usually occurs when the attorney files the first pleading, petition, or notice of appearance for the client in a legal proceeding before a court, governmental body, administrative agency, or insurance company. If the former attorney had already initiated the action, the substitution of attorneys (see form in §4.55) is usually the document by which a subsequent attorney becomes the attorney of record.

However arranged, becoming the attorney of record establishes a relationship between court, client, and attorney. Once established, it is subject to control by the court, limiting in some circumstances the client's right to discharge the attorney, and modifying the attorney's right to withdraw from representation. It vests the attorney with presumed authority over the client's affairs to an extent the client may not have contemplated. See CCP §283 (attorney has authority to bind client in any step of action or proceeding and to receive money claimed by client).

A client's written delegation of authority to become the attorney of record in California courts is not generally required. "In the absence of statutory requirement that the authority shall be evidenced by writing, it is always presumed that an attorney appearing and acting for a party to a cause has authority to so do." *Pacific Paving Co. v Vizelich* (1903) 141 C 4, 8, 74 P 352.

Practice before certain tribunals may require a special declaration of appearance. For example, to practice before the Treasury Department, the Internal Revenue Service often requires a written declaration with specified information. See Treas Reg §§601.502(c), 601.503.

NOTE: An attorney who is unfamiliar with an agency or tribunal should inquire about any requirements that must be met in order to represent a client.

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§4.4 B. Client's Right to Change Attorneys

The client has the absolute right and power to discharge the attorney at any time, with or without cause. CCP §284 (attorney in any action or special proceeding may be changed at any time before or after judgment or final determination). The client may hire another attorney or appear in propria persona. Because the attorney-client relationship is terminable at the will of the client, such a discharge is not a breach of contract. *Fracasse v Brent* (1972) 6 C3d 784, 791, 100 CR 385. On notice to other parties of a substitution of attorneys, see §4.6. On attorney's recovery of reasonable value of services rendered up to the time of discharge, see §4.13. For discussion of attorney's duties on termination of attorney client relationship, see Opening a Law Office: A Handbook for Starting Your Own Business, chap 6 (6th ed Cal CEB 2002).

Thus, for example, although the Trial Court Delay Reduction Act (Govt C §§68600-68620) permits courts to impose procedural requirements in addition to those authorized by statute, it does not authorize a court to make rules that interfere with this right. See *Hock v Superior Court* (1990) 221 CA3d 670, 270 CR 579 (local court rule that prohibited consensual withdrawal or substitution of counsel after trial-setting conference without leave of court was void because it infringed on client's absolute right to discharge attorney under CCP §284(1)). On the trial delay reduction rules generally, see chap 40.

When the attorney is employed as in-house counsel, the employer's right to terminate the attorney-client relationship at will still exists, but exercising that right may subject the employer to liability for wrongful discharge. *General Dynamics Corp. v Superior Court* (1994) 7 C4th 1164, 32 CR2d 1. An in-house attorney may pursue a "just cause" contract claim in the same way as a nonattorney employee. A tort claim for retaliatory discharge may also be pursued, unless it cannot be established without breaching the attorney-client privilege. 7 C4th at 1170.

Government attorneys who exercise their employee rights under the Meyers-Milias-Brown Act (MMBA) (Govt C §§3500-3510) are exempt from the general rule that a client may discharge an attorney at will. *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 28 CR2d 617. An attorney may not be terminated for engaging in protected activity under the MMBA.

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III. SUBSTITUTION OF ATTORNEY

A. Substitution With Counsel's Consent

§4.5 1. Procedures

When both attorney and client agree to substitute another attorney, their consent must be filed with the clerk of the court in which the proceeding is pending or entered in the court's minutes. CCP §284.

This consent is a three-party agreement, in which the client substitutes the new attorney for the former attorney, the new attorney agrees to represent the client, and the former attorney consents to the substitution. The written substitution of attorney is often phrased as both a notice of substitution of attorney as well as the agreement and consent to the substitution, thus reducing the number of documents required. See forms in §§4.55-4.56.

A substitution of attorneys in the California Supreme Court or in a court of appeal is governed by the California Rules of Court. It is accomplished by filing and serving a stipulation in the reviewing court signed by the party represented and the new attorney. See Cal Rules of Ct 8.36(b). In all appeals and original proceedings related to a superior court proceeding, the party must also serve the superior court. Cal Rules of Ct 8.36(b).

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§4.6 2. Notice to Other Parties

Notice of the substitution of attorneys must be sent to the "adverse party" (CCP §285) as well as any other attorneys of record and unrepresented parties (see CCP §1010).

It is not necessary to prepare a separate, formal notice. Notice of substitution is usually served by mailing a copy of the substitution. CCP §§1012-1013(a). The substitution should be titled so that its purpose is clear (*e.g.,* substitution of plaintiff's attorney). See attorney-drafted form in §4.55. The optional Judicial Council Form MC-050 (Substitution of Attorney—Civil (Without Court Order)) in §4.56 may also be used.

If a party to the proceeding has not appeared, that party may have to be served personally or another method of service may have to be found. See, *e.g.,* CCP §1011; discussion in chap 17 (service of process). When a party's default for failure to appear has been entered, no notice is required. CCP §§1010, 1014.

The original substitution must be filed with the court clerk along with a proof or acknowledgment of service on the other parties. If the substitution was made by oral consent entered in the minutes of the court, written notice must be served and filed, with proof of service on the parties. See CCP §§284-285, 1010.

Until notice of a change in representation is given, the adverse party must recognize the former attorney. CCP §285. However, the notice requirement is for the adverse party's benefit and may be waived by that party, either in writing or implicitly through the party's conduct. See *Withers v Little* (1880) 56 C 370, 372 (notice of substitution filed but not served on adverse party, whose acknowledgment of receipt of notice of appeal, signed by substituted attorney, waived objection to substitution). See also *Livermore v Webb* (1880) 56 C 489, 490.

NOTE: Irregularity in the substitution of attorney does not deprive the court of jurisdiction. *Carrara v Carrara* (1953) 121 CA2d 59, 62, 262 P2d 591.

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B. Substitution Without Counsel's Consent

1. Client's Motion for Substitution

§4.7 a. Motion Generally Granted

If the attorney of record refuses to consent to a substitution of attorneys, the client must apply to the court for an order after giving notice of the motion to the attorney of record. CCP §284. Note that the attorney's failure to execute or explain nonexecution of a request for substitution of attorney is a factor considered by the State Bar in deciding whether disciplinary action is warranted. See, *e.g., Conroy v State Bar* (1991) 53 C3d 495, 280 CR 100.

A client's motion to discharge a former attorney and substitute a new attorney, with rare exceptions, is granted. A client has an absolute right to change attorneys (see §4.4), and "in the absence of any relation of the attorneys to the subject matter of the action," it is necessary only "to request such change in order to justify the court in making an order therefor." *Scott v Superior Court* (1928) 205 C 525, 527, 271 P 906.

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§4.8 b. Denial Because Trial Imminent

When a party requests substitution of counsel at a time or under circumstances that will delay the trial, the court may deny the request. See CCP §128; *Flynn v Fink* (1923) 60 CA 670, 673, 213 P 716. See also *Berger v Mantle* (1936) 18 CA2d 245, 249, 63 P2d 335 (plaintiff and defendant not the only interested parties; court itself as arm of government in service to public can demand orderly and prompt disposition of case).

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§4.9 c. Denial Because Attorney's Power Coupled With an Interest

In rare situations, when an attorney has a power coupled with an interest, the court will refuse to permit substitution. This inability of a client to discharge an attorney who has a power coupled with an interest in the subject matter of the litigation arises from agency law. See CC §2356. The interest in the action must be other than that arising from the attorney's employment. *O'Connell v Superior Court* (1935) 2 C2d 418, 421, 41 P2d 334 (contract created an interest only for reimbursement and compensation; attorney's interest was thus not "beneficial" with respect to subject matter of litigation and agency or power was revocable).

An attorney's interest in the fee, or a "lien" on the action for the attorney fee, or an assignment by the client of the cause of action to secure payment of the attorney fee, is not the sort of interest that bars discharge of the attorney. The mere expression "a power coupled with an interest" does not necessarily render the power irrevocable. *Todd v Superior Court* (1919) 181 C 406, 419, 184 P 684. However, "[t]he case would be quite different if, in addition to providing for reimbursements and compensation, the contract vested in the attorney in fact a definite share in ownership of the legacies." 181 C at 420.

It would be difficult for an attorney to create a power coupled with an interest in the client's cause unless it predates the attorney-client relationship or exists independently of the representation. For example, in *Redevelopment Agency v Superior Court* (1961) 195 CA2d 591, 16 CR 45, the San Francisco City Attorney was retained by the Redevelopment Agency to condemn land in San Francisco. The Redevelopment Agency's later motion to substitute counsel was denied because of the city's ongoing interest and financial involvement in the redevelopment project. Noting that the interest of the municipality preexisted the litigation, thus precluding the substitution of its attorney, the court stated that "the interest of the attorney necessary to preclude substitution must contain three elements: (1) the interest must be specific; (2) the interest must be in the subject matter of the litigation; and (3) the interest must be beneficial." 195 CA2d at 595.

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§4.10 2. Former Counsel's Failure to Deliver Files

Occasionally, after being discharged, an attorney may refuse or fail to deliver the client's files to the client or the succeeding attorney of record. Under Cal Rules of Prof Cond 3-700(D)(1), an attorney whose employment has terminated must at the client's request, subject to any protective order or nondisclosure agreement, promptly release the client's papers and property.

Rule 3-700(D)(1) defines "client papers and property" to include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, experts' reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not. The work product of an attorney is the client's property whether or not the client has paid the attorney for his or her services. *Weiss v Marcus* (1975) 51 CA3d 590, 599, 124 CR 297. The physical file generated or maintained by the attorney is also treated as the client's property. *Academy of Optometrists v Superior Court* (1975) 51 CA3d 999, 1005, 124 CR 668.

For further discussion of attorney's duties upon termination of attorney client relationship, see Opening a Law Office: A Handbook for Starting Your Own Business, chap 6 (6th ed Cal CEB 2002).

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§4.11 a. Retaining Lien Void

A possessory lien on the physical file or the work product generated or maintained by the former attorney is generally void. Such a lien is described in case law as a "retaining lien." For example, in *Academy of Optometrists v Superior Court* (1975) 51 CA3d 999, 124 CR 668, the attorney had a specific contract giving him the right to hold the client's file, including pleadings, depositions, and correspondence, until all fees were paid. The file material had no pecuniary value except for the information and exhibits necessary to prosecute the case. The court held that if the subject matter of an attorney's retaining lien is of no economic value, but is used only to extort disputed fees from the client, the lien is void and the files must be delivered to the client forthwith. 51 CA3d at 1006. A concurring opinion disagreed with the distinction, turning on the pecuniary value of the liened property, and relied instead on the attorney's ethical obligation to preserve the client's rights. 51 CA3d at 1007.

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§4.12 b. Unearned Fees

The former attorney must also refund any unearned part of a fee paid in advance. However, a true retainer fee paid solely to ensure the attorney's availability need not be refunded. Cal Rules of Prof Cond 3-700(D)(2). For further discussion, see chap 3.

NOTE: The official discussion following Cal Rules of Prof Cond 3-700 states that the rule is intended neither to prohibit an attorney at his or her own expense from making and retaining copies of papers released to the client nor to prohibit a claim to recover the attorney's expenses in any subsequent legal proceeding. It is unclear what subsequent legal proceedings are intended by this discussion, but a lawsuit to recover attorney fees would be an example of a proceeding in which the attorney may seek recovery of the costs of duplicating the client's file.

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C. Former Counsel's Right to Fees

§4.13 1. Reasonable Fees to Time of Discharge

An attorney who has been discharged by a client may still be entitled to reasonable fees up to the time of discharge. *Salopek v Schoemann* (1942) 20 C2d 150, 153, 124 P2d 21. An attorney employed under a contingent fee agreement who is discharged by the client may recover:

- A reasonable fee, based on quantum meruit, for time spent pursuing a recovery for the client, when the contingency occurs;
- The entire fee stated in the agreement if the attorney is discharged after the contingency has occurred or so near to its occurrence that the entire fee was the reasonable value of the services (as when the client fires the attorney on the courthouse steps then immediately enters into a settlement); or
- No fee if the attorney withdraws, having done no more than spend the time needed to reach a conclusion that the case is not worth pursuing.

See *Fracasse v Brent* (1972) 6 C3d 784, 787, 100 CR 385 (client's right to discharge attorney at any time); *Joseph E. Di Loreto, Inc. v O'Neill* (1991) 1 CA4th 149, 156, 1 CR2d 636 (attorney fired after verdict for client entitled to entire fee). See also *Cal Pak Delivery, Inc. v United Parcel Serv.* (1997) 52 CA4th 1, 16, 60 CR2d 207 (even attorney who is disqualified for offering to sell out his client may be able to recover attorney fees for services rendered before his misconduct). See generally chaps 3 (contingent fee agreements) and 5 (proving agreement and services performed; effect of attorney's unjustified withdrawal) and §4.36 (attorney's abandonment of client).

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§4.14 2. Charging Lien Valid

In contrast to a "retaining lien" (see §4.9), a "charging lien" is a nonpossessory equitable right to satisfy the attorney's expenses and fees from the judgment recovered. *Academy of Optometrists v Superior Court* (1975) 51 CA3d 999, 1003, 124 CR 668. A charging lien may be freely created by contract on a cause of action, judgment, settlement, or amount due or to become due or paid, for fees and costs, and prevails over the subsequent attachment of a client's creditor. *Haupt v Charlie's Kosher Mkt.* (1941) 17 C2d 843, 845, 112 P2d 627.

The rationale for validating a charging lien is that a party should not be allowed to appropriate the entire judgment in his or her favor without paying for the attorney's services in obtaining the judgment. See *Tracy v Ringole* (1927) 87 CA 549, 551, 262 P 73 (attorney is equitable assignee of judgment even though action in which judgment was obtained was for a tort in itself unassignable).

The client's discharge of the attorney does not dissolve the lien, which continues to exist in order to secure payment of a fee. The lien may be enforced by an independent action, but only to the extent of the reasonable value of the services rendered. *Weiss v Marcus* (1975) 51 CA3d 590, 598, 124 CR 297.

Although permissible, it is not necessary to file a notice of lien in the pending action. *Hansen v Jacobsen* (1986) 186 CA3d 350, 358, 230 CR 580. A notice of lien does not change the rule that an independent action is necessary to enforce the lien, nor does it empower the court to award or decide a fee in the client's action. *Hendricks v Superior Court* (1961) 197 CA2d 586, 17 CR 364. But see *Curtis v Estate of Fagan* (2000) 82 CA4th 270, 276, 98 CR2d 84 (Prob C §3601(a) authorizes court to determine and award fee in action on behalf of minor or person with disability as defined in Prob C §3603).

The lien's priority is generally determined by the time of its creation, *e.g.,* the date of the original contract, taking precedence over liens created later. CC §2897; *Cetenko v United Cal. Bank* (1982) 30 C3d 528, 531, 179 CR 902. If the ultimate recovery is insufficient to pay both the discharged and current attorneys, proportional recovery may be appropriate. *Hansen v Jacobsen* (1986) 186 CA3d 350, 356, 230 CR 580; *Spires v American Bus Lines* (1984) 158 CA3d 211, 216, 204 CR 531.

The mere fact that the representation agreement grants the attorney a one-third "lien" on a recovery, without expressly stating the fee, does not necessarily establish the fee to which the attorney is entitled. See, *e.g., Gostin v State Farm Ins. Co.* (1964) 224 CA2d 319, 326, 36 CR 596 (retrial necessary for evidence to resolve ambiguity about fee attorney was to receive). For further discussion of attorney's lien and sample language, see chap 3.

NOTE: The term "lien" is not absolutely necessary. In some instances, the existence of a lien may be a triable issue of fact, despite the absence of words such as "lien," or "assignment." See *Gelfand, Greer, Popko & Miller v Shivener* (1973) 30 CA3d 364, 105 CR 445.

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IV. ASSOCIATION OF ATTORNEY

§4.15 A. Authority; Client's Consent Not Required

Once employed by a client, the attorney can associate other attorneys in handling the matter with or without the client's express authority. *Raskin v Superior Court* (1934) 138 CA 668, 33 P2d 35 (judicial notice taken of custom approved by California courts that attorneys employ other attorneys "to assist in legal work placed in their care, including appearances in court without the formality of being made attorneys of record").

If the attorney of record associates another attorney, it is up to them to divide the duties of conducting the case; unless the associated attorney claims to act as the sole attorney, no substitution of attorneys is necessary. *Wells Fargo & Co. v City & County of San Francisco* (1944) 25 C2d 37, 43, 152 P2d 625.

The association can be either a joint venture between the attorneys sharing the fees or an employment relationship, but not both. *Bunn v Lucas, Pino & Lucas* (1959) 172 CA2d 450, 465, 342 P2d 508. See also *Ford v Freeman* (1919) 40 CA 221, 227, 180 P 545.

WARNING: If a fee-splitting agreement between attorneys is made, the client must consent in writing after full written disclosure of the division of fees, which division may, but need not, be in proportion to the services performed by the attorneys, and the total fee charged must not be increased solely because of the fee division. See forms in chap 3.

The attorney's agreement with associated counsel for compensation does not obligate the client to payment without the client's authorization or ratification of the agreement to be obligated. *Porter v Elizalde* (1899) 125 C 204, 207, 57 P 899. For discussion of applicable rules of professional conduct and the problems involved in referral-participation fees, see chap 3.

Although the client's consent is not required, the attorney-client relationship may be better if counsel discusses the associated attorney's role in the case, particularly if work will be done over a long period of time by someone outside the immediate law firm.

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§4.16 B. Notice of Association

If the associated counsel will take a substantial role in conducting the litigation, it is good practice, although not necessary, to file a notice of association. The notice should contain the name, mailing address, and telephone number of the associate counsel, and should be filed with the court and served on all attorneys of record.

Because the client's consent is not required, only the attorney of record need sign the notice. See form of association in §4.61.

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C. Court Appearance by Out-of-State Attorney

§4.17 1. Procedures for Appearing as Counsel Pro Hac Vice

An attorney licensed to practice in another state, territory, or insular possession of the United States or in any United States federal court, but not licensed to practice in California, may apply to a California court for permission to represent a client in a pending matter. Cal Rules of Ct 9.40. See *Daybreak Group, Inc. v Three Creeks Ranch* (2008) 162 CA4th 37, 41, 75 CR3d 365 (Rule 9.40 only applies to persons, not law firms). If the application is granted, the out-of-state attorney is called counsel pro hac vice, who may appear in court "for this turn," *i.e.,* for a particular occasion.

Rule 9.40 governs the procedures required to appear as counsel pro hac vice. For example, a verified application and notice of hearing must be filed in the court in which the matter is pending and served on all parties and the State Bar at its San Francisco office. The application must include specific information about the applicant's professional standing. See Cal Rules of Ct 9.40(d). A filing fee paid to the State Bar in an amount up to $50 is also required. Cal Rules of Ct 9.40(e).

An application addressed to the California Supreme Court or a court of appeal must comply with Cal Rules of Ct 8.54 (procedures for motions in the reviewing court). Cal Rules of Ct 9.40(c). However, the Supreme Court or a court of appeal may permit an attorney who is not a member of the State Bar, but who is licensed to practice in another jurisdiction and possesses special expertise in the particular field affected by the proceeding, to present argument without applying to appear as counsel pro hac vice. Cal Rules of Ct 9.40(g). See form in §4.62.

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§4.18 2. Association of California Counsel as Attorney of Record Required

Counsel pro hac vice must have an active member of the State Bar associated as attorney of record. Cal Rules of Ct 9.40(a). See *People v Cooks* (1983) 141 CA3d 224, 290, 190 CR 211 ("the California attorney has a legal and ethical responsibility for seeing that the defendant, in a criminal case, is effectively represented. A perfunctory association, with no regular appearance at trial, would not fulfill that obligation").

A person is not eligible to appear as counsel pro hac vice if he or she is:

- A California resident;
- Regularly employed in California; or
- Regularly engaged in substantial business, professional, or other activities in California.

Cal Rules of Ct 9.40(a).

Without special circumstances, the application must be denied to anyone who has repeatedly appeared as counsel pro hac vice. Cal Rules of Ct 9.40(b). See *Walter E. Heller W., Inc. v Superior Court* (1980) 111 CA3d 706, 168 CR 785 (one previous appearance was not cause to deny counsel's application). See also Cal Rules of Ct 9.40(d)(5) (application must list court and action in which applicant has filed similar application in preceding 2 years and state whether application was granted).

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V. ATTORNEY'S WITHDRAWAL

§4.19 A. Duties to Client

An attorney must not withdraw from employment until:

- Reasonable steps have been taken to avoid reasonably foreseeable prejudice to the client's rights;
- Sufficient time has been given to the client to employ other counsel; and
- The withdrawing attorney has complied with all applicable laws and rules.

Cal Rules of Prof Cond 3-700(A)(2).

The official discussion to Rule 3-700 adds: "What such [reasonable] steps would include, of course, will vary according to the circumstance. Absent special circumstances, 'reasonable steps' do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied."

An attorney who has agreed to represent a client must withdraw from that representation in certain circumstances and may withdraw without the client's consent in other circumstances. See §§4.33-4.35 (grounds for withdrawal). Absent these circumstances, an attorney who discontinues representation of a client without the client's consent or without a court order relieving the attorney as counsel does so at the risk of liability to the client for any loss or injury caused by failure to act competently. See *Lane v Storke* (1909) 10 CA 347, 101 P 937. Abandonment of a client's interests or failure to act on the client's behalf are also grounds for disciplining the attorney. See §4.36 (attorney's abandonment of client).

Under Cal Rules of Prof Cond 3-700(D), an attorney whose employment has been terminated must, subject to any protective order or nondisclosure agreement, promptly release to the client, at the client's request, any unearned fee advance as well as all client papers and property, including correspondence, pleadings, experts' reports, and the like. See discussion in §4.10.

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§4.20 B. Withdrawal With Client's Consent

If a client consents to the attorney's withdrawal, a substitution of attorney is served and filed in the same manner as a substitution of attorney initiated by the client. See applicable discussion in §4.5. On notice requirements, see §4.6. Forms of notice and substitution appear in §§4.55-4.56.

Except for corporate clients, the client may be substituted in propria persona in the attorney's place, or another attorney may be substituted for the withdrawing attorney. On special rules for attorney's withdrawal when representing a corporation, see §4.32.

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C. Attorney's Withdrawal Without Client's Consent

§4.21 1. Motion to Be Relieved as Counsel

If the client refuses to join with the attorney in signing a substitution of attorney form, substituting either another attorney or the client in propria persona, the withdrawing attorney must file a motion in the court in which he or she is attorney of record for an order to be relieved as counsel. CCP §284(2).

Although an attorney may not abandon a client or act in a way that prejudices a client's interest, an attorney is entitled to withdraw from representation without cause, with or without client consent. *Ramirez v Sturdevant* (1994) 21 CA4th 904, 915, 26 CR2d 554. In a pending matter, counsel's motion to withdraw over the client's objection requires court approval, but the court should not prevent counsel from withdrawing from the case if withdrawal can be accomplished without undue prejudice to the client. 21 CA4th at 915. But see *Hodcarriers, Bldg. & Common Laborers Local v Miller* (1966) 243 CA2d 391, 395, 52 CR 251 (trial court's authority under CCP §128 to oversee conduct and order of its proceedings permitted it to deny counsel's motion to withdraw because withdrawal would have prejudiced opponent).

NOTE: An attorney who withdraws as counsel over clients' opposition and without sufficient justification may not assert a quantum meruit claim against any settlement eventually obtained by the former clients. *Rus, Miliband & Smith v Conkle & Olesten* (2003) 113 CA4th 656, 672, 6 CR3d 612.

In *Mossanen v Monfared* (2000) 77 CA4th 1402, 1406, 92 CR2d 459, the trial court, aware that plaintiff (a minor) had not yet obtained substitute counsel, allowed counsel to withdraw on the same day that defendant filed a motion for summary judgment. This error (among others) left the plaintiff with no attorney to oppose a motion for summary judgment and required reversal of the judgment for the defendant. 77 CA4th at 1410. See related discussion in §4.8 (denial of motion for substitution due to imminence of trial).

On grounds for withdrawal from representation, see §§4.33-4.35 (mandatory, conditionally mandatory, and permissive withdrawal).

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/ 2. Procedures for Obtaining Court Order Relieving Counsel/§4.22 a. Actions in Trial Court

2. Procedures for Obtaining Court Order Relieving Counsel

§4.22 a. Actions in Trial Court

Whatever the grounds for the attorney's motion to be relieved as counsel, the procedure is the same and at the trial court level is governed by Cal Rules of Ct 3.1362.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.23 (1) Notice of Motion

§4.23 (1) Notice of Motion

A notice of motion and motion to be relieved as counsel must be directed to the client. Counsel must use Notice of Motion and Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-051), reproduced in §4.64. Cal Rules of Ct 3.1362(a). A supporting memorandum is not required. Cal Rules of Ct 3.1362(b).

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§4.24 (2) Declaration of Counsel

The motion to be relieved as counsel must be accompanied by a declaration stating in general terms, and without compromising the confidentiality of the attorney-client relationship, why counsel was unable to obtain the client's consent to the attorney's withdrawal. Cal Rules of Ct 3.1362(c). The Judicial Council has issued a mandatory form, Declaration in Support of Attorney's Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-052), for the required declaration, which is reproduced in §4.65.

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§4.25 (3) Service of Notice and Declaration

The notice of motion, the motion, the declaration, and the proposed order must be served on the client and on all other parties who have appeared in the case. Cal Rules of Ct 3.1362(d). The motion may be personally served or served by mail. See CCP §1013. If, however, the *client* is served by mail, the motion must be accompanied by a declaration showing that the service address is either the current or last known residence or business address of the client.

NOTE: In this context, a "current address" is one that has been confirmed within the last 30 days; a showing that the notice was sent to the client's last known address and was not returned by the post office is not sufficient to show that the address is current. Cal Rules of Ct 3.1362(d).

If the motion is sent to the client's last known address, the accompanying declaration must state that within 30 days after serving the motion the attorney made reasonable efforts to locate a more current address for the client but was unsuccessful. Cal Rules of Ct 3.1362(d).

When service is by mail, CCP §1011(b) (providing for various methods of serving the client if the address is unknown or the client cannot be located) applies. Cal Rules of Ct 3.1362(d). See also Cal Rules of Ct 3.252 (service on clerk when party's address is unknown). On service by mail, express mail, or, when permitted, by facsimile transmission, see chap 18.

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§4.26 (4) Proposed Order

The proposed order must be prepared on the Order Granting Attorney's Motion to Be Relieved as Counsel (Judicial Council Form MC-053), reproduced in §4.66. Cal Rules of Ct 3.1362(e).

The proposed order must be lodged with the court and served on the client along with the moving papers. Cal Rules of Ct 3.1362(e).

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§4.27 (5) Order

If the order is signed, a copy must be served on the client and on all parties who have appeared in the litigation. See CCP §285. The court may delay the effective date of the order until counsel files proof of service on the client with the court. Cal Rules of Ct 3.1362(e).

NOTE: Counsel must also comply with any applicable local rules of court that have not been preempted by the California Rules of Court (*e.g.*, delay reduction rules). See Cal Rules of Ct 3.20, 2.100(a), discussed in chap 11. An attorney has a professional responsibility to be aware of such local rules. *Moyal v Lanphear* (1989) 208 CA3d 491, 256 CR 296.

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§4.28 b. Appeals Pending in Superior Court Appellate Division

Withdrawal or substitution of attorneys in appeals pending in the superior court appellate division is effected by serving and filing a stipulation in the reviewing court, signed by the client, the withdrawing attorney, and any substituted attorney. Cal Rules of Ct 8.814.

If the client refuses to agree to the attorney's withdrawal, the attorney must apply to the reviewing court for an order to be relieved as counsel. Unless the court orders otherwise, service of the motion need be made only on the party and the attorneys directly affected by the motion. Cal Rules of Ct 8.814(c)(1).

The reviewing court clerk must notify the trial court of any withdrawal of attorneys. Cal Rules of Ct 8.814(c)(3).

Otherwise, following the procedures for a motion to be relieved as counsel in a trial court under Cal Rules of Ct 3.1326 should satisfy most reviewing courts. See §4.22 and forms in §§4.64-4.66. Attorneys should check local court rules for any additional requirements not preempted by Cal Rules of Ct 3.20, 2.100(a), discussed in chap 11.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.29 c. Matters Pending in Court of Appeal and Supreme Court

§4.29 c. Matters Pending in Court of Appeal and Supreme Court

Withdrawal or substitution of attorneys in appeals pending in the California Supreme Court or a court of appeal is accomplished by serving and filing a stipulation in the reviewing court, signed by the party represented and the new attorney. See Cal Rules of Ct 8.36(b). In all appeals and original proceedings related to a superior court proceeding, the party must also serve the superior court. Cal Rules of Ct 8.36(b). Otherwise, a motion for withdrawal or substitution must be made in the reviewing court as provided in Cal Rules of Ct 8.54, 8.57. Unless the reviewing court orders service on additional persons, service of the motion need be made only on the party represented and the attorneys directly affected by the motion. Cal Rules of Ct 8.36. The proof of service need not include the address of the party represented. But if the court grants the motion, the withdrawing attorney must promptly provide the court and the opposing party with the party's current or last known address and telephone number. Cal Rules of Ct 8.36(c)(2). See Cal Rules of Ct 8.54, 8.57 for additional filing and format requirements for the motion.

The motion is disposed of without further hearing after filing of opposition or expiration of the time for filing opposition. The reviewing court may, however, set the matter for hearing on its own motion or at the request of any party. Cal Rules of Ct 8.54(b). Failure of the adverse party to oppose a motion may be deemed a consent to the granting of the motion. See Cal Rules of Ct 8.54(c).

The reviewing court clerk must notify the trial court clerk, or the appellate court clerk in the case of review by the supreme court, of any substitution or withdrawal of attorney. Cal Rules of Ct 8.36. Counsel should review and comply with any applicable appellate court local rules not preempted by Cal Rules of Court 3.20, 2.100(a), (b), discussed in chap 11.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.30 d. Withdrawal When Publicly Funded Representation Reduced

§4.30 d. Withdrawal When Publicly Funded Representation Reduced

Code of Civil Procedure §285.2 provides for a special situation in which there is a reduction in public funding of legal services to indigent clients. If the reduction materially impairs the agency attorney's ability to represent the client, the court, on its own motion or on the motion of the client or attorney, must permit the attorney's withdrawal if it is shown that:

- Public funding is inadequate;
- No alternative representation can be found; and
- All reasonable steps have been taken to reduce legal prejudice to the client.

If the motion for withdrawal is granted, the court may toll the running of any statute of limitations, filing requirement, mandatory dismissal statute, notice of appeal, or discovery requirement for up to 90 days. CCP §285.3. The court may also appoint any attorney, law firm, or professional corporation to represent the indigent client according to the guidelines in CCP §285.4.

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§4.31 e. Withdrawal From Dissolution of Marriage Action

The attorney of record for a party in a dissolution of marriage case may withdraw after entry of final judgment without the client's consent or a court order. CCP §285.1. This section reflects the continuing nature of dissolution matters and offers the attorney a simple means of terminating an otherwise continuing responsibility. See *Reynolds v Reynolds* (1943) 21 C2d 580, 134 P2d 251.

Withdrawal can be effected in this situation by filing a notice of withdrawal, mailing a copy to the client at the client's last known address, and serving the notice on the adverse party. The notice must give the date of entry of the final decree or judgment, the client's last known address, and state that the attorney withdraws as attorney of record. CCP §285.1. For form, see §4.67.

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§4.32 f. Withdrawal From Representation of Corporation

Counsel attempting to withdraw from representing a corporation may experience difficulties if no attorney will be substituted in his or her place. Except in small claims court, a corporation cannot appear in propria persona in civil litigation. See CCP §116.540(b); *Paradise v Nowlin* (1948) 86 CA2d 897, 195 P2d 867.

Withdrawal of counsel may be permitted when the corporation is unwilling or uncooperative, which has the effect of forcing the corporation to choose between forfeiting its rights or obtaining new counsel. Counsel facing this situation should be prepared to show that the corporation has been unwilling or uncooperative in obtaining new counsel.

Counsel seeking to be relieved from representation of a corporation must use the mandatory forms adopted by the Judicial Council. For discussion, see §4.22. The Judicial Council's mandatory form for notice of motion and motion to be relieved as counsel (MC-051) is reproduced in §4.64. The Judicial Council's mandatory form for declaration in support of attorney's motion to be relieved as counsel (MC-052) is reproduced in §4.65. The Judicial Council's mandatory form for proposed order granting attorney's motion to be relieved as counsel (MC-053) is reproduced in §4.66. Judicial Council forms MC-051 and MC-053 both contain a notice to corporations and other entities that are not permitted to appear without counsel (*e.g.*, guardians, personal representatives, unincorporated associations), warning them that the failure to obtain counsel may have serious consequences and advising them to obtain legal advice.

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D. Grounds

§4.33 1. Mandatory Withdrawal

An attorney must withdraw from employment and from representation before a court or tribunal in any of the following circumstances:

- **Harassing litigation**. When the attorney knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person. Cal Rules of Prof Cond 3-700(B)(1).
- **Unethical conduct**. When the attorney knows or should know that continued employment will result in violation of the California Rules of Professional Conduct or the State Bar Act. Cal Rules of Prof Cond 3-700(B)(2).
- **Health of attorney.** When the attorney's mental or physical condition makes it unreasonably difficult to conduct the case effectively. Cal Rules of Prof Cond 3-700(B)(3).
- **Sexual relations with client.** When attorney-client sexual relations cause the attorney to perform legal services incompetently. Cal Rules of Prof Cond 3-120.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.34 2. Conditionally Mandatory Withdrawal

§4.34 2. Conditionally Mandatory Withdrawal

An attorney may be required to withdraw from representing a client in the following circumstances unless the attorney can meet the requirements for written disclosure to the client and for obtaining the informed written consent of affected persons that are detailed in Cal Rules of Prof Cond 3-310:

NOTE: Other aspects of Rule 3-310, including circumstances in which an attorney must decline to accept employment and aggregate settlements as well as the following situations, are discussed more fully in chap 2.

- **Relationship with party or witness in same matter.** The attorney (1) has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter or (2) knows or should know of a previous such relationship and that it would substantially affect the representation. Cal Rules of Prof Cond 3-310(B)(1)-(2).
- **Relationship with person likely to be affected**. The attorney has (or had) a legal, business, financial, professional, or personal relationship with a person or entity that the attorney should know would be affected substantially by the resolution of the matter. Cal Rules of Prof Cond 3-310(B)(3).
- **Interest in subject matter.** The attorney has, or had, a legal, business, financial, or professional interest in the subject matter of the representation. Cal Rules of Prof Cond 3-310(B)(4).
- **Two or more clients' interests conflict.** The attorney learns that the interests of two clients in the same matter actually conflict or that the interests of a client in one matter are adverse to a client in a separate matter. Cal Rules of Prof Cond 3-310(C)(2)-(3).
- **Organizational representation**. When an attorney represents an organization, and when an agent, real or apparent, of the organization "acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization" or that is likely to result in substantial injury to the organization, the attorney must take whatever action appears to be in the organization's best interests, including arguing for reconsideration or referring the matter to a higher authority in the organization. If the highest authority that can act in the organization persists in conduct that is a violation of law and is likely to result in substantial injury to the organization, the attorney may, and in some circumstances must, resign and withdraw. Cal Rules of Prof Cond 3-600.
- **Witness in jury trial.** The attorney may not act as an advocate before a jury that will hear testimony from the attorney unless the testimony relates to an uncontested matter or to the nature and value of legal services rendered in the case or unless the attorney has the client's informed, written consent. If the attorney represents a governmental entity, the consent must be obtained from the head of the office or a designee of the head of the office by which the attorney is employed and must be consistent with principles of recusal. Cal Rules of Prof Cond 5-210. Reasons for not acting both as trial counsel and witness are discussed in *Lyle v Superior Court* (1981) 122 CA3d 470, 480, 175 CR 918. These include:
- The impeachment of the witness for bias because the witness has an interest in the outcome of the trial;
- The disadvantage to opposing counsel in impeaching the witness and attacking the witness's credibility;
- The difficulty of trial counsel arguing for his or her own credibility as a witness;
- The inconsistency between the roles of advocate and witness; and
- The possible appearance of impropriety.

- The client should be informed of the possible adverse effects of the attorney's dual role as advocate and witness and have an opportunity to seek independent counsel.
- As indicated in the official discussion, Rule 5-210 is not intended to apply when a lawyer in an advocate's firm will be a witness, nor does it apply to any proceeding other than a jury trial. This is a clear departure from *Comden v Superior Court* (1978) 20 C3d 906, 145 CR 9 (decided under a former rule of professional conduct), requiring disqualification of the entire law firm of an attorney who knows or should know that a lawyer in his firm ought to testify as a witness on the client's behalf, even though that attorney-witness was not representing the

client as an advocate at trial. See form of client's consent to continued representation in §4.63.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.35 3. Permissive Withdrawal

§4.35 3. Permissive Withdrawal

If no grounds exist for mandatory withdrawal or for conditionally mandatory withdrawal, the grounds on which an attorney may withdraw without the client's written consent are:

- **Unwarranted claim or defense.** The client insists on presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for extension, modification, or reversal of existing law. Cal Rules of Prof Cond 3-700(C)(1)(a).
- **Client's illegal course of conduct.** The client seeks to pursue an illegal course of conduct. Cal Rules of Prof Cond 3-700(C)(1)(b).
- **Attorney's illegal or prohibited conduct**. The client insists that the attorney pursue a course of conduct that is illegal or that is prohibited under the California Rules of Professional Conduct or the State Bar Act. Cal Rules of Prof Cond 3-700(C)(1)(c).
- **Unreasonable difficulty in serving as attorney.** The client by other conduct makes it unreasonably difficult for the attorney to carry out the employment effectively. Cal Rules of Prof Cond 3-700(C)(1)(d).
- **Client's failure to follow advice.** The client insists, in a matter not pending before a tribunal, that the attorney engage in conduct contrary to the attorney's judgment and advice but not prohibited under the California Rules of Professional Conduct or the State Bar Act. Cal Rules of Prof Cond 3-700(C)(1)(e).
- **Failure to pay as agreed**. The client breaches an agreement or obligation to the attorney on expenses or fees. Cal Rules of Prof Cond 3-700(C)(1)(f).
- **Violation of rules likely.** The continued employment is likely to result in a violation of the California Rules of Professional Conduct or of the State Bar Act. Cal Rules of Prof Cond 3-700(C)(2).
- **Inability to work with co-counsel.** An inability to work with co-counsel indicates that the client's best interests will likely be served by withdrawal. Cal Rules of Prof Cond 3-700(C)(3).
- **Mentally or physically unable to serve**. The attorney's mental or physical condition makes it difficult for the attorney to carry out the employment effectively. Cal Rules of Prof Cond 3-700(C)(4).
- **Client assents to withdrawal.** The client knowingly and freely assents to termination of the employment. Cal Rules of Prof Cond 3-700(C)(5).
- **Other good cause for withdrawal.** The attorney believes, in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal. Cal Rules of Prof Cond 3-700(C)(6).

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§4.36 VI. ATTORNEY'S ABANDONMENT OF CLIENT

Neglecting or disregarding a client's interests, whether owing to carelessness, willfulness, or dishonesty, is grounds for disciplining an attorney. *Stanley v State Bar* (1990) 50 C3d 555, 566, 268 CR 183; *Simmons v State Bar* (1970) 2 C3d 719, 729, 87 CR 368. See *King v State Bar* (1990) 52 C3d 307, 276 CR 176 (inadvertent neglect is punishable). Under Cal Rules of Prof Cond 3-110, an attorney may not repeatedly fail to perform legal services competently. To perform "competently" under the rule is "diligently to apply the learning and skill necessary to perform the attorney's duties arising from employment and representation." See *Arden v State Bar* (1987) 43 C3d 713, 239 CR 68 (failure of long duration may be deemed willful).

The protection offered by CCP §286, requiring notice to the client to appear in person or appoint an attorney when the client's attorney "ceases to act as such," does not apply when the attorney had ceased to act for a client in a particular case. *California Water Serv. Co. v Edward Sidebotham & Son* (1964) 224 CA2d 715, 734, 37 CR 1; *Gion v Stroud* (1961) 191 CA2d 277, 279, 12 CR 540.

The client's remedy for abandonment is to move under CCP §284 for an order removing the attorney and substituting the client or another attorney. On client's motion for substitution, see §§4.7-4.9.

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§4.37 VII. CLIENT'S DEATH OR INCAPACITY

Depending on the representation agreement between attorney and client, the attorney-client relationship may be terminated by the client's death (see *Swartfager v Wells* (1942) 53 CA2d 522, 527, 128 P2d 128) or incapacity (see *Sullivan v Dunne* (1926) 198 C 183, 244 P 343). See CC §2356.

The attorney's representation is not terminated when there is a special contract of employment, *e.g.,* a contract to conduct a suit to final judgment or a fee agreement for the entire case. *Estate of Mallory* (1929) 99 CA 96, 278 P 488. In addition, a notice of appeal may be filed by the attorney of record for a decedent in the court in which judgment was rendered. CCP §903.

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VIII. CESSATION OF LAW PRACTICE

§4.38 A. Attorney's Death, Incapacity, or Suspension

Suspension and disbarment of an attorney by the State Bar terminates the right to practice law. Bus & P C §§6006, 6126. The attorney-client relationship is terminated under the usual rules of agency by the attorney's death, removal, or incapacity, or when the attorney ceases to practice. See CCP §286; 1 Witkin, California Procedure, *Attorneys* §66 (5th ed 2008).

Death, suspension, or incapacity of an attorney does not automatically terminate a law firm's employment when the representation agreement was not made with that particular attorney. See *Little v Caldwell* (1894) 101 C 553, 36 P 107 (if representation agreement is with partnership, option to terminate agreement rests with client, not surviving partners).

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§4.39 1. Procedures for Finding of Incapacity

Incapacity of an attorney generally refers to one who has, for any reason (*e.g.,* excessive use of alcohol or drugs, or physical or mental illness), become incapable of devoting the necessary time and attention to the practice of law and providing the quality of service necessary to protect a client's interest. Bus & P C §6190. Jurisdiction over an incapacitated attorney's law practice lies in the superior court of the county in which the attorney maintains or has most recently maintained his or her principal law office or the county in which the attorney lives. Bus & P C §6190.1(a).

Only the State Bar may apply for the court's assumption of jurisdiction over an attorney's practice unless the attorney consents to the assumption of jurisdiction. If the attorney consents to the court's assumption of jurisdiction over the attorney's practice, any interested person or entity, a client, or the State Bar may apply. Bus & P C §6190.1(b)-(c).

For contents of application, see Bus & P C §6190.2; for necessary court findings, see Bus & P C §6190.34.

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§4.40 2. Demand That Party Appoint Attorney or Appear

When the attorney-client relationship is terminated by the attorney's death, suspension, or other incapacity, the unrepresented client is protected by the requirement that, before any further proceedings can be conducted against him or her, the adverse party must give written notice to appoint another attorney or to appear in person. CCP §286. See form of demand to the unrepresented party to appoint an attorney or make a personal appearance in §4.68.

The client can waive the right to this notice, or the client's conduct may estop him or her from raising the issue of lack of notice. *California Water Serv. Co. v Edward Sidebotham & Son* (1964) 224 CA2d 715, 736, 37 CR 1. The notice requirement applies only when an attorney has ceased to practice law, not when the attorney merely withdraws from a particular matter. *De Recat Corp. v Dunn* (1926) 197 C 787, 242 P 936. An attorney's cessation to act means "died or ceased to be an attorney." *California Water Serv. Co. v Edward Sidebotham & Son* (1964) 224 CA2d 715, 734, 37 CR 1. This protection afforded a client does not prevent the running of time limits. *Larkin v Superior Court* (1916) 171 C 719, 724, 154 P 841. The adverse party's failure to give the notice under CCP §286 as required may foreclose proceedings against the unrepresented client. *Aldrich v San Fernando Valley Lumber Co.* (1985) 170 CA3d 725, 216 CR 300.

In *McMunn v Lehrke* (1915) 29 CA 298, 307, 155 P 473, the defendant discharged his attorneys, but no substitution of attorneys was prepared or filed. The court held that the defendant's attorneys had ceased to act as attorneys and that CCP §286 applied. This language and holding was disapproved in *De Recat Corp. v Dunn* (1926) 197 C 787, 794, 242 P 936.

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§4.41 3. Party's Appointment of Attorney

A party's appointment of attorney is usually a two-party document reciting the death, suspension, or disability of the former attorney, the party's appointment of the successor attorney, and the successor attorney's consent to serve.

As with the more customary three-party substitution of attorneys (see form in §4.55), notice of an attorney's substitution by the client's appointment of attorney must be given to the other parties. CCP §§285, 1010. The original document (and notice, if a different document) must be filed with the court clerk. CCP §284.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.42 B. Notice of Cessation of Law Practice

§4.42 B. Notice of Cessation of Law Practice

A notice of cessation of law practice is required when an attorney dies, resigns, becomes an inactive member of the State Bar, is disbarred, or is suspended from the active practice of law. Bus & P C §6180.

The notice must contain any other information required by the order of suspension, disbarment, or acceptance of the attorney's resignation, as well as any information required by a rule of the California Supreme Court, Judicial Council, or State Bar or by a court order. It must be mailed to all clients, to opposing counsel, to courts and agencies in which the attorney has pending matters (describing those matters sufficiently to identify them), to any errors and omissions insurer, to the Chief Trial Counsel of the State Bar, and to any other person or entity that has reason to be informed of the cessation of practice. Bus & P C §6180.1.

On the death or incompetence of an attorney, notice must be given by the attorney's personal representative or conservator; if none, notice must be given by the person having custody of the attorney's files and records. Bus & P C §6180.1.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.43 C. Application for Court Jurisdiction Over Practice

§4.43 C. Application for Court Jurisdiction Over Practice

Any interested person or entity, including the State Bar, a client of the attorney, or the superior court on its own motion, may apply to the court in the county of the attorney's residence or principal office for a limited assumption by the court of jurisdiction over a terminated practice. Bus & P C §6180.2.

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§4.44 1. Contents of Application

The application must (1) be verified, (2) recite facts disclosing the death, suspension, disbarment, resignation, or inactive status of the attorney and the existence of pending matters in which clients are unrepresented, and (3) state the belief that supervision is warranted and that the interests of one or more clients or interested persons or entities will be prejudiced if jurisdiction is not assumed. Bus & P C §6180.3.

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§4.45 2. Hearing

If it appears to the court that the application will be granted and that delay will result in substantial injury to others, the court may make appropriate interim orders, pending a hearing on the application. Bus & P C §6180.8. The court must set the application for hearing after notice to the attorney and to the conservator or personal representative or the person having custody of the files and records, and to the State Bar, if the State Bar is not the applicant. Bus & P C §6180.4.

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§4.46 3. Appointment of Attorney

Based on its findings, the court may make an order assuming jurisdiction over the attorney's practice and appoint one or more attorneys to mail the notice of cessation of law practice (see §4.42), to examine the files and records, to notify the clients of the attorney's status, and to advise them to seek other counsel. The appointed attorney may apply for extensions of time for this purpose and, with the client's consent, file motions and pleadings when jurisdictional time limits are involved. The appointed attorney may secure papers and records, appoint receivers, and take other appropriate actions. Bus & P C §6180.5.

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§4.47 4. Limited Judicial Powers

A court assuming jurisdiction over a law practice does not have authority to conduct the practice, and neither appointed attorneys nor their partners or associates may, without the court's consent, accept legal employment by the unrepresented clients, except to the limited extent, until other counsel is obtained, of applying for extensions of time and, with the client's consent, filing papers needed to meet jurisdictional time limits. Bus & P C §§6180.6-6180.7.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.48 5. Confidentiality

§4.48 5. Confidentiality

The appointed attorneys are bound by the lawyer-client privilege when examining the original attorney's records and files. Bus & P C §6180.10.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.49 6. No Liability

§4.49 6. No Liability

The appointed attorneys will incur no personal liability by applying or failing to apply for court jurisdiction, or by any actions taken under the assumption of jurisdiction over the practice. Bus & P C §6180.11.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.50 7. Expenses Paid, But No Fees

§4.50 7. Expenses Paid, But No Fees

The appointed attorneys may be reimbursed for their expenses, but they are not compensated for their services unless the State Bar finds that they have performed extraordinary necessary services. Bus & P C §6180.12.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.51 8. No Appeals

§4.51 8. No Appeals

Orders made under Bus & P C §§6180.2-6180.12 are not appealable. Bus & P C §6180.13.

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IX. MOTION FOR DISQUALIFICATION

§4.52 A. Adverse Party's Motion for Disqualification

The court's power to disqualify an attorney is based on statutory authority and on the court's inherent authority to control the officers who appear before it. CCP §128; *Klemm v Superior Court* (1977) 75 CA3d 893, 901 n4, 142 CR 509. See *Trust Corp. v Piper Aircraft Corp.* (9th Cir 1983) 701 F2d 85, 87.

When an adverse party challenges the authority of opposing counsel to prosecute or defend an action, the court has jurisdiction to entertain the motion: "It has … been held that the court may require an attorney to show special authority, upon the application of the opposite party, when justice demands it." *Clark v Willett* (1868) 35 C 534, 540.

Although a motion to disqualify counsel is usually made by an opposing party, it may be made by a person (*e.g.,* a current or former client) who would be affected by the representation at any time while the action is pending. *Earl Scheib, Inc. v Superior Court* (1967) 253 CA2d 703, 709, 61 CR 386.

Because eliminating another party's attorney could have a detrimental effect on that party's case, the courts are sensitive to an opposing party's making the motion for tactical reasons. See *White v Superior Court* (1979) 98 CA3d 51, 55, 159 CR 278 (party seeking to challenge counsel's qualifications to represent adversary party must proceed at first reasonable opportunity or, in effect, waive opportunity; trial court abuses its discretion if motion for disqualification later granted). For further discussion in the context of conflicts of interest rules, see chap 2.

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§4.53 B. Grounds; Procedure

The grounds of a motion for disqualification often involve a conflict situation in which the attorney is alleged by virtue of the current representation to be violating one or more of the ethical prohibitions of the California Rules of Professional Conduct. On rules prohibiting attorneys' conflicts of interest generally, see chap 2.

Thus, the grounds for challenging an attorney's representation of a party are the same grounds by which an attorney may seek withdrawal from representation. See §§4.21-4.35. For example, a party may seek disqualification on the ground that the attorney acquired confidential information from a former representation in violation of Cal Rules of Prof Cond 3-310(D). The moving party must then make some showing, perhaps by way of declaration, of "the nature of the communications [*and*] how they relate to the current representation." See *Elliott v McFarland Unified Sch. Dist.* (1985) 165 CA3d 562, 572, 211 CR 802 (confidential information allegedly received by challenged attorney must be based on "substantial relationship"). For further discussion, see chap 2.

Without such a showing, the court will not disqualify counsel. For example, in *Gregori v Bank of America* (1989) 207 CA3d 291, 305, 254 CR 853, the court of appeal criticized the lawyer's lack of judgment in initiating a social relationship with the secretary of the partners on the other side of a lawsuit, but it found no showing that confidential information had passed in violation of the Rules of Professional Conduct.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.54 C. Court's Ruling

§4.54 C. Court's Ruling

Even with the client's informed, written consent to representation by an attorney with potential conflicts, the court has the discretion to grant the opposing party's motion for disqualification. See, *e.g., Lyle v Superior Court* (1981) 122 CA3d 470, 175 CR 918 (in balancing interests under former Cal Rules of Prof Cond 2-111(A)(4) (lawyer as witness), trial court in close cases should favor client's right to attorney of choice, even if less effective representation results, unless detriment to opponent or injury to integrity of judicial process is convincingly demonstrated). For further discussion of conflicts involved when the attorney is a witness, see chap 2.

Some California decisions recognize a balancing test, weighing the interests of the party opposing disqualification against the interest of avoiding conflicts, such that if the nonmoving party would suffer a great burden by disqualification of its counsel, the ethical considerations may be overcome. *William H. Raley Co. v Superior Court* (1983) 149 CA3d 1042, 1048, 197 CR 232; *Elliott v McFarland Unified Sch. Dist.* (1985) 165 CA3d 562, 567, 211 CR 802 (citing *Raley* with approval). See also *Mills Land & Water Co. v Golden W. Ref. Co.* (1986) 186 CA3d 116, 230 CR 461 (citing *Raley* with approval and allowing attorney to continue representation). The court stated that exercise of the power to disqualify counsel "*requires a cautious balancing of competing interests*." 186 CA3d at 126.

The *Raley* court outlined three principal types of "prejudice" that may serve to avoid "imputed" disqualification (*i.e.,* when entire law firm of attorney having conflict is disqualified as counsel):

- The party opposing the motion would suffer a great financial loss in the litigation if counsel were disqualified;
- Disqualification would result in burdensome delay of the litigation (see also *Chambers v Superior Court* (1981) 121 CA3d 893, 175 CR 575); and
- Disqualification would deprive the party of counsel uniquely qualified to represent the client.

These exceptions have rarely been applied in the reported cases, and *Raley* has been criticized on this issue. See, *e.g., River West, Inc. v Nickel* (1987) 188 CA3d 1297, 1307, 234 CR 33; *Employers Ins. of Wausau v Albert D. Seeno Constr. Co.* (ND Cal 1988) 692 F Supp 1150, 1163 n16.

But see *Gregori v Bank of America* (1989) 207 CA3d 291, 301, 254 CR 853 (disqualification usually imposes hardship on innocent client; court upheld denial of motion to disqualify because it was unclear whether any prohibited conflict existed); *Dill v Superior Court* (1984) 158 CA3d 301, 306, 205 CR 671 (parties' right to counsel of their choice "must be balanced against the need to maintain high ethical standards of professional responsibility"; trial court upheld disqualification).

NOTE: The trial court's decision on disqualification of counsel will not be disturbed on appeal except for abuse of discretion. *Elliott v McFarland Unified Sch. Dist., supra*. See *William H. Raley Co. v Superior Court* (1983) 149 CA3d 1042, 1049, 197 CR 232 (abuse of discretion found). On appeal, any conflicts in testimony or declarations must be resolved in the prevailing party's favor. *Chronometrics, Inc. v Sysgen, Inc.* (1980) 110 CA3d 597, 603, 168 CR 196.

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X. FORMS

§4.55 A. Form: Notice and Substitution of Attorney

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE AND SUBSTITUTION**
vs	)	**OF ATTORNEY**
	)	
_ _[*Name(s)*]_ _ **Defendant(s)**	)	
_____	)	

PLEASE TAKE NOTICE that _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, substitutes** _ _[*name, address, and telephone number of incoming attorney*]_ _ **as** _ _[*his/her/its*]_ _ **attorney of record in this action in the place of** _ _[*name of outgoing attorney*]_ _**.**

I consent to this substitution.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name of party*]_ _

I accept this substitution.

Date: _ _ _ _ _ _ __[*Signature of incoming attorney*]__
_ _[*Typed name*]_ _

I consent to this substitution.

Date: _ _ _ _ _ _ __[*Signature of outgoing attorney*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§4.5-4.8.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.56 B. Form: Substitution of Attorney--Civil (Without Court Order) (Judicial Council Form MC-050)

§4.56 B. Form: Substitution of Attorney—Civil (Without Court Order) (Judicial Council Form MC-050)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
SUBSTITUTION OF ATTORNEY—CIVIL (Without Court Order)	CASE NUMBER:

THE COURT AND ALL PARTIES ARE NOTIFIED THAT *(name)*: makes the following substitution:

1. **Former legal representative** ☐ Party represented self ☐ Attorney *(name)*:
2. **New legal representative** ☐ Party is representing self* ☐ Attorney
   a. Name: b. State Bar No. *(if applicable)*:
   c. Address *(number, street, city, ZIP, and law firm name, if applicable)*:
   d. Telephone No. *(include area code)*:
3. The party making this substitution is a ☐ plaintiff ☐ defendant ☐ petitioner ☐ respondent ☐ other *(specify)*:

***NOTICE TO PARTIES APPLYING TO REPRESENT THEMSELVES**

- **Guardian**
- **Conservator**
- **Trustee**
- **Personal Representative**
- **Probate fiduciary**
- **Corporation**
- **Guardian ad litem**
- **Unincorporated association**

If you are applying as one of the parties on this list, you may NOT act as your own attorney in most cases. Use this form to substitute one attorney for another attorney. SEEK LEGAL ADVICE BEFORE APPLYING TO REPRESENT YOURSELF.

NOTICE TO PARTIES WITHOUT ATTORNEYS
A party representing himself or herself may wish to seek legal assistance. Failure to take timely and appropriate action in this case may result in serious legal consequences.

4. I consent to this substitution.
   Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PARTY)

5. ☐ I consent to this substitution.
   Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF FORMER ATTORNEY)

6. ☐ I consent to this substitution.
   Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF NEW ATTORNEY)

(See reverse for proof of service by mail)

Form Adopted For Mandatory Use
Judicial Council of California
MC-050 [Rev. January 1, 2009]

SUBSTITUTION OF ATTORNEY—CIVIL
(Without Court Order)

CEB

Code of Civil Procedure, §§ 284(1), 285;
Cal. Rules of Court, rule 3.1362
www.courtinfo.ca.gov

Print

CASE NAME:	CASE NUMBER:
—	

PROOF OF SERVICE BY MAIL
Substitution of Attorney—Civil

Instructions: *After having all parties served by mail with the Substitution of Attorney—Civil, have the person who mailed the document complete this Proof of Service by Mail. An unsigned copy of the Proof of Service by Mail should be completed and served with the document. Give the Substitution of Attorney—Civil and the completed Proof of Service by Mail to the clerk for filing. If you are representing yourself, someone else must mail these papers and sign the Proof of Service by Mail.*

1. I am over the age of 18 and **not a party to this cause.** I am a resident of or employed in the county where the mailing occurred. My residence or business address is *(specify)*:

2. I served the Substitution of Attorney—Civil by enclosing a true copy in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid.

   (1) Date of mailing: (2) Place of mailing *(city and state)*:

3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

4. a. Name of person served:
   b. Address *(number, street, city, and ZIP)*:

   c. Name of person served:
   d. Address *(number, street, city, and ZIP)*:

   e. Name of person served:
   f. Address *(number, street, city, and ZIP)*:

   g. Name of person served:
   h. Address *(number, street, city, and ZIP)*:

   i. Name of person served:
   j. Address *(number, street, city, and ZIP)*:

☐ List of names and addresses continued in attachment.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/ C. Client's Motion for Substitution of Attorney/§4.57 1. Form: Notice of Motion for Substitution of Attorney

C. Client's Motion for Substitution of Attorney

§4.57 1. Form: Notice of Motion for Substitution of Attorney

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR ORDER SUBSTITUTING** _ _[*E.G., PLAINTIFF*]_ _**'S ATTORNEY;** _ _[*SUPPORTING MEMORANDUM ;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _ [*In limited civil case, add: Amount demanded* _ _[*exceeds/does not exceed*]_ _ *$10,000*]

PLEASE TAKE NOTICE that on _ _[*date*]**,**_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court for an order** _ _[*specify nature of order sought*]_ _ **under CCP §284 on the following grounds**: _ _[*state grounds, preferably in terms used in authorizing statute or rule; if more than one ground, list them as numbered or bulleted items*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _**,** *dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of incoming attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On motion for substitution of attorneys, see §4.7. On noticed motions generally, see chap 12. On client's right to change attorneys, see §4.4.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.58 2. Form: Declaration of Client Supporting Motion for Substitution of Attorney

§4.58 2. Form: Declaration of Client Supporting Motion for Substitution of Attorney

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	**SUBSTITUTION** _ _[*E.G., PLAINTIFF*]_ _**'S ATTORNEY**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*e.g., plaintiff*]_ _ **in this action.**

2. I have discharged _ _[*name of outgoing attorney*]_ _ **as my attorney of record in this action and have retained** _ _[*name of incoming attorney*]_ _ **in** _ _[*his/her*]_ _ **place.**

3. _ _[*Name of outgoing attorney*]_ _ _ _[*has declined/is unable/is unavailable*]_ _ **to sign a substitution of attorney.**

4. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On client's motion for substitution of attorneys without former attorney's consent, see §4.7. On client's right to change attorneys, see §4.4.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details

required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.59 3. Form: Declaration of Attorney Supporting Motion for Substitution of Attorney

§4.59 3. Form: Declaration of Attorney Supporting Motion for Substitution of Attorney

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING MOTION OF** _ _[*NAME*]_ _ **FOR SUBSTITUTION OF** _ _[*E.G., PLAINTIFF*]_ _**'S ATTORNEY**
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I have been retained by _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, to act as attorney of record in this action.**

2. _ _[*E.g., Plaintiff*]_ _ **has informed me and I state on information and belief that** _ _[*he/she/it*]_ _ **has discharged** _ _[*name of outgoing attorney*]_ _ **as** _ _[*his/her/its*]_ _ **attorney in this action.**

3. _ _[*Name of outgoing attorney*]_ _ _ _[*has declined/is unable/is unavailable*]_ _ **to sign a substitution of attorney.**

4. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: This form can be used if the outgoing attorney is unavailable to sign a declaration. On motion for substitution of attorneys, see §4.7.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading

paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.60 4. Form: Order Substituting Attorney

§4.60 4. Form: Order Substituting Attorney

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**ORDER SUBSTITUTING** _ _[*E.G., PLAINTIFF*]_ _**'S ATTORNEY**
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, for an order substituting** _ _[*name of incoming attorney*]_ _ **in place of** _ _[*name of outgoing attorney*]_ _ **as attorney of record in this action was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

IT IS ORDERED that:

1. _ _[*Name of incoming attorney*]_ _ **be substituted for** _ _[*name of outgoing attorney*]_ _ **as attorney for** _ _[*e.g., plaintiff*]_ _**.**

2. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of motion for substitution of attorney, see §4.7. On court orders given after noticed motions generally, see chap 12.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.61 D. Form: Association of Attorney

§4.61 D. Form: Association of Attorney

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ASSOCIATION OF ATTORNEY**
vs	)	
_ _[*Name(s)*]_ _ **Defendant(s)**	)	

The undersigned associates _ _[*name, address, and telephone number of incoming attorney*]_ _ **as an attorney of record for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, **in this action. Please address all papers, correspondence, and inquiries in this case to** _ _[*name of attorney*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of attorney's associating other counsel, see §4.15. On giving notice of association, see §4.16.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.62 E. Form: Application to Appear as Counsel Pro Hac Vice; Notice of Hearing

§4.62 E. Form: Application to Appear as Counsel Pro Hac Vice; Notice of Hearing

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**APPLICATION OF** _ _[*NAME*]_ _ **TO APPEAR AS COUNSEL PRO HAC VICE; NOTICE OF HEARING**
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _ [*In limited civil case, add:* *Amount demanded* _ _[*exceeds/does not exceed*]_ _ *$10,000*]

PLEASE TAKE NOTICE that at the above time and place the undersigned applicant will apply for permission to appear as counsel pro hac vice in this matter.

APPLICATION

_ _[*Name*]_ _ **certifies:**

1. I reside at _ _[*address*]_ _ **and maintain my office at** _ _[*address*]_ _**.**

2. I have been admitted to practice before _ _[*list court(s) and date(s) of admission*]_ _**. I am a member in good standing in** _ _[*this/these*]_ _ **court(s) and am not currently suspended or disbarred in any court.**

[*Add if appropriate*]

3. I have filed application to appear as counsel pro hac vice in California in the preceding two years as follows:

_ _[*List each application, including title of court and cause, date of application, and whether or not granted*]_ _**.**

I request permission of the Court to appear as counsel pro hac vice in this matter in association with the attorney of record who is _ _[*name, address, and telephone number of active member of State Bar of California*]_ _**.**

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party and one for State Bar; see Comment); ___ office copies.

Comment: On out-of-state attorney's appearance in California action, see §4.17. The application must be verified and may be in the form of a certification or declaration under penalty of perjury. Service by mail should be in accordance with CCP §1013a. The State Bar should be served at its San Francisco office. Notice of the hearing must be given as prescribed by CCP §1005 unless the court orders a shorter time. Cal Rules of Ct 9.40(b).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.63 F. Form: Consent by Client to Continued Representation (Cal Rules of Prof Cond 5-210)

§4.63 F. Form: Consent by Client to Continued Representation (Cal Rules of Prof Cond 5-210)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**CONSENT BY CLIENT TO CONTINUED REPRESENTATION (Cal Rules of Prof Cond 5-210)**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*e.g., plaintiff*]_ _ **in this action.**

2. I am represented by _ _[*name of attorney*]_ _ _ _[*of* _ _[*name of law firm*]_ _]_ _ **as trial counsel.**

3. On _ _[*date*]_ _, _ _[*name of attorney*]_ _ **advised me that:**

a. _ _[*He/She*]_ _ **has information that will be useful in the resolution of this matter;**

b. _ _[*He/She*]_ _ **may be called as a witness at trial to present that information;**

c. _ _[*His/Her*]_ _ **effectiveness as an advocate may be diminished if** _ _[*he/she*]_ _ **acts as both trial counsel and witness;**

d. _ _[*His/Her*]_ _ **credibility as a witness may be impaired if** _ _[*he/she*]_ _ **acts as both trial counsel and witness;**

e. _ _[*His/Her*]_ _ **dual role of witness and advocate could adversely affect the outcome of my case;**

f. I am under no obligation to continue to use _ _[*him/her*]_ _ **to try this matter; and**

g. I have had the opportunity to seek the advice of independent counsel on whether to continue to employ _ _[*him/her*]_ _ **as trial counsel in this action.**

4. I want to continue to employ _ _[*name of attorney*]_ _ as my trial counsel even though _ _[*he/she*]_ _ may also be a witness.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (held for future use); one copy to client; ___ office copies.

Comment: Counsel should be prepared to produce this form at trial or at any hearing on a motion to disqualify counsel and should hold the original for this purpose. For discussion of attorney serving both as advocate and witness as conditionally mandatory grounds for withdrawal, see §4.34.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/ G. Withdrawal as Attorney (Cal Rules of Ct 3.1362)/§4.64 1. Form: Notice of Motion and Motion to Be Relieved as Counsel--Civil (Judicial Council Form MC-051)

G. Withdrawal as Attorney (Cal Rules of Ct 3.1362)

§4.64 1. Form: Notice of Motion and Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-051)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: ATTORNEY FOR *(Name)*:	
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:
NOTICE OF MOTION AND MOTION TO BE RELIEVED AS COUNSEL—CIVIL	HEARING DATE: DEPT.: TIME: BEFORE HON.: DATE ACTION FILED: TRIAL DATE:

TO *(name and address of client)*:

1. PLEASE TAKE NOTICE that *(name of withdrawing attorney)*:
   moves under California Code of Civil Procedure section 284(2) and California Rules of Court, rule 3.1362, for an order permitting the attorney to be relieved as attorney of record in this action or proceeding.

2. A hearing on this motion to be relieved as counsel will be held as follows:

a. Date:	Time:	Dept.:	Room:

   b. The address of the court: ☐ same as noted above ☐ other *(specify)*:

3. This motion is supported by the accompanying declaration, the papers and records filed in this action or proceeding, and the following additional documents or evidence *(specify)*:

(This motion does not need to be accompanied by a memorandum of points and authorities. Cal. Rules of Court, rule 3.1362.)

4. The client presently represented by the attorney is
   a. ☐ an individual.
   b. ☐ a corporation.
   c. ☐ a partnership.
   d. ☐ an unincorporated association.
   e. ☐ a guardian.
   f. ☐ a conservator.
   g. ☐ a trustee.
   h. ☐ a personal representative.
   i. ☐ a probate fiduciary.
   j. ☐ a guardian ad litem.
   k. ☐ other *(specify)*:

(Continued on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
MC-051 [Rev. January 1, 2007]

Code of Civil Procedure , § 284;
Cal. Rules of Court, rule 3.1362
www.courtinfo.ca.gov

Print

CASE NAME:	CASE NUMBER:

NOTICE TO CLIENT

If this motion to be relieved as counsel is granted, your present attorney will no longer be representing you. You may not in most cases represent yourself if you are one of the parties on the following list:

- A guardian
- A conservator
- A trustee
- A personal representative
- A probate fiduciary
- A corporation
- A guardian ad litem
- An unincorporated association

If you are one of these parties, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking the pleadings or to the entry of a default judgment.

5. If this motion is granted and a client is representing himself or herself, the client will be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

If this motion to be relieved as counsel is granted, you will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

6. If this motion is granted, the client must keep the court informed of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

If this motion to be relieved as counsel is granted, the court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF ATTORNEY)

Attorney for *(name)*:

Copies: Original (file with court clerk); ___ copies for service (one for client and each other party); ___ office copies.

Comment: See §4.22. Use of the Judicial Council form is mandatory. Cal Rules of Ct 3.1362(a). No supporting memorandum is required. Cal Rules of Ct 3.1362(b). On noticed motions generally, see chap 12.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.65 2. Form: Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil (Judicial Council Form MC-052)

§4.65 2. Form: Declaration in Support of Attorney's Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-052)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: ATTORNEY FOR *(Name)*:	
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:
DECLARATION IN SUPPORT OF ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL—CIVIL	HEARING DATE: DEPT.: TIME: BEFORE HON.: DATE ACTION FILED: TRIAL DATE:

1. **Attorney and Represented Party.** Attorney *(name)*:
   is presently counsel of record for *(name of party)*:
   in the above-captioned action or proceeding.

2. **Reasons for Motion.** Attorney makes this motion to be relieved as counsel under Code of Civil Procedure section 284(2) instead of filing a consent under section 284(1) for the following reasons *(describe)*:

   ☐ Continued on Attachment 2.

3. **Service**
   a. Attorney has
      (1) ☐ personally served the client with copies of the motion papers filed with this declaration. A copy of the proof of service will be filed with the court at least 5 days before the hearing.
      (2) ☐ served the client by mail at the client's last known address with copies of the motion papers served with this declaration.
   b. If the client has been served by mail at the client's last known address, attorney has
      (1) ☐ confirmed within the past 30 days that the address is current
         (a) ☐ by mail, return receipt requested.
         (b) ☐ by telephone.
         (c) ☐ by conversation.
         (d) ☐ by other means *(specify)*:

(Continued on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
MC-052 [Rev. January 1, 2007]

CEB
Code of Civil Procedure, § 284;
Cal. Rules of Court, rule 3.1362
www.courtinfo.ca.gov

Print

CASE NAME:	CASE NUMBER:

3. b. (2) ☐ been unable to confirm that the address is current or to locate a more current address for the client after making the following efforts:
   (a) ☐ mailing the motion papers to the client's last known address, return receipt requested.
   (b) ☐ calling the client's last known telephone number or numbers.
   (c) ☐ contacting persons familiar with the client *(specify)*:

   (d) ☐ conducting a search *(describe)*:

   (e) ☐ other *(specify)*:

   c. Even if attorney has been unable to serve the client with the moving papers, the court should grant attorney's motion to be relieved as counsel of record *(explain)*:

4. The next hearing scheduled in this action or proceeding
   a. ☐ is not yet set.
   b. ☐ is set as follows *(specify the date, time, and place)*:

   c. ☐ concerns *(describe the subject matter of the hearing)*:

   ☐ Continued on Attachment 4.

5. The following additional hearings and other proceedings (including discovery matters) are presently scheduled in this case *(for each, describe the date, time, place, and subject matter)*:

   ☐ Continued on Attachment 5.

6. Trial in this action or proceeding
   a. ☐ is not yet set.
   b. ☐ is set as follows *(specify the date, time, and place)*:

7. **Other.** Other matters that the court should consider in determining whether to grant this motion are the following *(explain)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

8. Number of pages attached: _____

Copies: Original (file with court clerk); ___ copies for service (one for client and each other party); ___ office copies.

Comment: See §4.22. Use of the Judicial Council Form is mandatory. Cal Rules of Ct 3.1362(c). The declaration must state in general terms, without compromising the confidentiality of the attorney-client relation ship, why the declarant is making a motion to withdraw instead of filing a substitution of attorneys. If the notice of motion will be served on the client by mail, declarant must fill out the portions of the declaration concerning the client's current or last known address. Cal Rules of Ct 3.1362(d).

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.66 3. Form: Order Granting Attorney's Motion to Be Relieved as Counsel--Civil (Judicial Council Form MC-053)

§4.66 3. Form: Order Granting Attorney's Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-053)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:
ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL—CIVIL	HEARING DATE: DEPT.: TIME: BEFORE HON.: DATE ACTION FILED: TRIAL DATE:

1. The motion of *(name of attorney):*
   to be relieved as counsel of record for *(name of client):*
   a party to this action or proceeding, came on regularly for hearing at the date, time, and place indicated above.

2. The following persons were present at the hearing:

FINDINGS

3. Attorney has
   a. ☐ personally served the client with papers in support of this motion.
   b. ☐ served client by mail and submitted a declaration establishing that the service requirements of California Rules of Court, rule 3.1362, have been satisfied.

4. Attorney has shown sufficient reasons why the motion to be relieved as counsel should be granted and why the attorney has brought a motion under Code of Civil Procedure section 284(2) instead of filing a consent under section 284(1).

ORDER

5. Attorney is relieved as counsel of record for client
   a. ☐ effective upon the filing of the proof of service of this signed order upon the client.
   b. ☐ effective on *(specify date):*
6. The client's ☐ current ☐ last known address and telephone number:

If the client's current address is known, service on the client must hereafter be made at that address unless otherwise ordered in item 13. If the current address is not known, service must be made according to Code of Civil Procedure section 1011 (b) and rule 3.252 of the California Rules of Court.

7. a. The next scheduled hearing in this action or proceeding is set for *(date, time, and place):*

   b. The hearing will concern *(subject matter):*

NOTICE TO CLIENT
You or your new attorney, if any, must prepare for and attend this hearing.

Form Adopted for Mandatory Use
Judicial Council of California
MC-053 [Rev. January 1, 2007]

CEB
Code of Civil Proedure., § 284; Cal. Rules of Court, rule 3.1362
www.courtinfo.ca.gov

Print

CASE NAME:	CASE NUMBER:

8. The following additional hearings and other proceedings (including discovery matters) are set in this action *(describe the date, time, place, and subject matter of each)*:

9. The trial in this action or proceeding:
   a. ☐ is not yet set.
   b. ☐ is set for *(specify date, time, and place)*:

10. Client is hereby notified of the following effects this order may have upon parties.

NOTICE TO CLIENT

Your present attorney will no longer be representing you. You may not in most cases represent yourself if you are one of the parties on the following list:

- A guardian
- A conservator
- A trustee
- A personal representative
- A probate fiduciary
- A corporation
- A guardian ad litem
- An unincorporated association

If you are one of these parties, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking the pleadings or to the entry of a default judgment.

11. Client is notified that, if the client will be representing himself or herself, the client shall be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

You will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

12. Client is notified that it is the client's duty to keep the court informed at all times of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

The court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

13. The court further orders *(specify)*:

Date:

_____
JUDGE OR JUDICIAL OFFICER

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___

office copies.

Comment: See §4.22. An unsigned copy of the order must be lodged with the trial court and served on the client and other parties to the action when the motion is filed. Cal Rules of Ct 3.1362(e). A copy of the court's signed order must be served on the former client and other parties in the action. Cal Rules of Ct 3.1362(e).

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.67 H. Form: Notice of Attorney's Withdrawal Under CCP §285.1 (Dissolution of Marriage Case)

§4.67 H. Form: Notice of Attorney's Withdrawal Under CCP §285.1 (Dissolution of Marriage Case)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF ATTORNEY'S**
vs	)	**WITHDRAWAL UNDER CCP**
	)	**§285.1**
_ _[*Name(s)*]_ _ **Defendant(s)**	)	
	)	

PLEASE TAKE NOTICE that the undersigned withdraws as the attorney of record for _ _[*name of, e.g., plaintiff*]_ _**,** _ _[*e.g., plaintiff*]_ _ **in this action, for** _ _[*specify cause of action under CCP §285.1*]_ _**. A final judgment in the action was entered on** _ _[*date*]_ _**.**

The last known address and telephone number of _ _[*name of, e.g., plaintiff*]_ _ **are** _ _[*specify*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each party); ___ office copies.

Comment: In family law matters, in which the court retains jurisdiction over ongoing matters such as child custody and support, an attorney may withdraw as counsel of record without the consent of the client *after* the finality of a judgment (other than an interlocutory decree) and *before* service of pleadings or motion papers "in any proceeding then pending" in the cause. CCP §285.1.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/4 Changing Representation During Suit/§4.68 I. Form: Demand for Appointment of Attorney or Personal Appearance

§4.68 I. Form: Demand for Appointment of Attorney or Personal Appearance

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**DEMAND FOR APPOINTMENT**
vs	)	**OF ATTORNEY OR**
	)	**PERSONAL APPEARANCE**
_ _[*Name(s)*]_ _ **Defendant(s)**	)	
	)	

To _ _[*name of, e.g., plaintiff*]_ _**:**

_ _[*Name*]_ _**, your attorney of record, has** _ _[*e.g., died, ceased to practice*]_ _**. Under Code of Civil Procedure §286,** _ _[*e.g., defendant*]_ _ **demands that you appoint another attorney, or that you appear in person, in this action.**

If you appoint another attorney, please notify me by filing and serving a substitution of attorney form. If I have not received such a form by _ _[*date*]_ _**, I will assume that you have elected to appear in this action without an attorney, and further papers in the action will be served on you as provided by law.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each party); ___ office copies.

Comment: On cessation of attorney's law practice as a result of, *e.g.,* attorney's death or incapacity, see §§4.38-4.41. For discussion of demand that must be made on unrepresented party, see §4.39.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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5

Client Fee Dispute Arbitrations

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I. INTRODUCTION

§5.1 A. Scope of Chapter

This chapter discusses California law regulating fee disputes between attorneys and clients. The focus is on arbitrations conducted by the State Bar under the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206), although litigating a fee action is also discussed. The MFAA is set forth in §§5.3-5.12. Procedures before arbitration are discussed in §§5.13-5.24, the hearing in §§5.25-5.34, and postarbitration procedures in §§5.35-5.40. Litigating a fee collection action is covered in §§5.41-5.48.

The State Bar forms used in arbitration proceedings appear at the end of the chapter. See §§5.49-5.60. Except for the "Notice of Client's Right to Arbitration" and the "Notice of Your Rights After Fee Arbitration," which are mandatory, these forms used by the State Bar to conduct its arbitration matters are included for illustrative purposes only; local bar associations issue their own forms for arbitration matters.

PRACTICE TIP: To avoid fee disputes, the attorney should reach a clear understanding about fees with prospective clients before a written representation agreement is signed. For guidance in drafting representation agreements, see chap 3. See also Fee Agreement Forms Manual (2d ed Cal CEB 2007). If a dispute over fees does develop, the practitioner may refer to this chapter for the respective rights and responsibilities of attorneys and clients under the MFAA.

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§5.2 B. Governing Law

Mandatory fee arbitration is governed by Bus & P C §§6200-6206 and the State Bar Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California (referred to in this chapter as "State Bar Rules"). These rules are on the State Bar website at www.calbar.ca.gov under the heading "Attorney Resources." Local bar associations have adopted their own rules of procedure for fee arbitrations. For discussion, see §5.4.

NOTE: Mandatory fee arbitration, which is described in this chapter, differs from judicial arbitration (CCP §§1141.10-1141.31). See chap 37. For discussion of contractual arbitration (CCP §§1280-1297.337) and other forms of alternative dispute resolution, see chap 45.

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II. MANDATORY FEE ARBITRATION ACT

§5.3 A. Purpose

The purpose of the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206) is to provide clients with access to a speedier and less costly method of resolving attorney-client fee disputes than civil litigation. Fee arbitration is mandatory only for the attorney, at the client's option (Bus & P C §6200(c)), unless the parties have a written agreement requiring them to submit fee disputes to mandatory fee arbitration. Before its enactment, the typical method of fee collection by attorneys was the commencement of an action against a former client. See §§5.41-5.48. This aggressive method of fee dispute resolution often triggered a cross-complaint for professional negligence, sometimes coupled with other causes of action.

NOTE: The MFAA includes a system for voluntary mediation. Under Bus & P C §6200(a), the State Bar may establish, maintain, and administer a mediation system for disputes about fees, costs, or both. Any mediation system that is adopted must be voluntary for both attorney and client. Bus & P C §6200(c). Mediation is an extension of the negotiated settlement process and is based on direct negotiation between attorney and client. Bus & P C §6200(h). Like settlement discussions, mediation proceedings may not be disclosed in any subsequent arbitration or other proceeding. Bus & P C §6200(h).

Since 1979 tens of thousands of fee dispute arbitrations have taken place in California through the State Bar and approved local programs. See §5.4. Currently, there are some 43 State Bar-approved fee arbitration programs. The hundreds of California attorneys and laypersons who have volunteered their time to conduct these arbitrations have acquired a great deal of experience, not only in receiving and weighing evidence and making awards, but in learning the most probable causes of attorney-client fee disputes.

The source of most fee disputes is poor communication between attorney and client, which is often the result of an incomplete, ambiguous, unwritten, or absent fee agreement. As a rule, clients do not object to paying a reasonable fee. Paralleling this, most attorneys seek only the fee that they believe was agreed on. Care should be given, however, to ensure that the billing statement clearly reflects the work undertaken.

PRACTICE TIP: To minimize the possibility of a fee dispute between attorney and client, careful attention at the start of the relationship should be given to the retainer agreement and the requirements for billing statements. For guidance in drawing up its terms and conditions as well as information on the statutes and ethical rules applicable to fee agreements, see chap 3.

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§5.3A B. Duty to Notify Client

Under Bus & P C §6201(a), an attorney who brings a court action against a client for the recovery of attorney fees must notify the client of the right to arbitrate the dispute before or at the time of service of summons, using the most current version of the approved State Bar form, titled "Notice of Client's Right to Arbitration." See §5.13. Although either party may request arbitration, the attorney *must* arbitrate if the client initiates arbitration or responds to an attorney's suit for fees by requesting arbitration. The client's participation in arbitration is optional unless the client has agreed in writing to arbitrate fee disputes. See Bus & P C §6200(c). Business and Professions Code §§6200-6206 permits the parties to an attorney fee dispute to agree that arbitrators may decide the existence of an attorney-client relationship. *Glassman v McNab* (2003) 112 CA4th 1593, 1600, 6 CR3d 293.

Although the attorney's primary duty under the statute consists in the obligation to give the client written notice of the right to arbitration, it is advisable from a practical standpoint to cooperate in the arbitration, making the experience as informative and constructive as possible. The arbitration process is confidential, usually informal, relatively speedy, and less expensive than litigation. Although the award is not binding unless the parties agree that it is binding, it can still be educational in the sense that it expresses to the parties the neutral's evaluation of the merits, which may inform the parties of their likelihood of prevailing in court.

Some parties are wary about subjecting their claims for fees to "nonbinding" arbitration, expecting it to be merely an unnecessary prelude to litigation. See §5.24. Experience, however, shows that the vast majority of nonbinding fee arbitrations become binding by operation of law. Failure to file an action requesting trial de novo within 30 days after service of notice of a nonbinding award results in a binding award. See Bus & P C §6203(b). Because most fee disputes result from poor communication between attorney and client, many arbitrations result in awards satisfactory to both sides because, for the first time, both parties are exposed the other's position and to an analysis of the issues presented.

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§5.4 C. State Bar and Local Programs

The attorney fee arbitration provisions provide that both the State Bar of California (Bus & P C §6200(a)) and local bar associations (Bus & P C §6200(c)) may sponsor and administer programs to arbitrate fee disputes. The State Bar has adopted "Rules of Procedure for Fee Arbitrations and the Enforcement of Awards" (cited in this chapter as "State Bar Rules"), which apply when the State Bar arbitrates fee disputes. See State Bar Rules 1.0-52.0. A local bar must obtain approval for its own rules of procedure from the State Bar Board of Governors.

In carrying out its supervisory responsibilities, the State Bar Board of Governors has adopted "Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs," applicable to arbitration programs sponsored and administered by local bar associations. The procedural rules adopted by these associations may vary from those of the State Bar, but they must be reviewed by the State Bar Board of Governors or a committee designated by the Board to ensure that they are consistent with the State Bar's guidelines and minimum standards for the operation of mandatory fee arbitration programs. Bus & P C §6200(d). Local procedures and fee provisions must provide for a fair, impartial, and speedy hearing and award. Bus & P C §6200(d). Local bar programs that obtain such approval are entitled to the statutory immunity provided by Bus & P C §6200(f). See §5.8.

The great majority of fee dispute arbitrations are conducted through local bar associations. For example, in 2003, the State Bar dealt with 102 fee arbitration requests, while local bar associations processed about 2000 such requests. The State Bar's jurisdiction is limited to certain situations set forth in §5.7. Although both lawyers and lay people serve as arbitrators without compensation, fee arbitration programs incur substantial administrative costs, which are met at least in part by the filing fees paid by the parties participating in the arbitration. The State Bar also reimburses the local bar programs a prorata amount to help offset some of these costs.

The number of clients requesting fee arbitrations varies from year to year and from program to program. According to informal surveys conducted after arbitration, the clients and attorneys both express confidence that fee arbitration programs provide a fair method for resolving fee disputes.

Although local arbitration rules are mentioned from time to time for illustrative purposes, this chapter concentrates on the State Bar Rules and includes forms used in fee arbitrations conducted by the State Bar. See §§5.49-5.60.

WARNING: Except for the State Bar's mandatory form for notifying the client of the right to arbitration (see §5.13), and the notice of rights after arbitration, State Bar forms are not used in arbitrations conducted by local bar associations. Local bar associations have developed their own rules and forms for administration of their own programs, and will supply copies to clients and attorneys participating in their fee arbitrations.

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§5.5 1. State Bar Website

The State Bar's website, located at www.calbar.ca.gov, has a section on mandatory fee arbitration that can be found on the main menu under the heading "Attorney Resources." The website has a great deal of useful information about attorney fee arbitration, including:

- The text of the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206);
- State Bar Rules of Procedure for Fee Arbitrations and the Enforcement of Awards;
- Addresses and telephone numbers of local bar associations with approved fee arbitration programs and a brief description of each approved program, including filing fees; and
- Notice of Right to Arbitration form.

In addition, the State Bar Committee on Mandatory Fee Arbitration issues "Arbitration Advisories," which discuss and analyze for fee arbitrators recurring legal questions, *e.g.*, determining a reasonable fee, mandatory and recommended disclosures that arbitrators should make to parties, and arbitration issues involved in contingency fee agreements. These advisories, which are indexed according to title, may be useful to the parties and are available on the State Bar website.

WARNING: These advisories have not been adopted or endorsed by a court of law and constitute only the official opinion or policy of the State Bar Committee on the questions they address. They are advisory only.

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§5.6 2. Filing Fees and Costs

A filing fee is usually charged to the party requesting the arbitration (usually the client). The amount of the fee charged is sometimes stated as a percentage (*e.g.,* 5 percent) of the amount in dispute with a minimum fee when little money is in dispute and a maximum fee when greater amounts are disputed. Some bar associations have adopted sliding fee scales based on both fixed amounts and percentages of the amount in dispute.

In arbitrations conducted by the State Bar, a party may file an application for a filing fee waiver on the approved State Bar form. State Bar Rule 17.0. The presiding arbitrator may grant the fee waiver or order a reduced fee for good cause shown. Fee waivers are not available to business entities, including partnerships and corporations. State Bar Rule 17.0. Local bar association rules may also provide for waiver of fees. The filing fee and other costs of arbitration may be reallocated or redistributed between the parties by the arbitrator in the award. Arbitration Advisory 03-03 provides a guideline on how program filing fees may be awarded.

PRACTICE TIP: Although an attorney may not require the client to arbitrate a fee dispute unless there is a written agreement to arbitrate fee disputes entered into before the fee dispute arose, the attorney should seriously consider arbitration rather than litigation if the client is receptive to the idea. See §5.3 (cross-complaints for professional negligence commonly filed in response to actions for recovery of legal fees).

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§5.7 3. Jurisdiction

Ordinarily, jurisdiction lies with the local bar associations or lawyers' referral services that have adopted arbitration rules of procedure approved by the State Bar Board of Governors. However, State Bar Rule 12.1 provides that a matter must be accepted by the State Bar for arbitration if:

- There is no approved local bar association program with jurisdiction over the dispute;
- A party declares under penalty of perjury that a fair hearing cannot be obtained with the local bar association program; or
- The matter is not within the jurisdiction of a local bar association program.

NOTE: State Bar Rule 11.5 permits local programs to accept jurisdiction over arbitration matters from other local programs on the parties' written consent.

A local bar association may, by procedural rule, define its own jurisdiction. Jurisdiction is limited, however, to disputes between an attorney and a client when requested by the client or when agreed to by the attorney and the client in writing, and the client must be one to whom the attorney has rendered professional services. Legal malpractice claims are not covered by the program. *National Union Fire Ins. Co. v Stites Prof. Law Corp.* (1991) 235 CA3d 1718, 1727, 1 CR2d 570 (insurance company paying fees of *Cumis* counsel for insured is not proper party in fee arbitration covered by Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206); see §5.11). For discussion of disputes that are not covered by the MFAA, see §§5.7, 5.9-5.12. An arbitrator's finding that a particular fee dispute is arbitrable will stand unless it is shown not to be a rational construction of the law. *Manatt, Phelps, Rothenberg & Tunney v Lawrence* (1984) 151 CA3d 1165, 1171, 199 CR 246.

A presiding arbitrator may, for good cause, assign a matter to a hearing panel to take evidence and to decide whether jurisdiction should be accepted. State Bar Rule 11.2.

NOTE: Attorneys and clients who are contemplating participation in a fee dispute arbitration should consult with the local bar association or lawyers' referral service to ascertain whether a local fee arbitration program has been established in their county. The State Bar at its San Francisco office can furnish the names and addresses of the local bar association having jurisdiction over fee arbitrations in a given geographical area. This information is also available on the State Bar's website (www.calbar.ca.gov).

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§5.8 4. Arbitral and Mediation Immunity

The State Bar and local bar associations conducting arbitrations or mediations under approved procedural rules, and arbitrators and mediators, as well as the arbitrating or mediating associations' directors, officers, and employees, have the same immunity that attaches in judicial proceedings. Bus & P C §6200(f).

Generally, arbitrators may not be held liable for damages or be compelled to testify at postarbitration proceedings. Evidence Code §703.5 provides: "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding." Exceptions include, *e.g.,* when a statement or conduct during the prior proceeding could give rise to contempt, constitute a crime, be the subject of investigation by the State Bar or Commission on Judicial Performance, or give rise to disqualification proceedings under CCP §170.6. Evid C §703.5.

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§5.9 D. Statutory Exceptions to Mandatory Fee Arbitration Act

There are several exceptions to the mandatory fee arbitration provisions. Statutory exceptions include:

- **Statute of limitations.** A client may not compel arbitration if the same relief sought by a civil action would be barred by a statute of limitations. Bus & P C §6206.
- **No office or services in state.** The Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206) does not apply if the attorney is also (or is only) admitted to practice in another jurisdiction, maintains no office in California, and no material portions of the services were rendered in California. Bus & P C §6200(b)(1). See State Bar Rule 4.1.
- **Claims for affirmative relief against attorney.** The client cannot compel mandatory fee arbitration of a claim against the attorney for damages or for other affirmative relief for alleged malpractice or professional misconduct. Bus & P C §6200(b)(2). See State Bar Rule 4.2. Under Bus & P C §6201(d), a client's right to maintain arbitration under the mandatory fee arbitration provisions is waived if the client seeks affirmative relief against the attorney based on allegations of professional malpractice. *Aguilar v Lerner* (2004) 32 C4th 974, 989, 12 CR3d 287. Evidence relating to claims of malpractice and professional misconduct is admissible in fee arbitrations, but only to the extent that such evidence bears on the amount of compensation to which the attorney is entitled. Arbitrators may not award affirmative relief in the form of damages, offset or otherwise, for injuries underlying any such claim. Bus & P C §6203(a). The client, however, may be entitled to a refund for unearned fees and costs previously paid to the attorney or for fees incurred after an ethical violation occurred. Bus & P C §6203(a).
- **Fees determined by statute or court.** When the fees in dispute are determined or are determinable by a statute or by a court order, the client may not compel arbitration. Bus & P C §6200(b)(3). See State Bar Rule 4.3.

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E. Nonstatutory Exceptions

§5.10 1. Person or Entity Other Than Client Disputing Attorney Fees

State Bar Rule 1.5 defines a client as: "A person who directly or through an authorized representative consults, retains, or secures legal services or advice from a lawyer in the attorney's professional capacity." But see *Wager v Mirzayance* (1998) 67 CA4th 1187, 79 CR2d 661 (upholding dismissal of attorney fee collection action because attorney had failed to notify client's father, who had retained attorney and had agreed to pay bills, of right to arbitrate).

However, the personal representative of a deceased client or the guardian or conservator of a person with a disability may be substituted in an arbitration conducted by the State Bar. See State Bar Rule 29.0. In addition, in State Bar arbitrations, the client "for good cause shown" may include as a party to the arbitration a person or entity who "may be liable for or entitled to a refund of the attorney fees and/or costs." In these circumstances, the arbitration request must be signed both by the client and that party. State Bar Rule 15.4.

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§5.11 2. "*Cumis*" Insurance Disputes Not Subject to Mandatory Fee Arbitration Act

In certain situations involving conflicts of interest between an insurer and its insured, the insurance company is obligated to provide the insured with independent counsel at its own expense. *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 208 CR 494. See discussion in §2.50. This independent counsel (*Cumis* counsel) is the attorney for the insured, not for the insurance company, and thus a fee dispute between an insurance company and *Cumis* counsel is not subject to the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206), which applies only to fee disputes between attorneys and their clients. *National Union Fire Ins. Co. v Stites Prof. Law Corp.* (1991) 235 CA3d 1718, 1728, 1 CR2d 570.

Civil Code §2860, which codifies the holding in *Cumis,* has its own provision for mandatory and binding arbitration of attorney fee disputes that have not been resolved under policy provisions. See CC §2860(c) (when any dispute concerning attorney fees is not resolved under policy provisions, it must be resolved "by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute"). See also *Compulink Mgmt. Ctr., Inc. v St. Paul Fire & Marine Ins. Co.* (2008) 169 CA4th 289, 87 CR3d 72 (CC 2860 mandates arbitration of amount of fees owed to *Cumis* counsel, even though complaint may contain other, nonarbitrable issues); *Gray Cary Ware & Friedenrich v Vigilant Ins.* (2004) 114 CA4th 1185, 1192, 8 CR3d 475 (CC §2860 mandates arbitration of disputes between insurer and *Cumis* counsel over attorney fees, but not over expenses incurred by *Cumis* counsel while representing insured).

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§5.12 3. Separate Negotiation of Damages and Attorney Fees

When an attorney negotiates a separate settlement of damages and attorney fees, the settlement can be reviewed by the court at a settlement conference or on the motion of a party to determine whether the settlement negotiations reflect a fair and reasonable balancing of the client's and the attorney's interests. *Ramirez v Sturdevant* (1994) 21 CA4th 904, 26 CR2d 554.

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III. PROCEDURES BEFORE ARBITRATION

§5.13 A. Notice of Client's Right to Arbitration; Service

With limited exceptions (see §§5.9-5.12), when an attorney initiates any fee collection proceeding other than mediation or arbitration under the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206), the attorney must notify the client in writing of the client's right to arbitration under the MFAA. Bus & P C §6201(a). Notice must be given before or at the time of service of the summons in a lawsuit or before or at the commencement of any other proceeding. Bus & P C §6201(a). To avoid filing an action when the client may ultimately request arbitration, most attorneys notify the client of the right to arbitration before bringing suit. Failure to provide the client with timely notice of the right to arbitration is grounds for dismissal of the action or other proceeding. Bus & P C §6201(a).

NOTE: The MFAA applies to all attempts to collect costs and fees through court action, including attorney-initiated fee actions filed in small claims court or any other proceeding, such as private arbitration. See Bus & P C §6201(b). Judicial Council Forms SC-100 and SC-101 are provided for litigation of attorney-client fee disputes in small claims court. See CCP §116.220(a)(4).

The State Bar requires attorneys to use the most current version of its notice form. Bus & P C §6201(a). Local bar associations that have been authorized by the State Bar to conduct fee arbitrations have a supply of these forms, as does the State Bar. See State Bar form, "Notice of Client's Right to Arbitration," in §5.49. The notice form is also available on the State Bar's website at www.calbar.ca.gov.

Although §6201(a) merely requires the attorney to "forward" the written notice of right to arbitration to the client, the attorney should serve the notice if for no other reason than to document the service and to form an approximate time line since the client has 30 days after "receipt" of the notice to request fee arbitration. On service of papers generally, see chap 18. State Bar Rule 51.0 provides that papers may be served by personal delivery, United States mail, or by deposit in a business facility used for collection and processing of correspondence for mailing under CCP §1013a.

Service of the notice, which under the State Bar Rules is complete at the time of deposit (State Bar Rule 51.4), will perhaps avoid dispute about the timeliness of a request for arbitration if the client elects to arbitrate. The client has 30 days after receipt of the notice of the right to arbitration to request arbitration. Bus & P C §6201(a). See §5.17. Furthermore, proof of service on the client protects the attorney from any subsequent motion to dismiss a fee collection action for failure to notify the client. See chap 18 on proof of service.

NOTE: In *Wager v Mirzayance* (1998) 67 CA4th 1187, 79 CR2d 661, the court adopted for the notification requirement a broader definition of "client" than that given in State Bar Rule 1.5, upholding the trial court's dismissal of an attorney fee collection action because the attorney had failed to notify the client's father, who had retained the attorney and had agreed to pay the attorney's bills, of the right to arbitrate.

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§5.14 B. Request for Arbitration; Service on Respondent

Arbitration is initiated by filing a written request for arbitration form with the appropriate fee arbitration program and paying the filing fee. For arbitrations conducted by the State Bar, see State Bar Rule 15.0. On filing fees, see §5.6. The fee arbitration program will serve the request for arbitration form on the respondent. See, *e.g.*, State Bar Rule 15.0.

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§5.15 1. Attorney's Response

If the client has requested State Bar arbitration, the respondent (usually the attorney) must file a reply with the State Bar within 30 days after service of the request. State Bar Rule 18.1. The attorney may obtain an extension of time to reply under State Bar Rule 18.1.

The State Bar request and reply forms give the parties an opportunity to explain the facts of the fee dispute and to agree to binding arbitration. See §§5.50-5.51. If the amount in dispute exceeds $15,000, the parties are entitled to three arbitrators. State Bar Rule 22.1. No filing fee is required of the respondent attorney, but the arbitrator may reallocate part of or all of the filing fee to be paid by the respondent as part of the award. See §5.6.

If the attorney fails to respond to a request for arbitration or refuses to participate, the arbitrator will proceed with the arbitration as scheduled and a decision will be rendered on the basis of the evidence presented. State Bar Rule 32.2.

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§5.16 2. Client's Response

When the request to arbitrate is made by the attorney, arbitration may proceed only if the client files a written consent to participate with the program within 30 days after service of the request, unless the client has already consented to arbitration (*e.g.*, written agreement to arbitrate). See, *e.g.*, State Bar Rule 18.2; §5.53.

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C. Client's Loss of Right to Compel Arbitration

§5.17 1. Failure to Request Arbitration Within 30 Days After Receipt of Notice

If the client does not request arbitration within 30 days after receipt of the notice, the client's right to arbitration will be deemed waived. Bus & P C §6201(a). See, *e.g.*, State Bar Rule 8.3. The attorney is then entitled to proceed with a fee collection action. See §§5.41-5.48. The parties may stipulate, however, to set the waiver aside and proceed with arbitration. Bus & P C §6201(e).

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§5.18 2. Attorney's Small Claims Action

The Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206) applies to all attempts to collect costs and fees through court action, including attorney-initiated fee actions filed in small claims court. See Bus & P C §6201(b). Judicial Council Forms SC-100 and SC-101 are provided for litigation of attorney-client fee disputes in small claims court. See CCP §116.220(a)(4).

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§5.19 3. Client's Answer to Complaint for Fees

A client, who has received notice of the right to arbitration but files an answer to an attorney's complaint for fees without requesting arbitration, is deemed to have waived the right to arbitration. Bus & P C §6201(b). See State Bar Rule 8.2. See form of notice in §5.49. The parties may stipulate, however, to set the waiver aside and proceed with arbitration. Bus & P C §6201(e).

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§5.20 4. Client's Filing of Action or Pleading Seeking Judicial Resolution of Dispute or Affirmative Relief Based on Malpractice

The client waives the right to arbitration by commencing any action or filing any pleading seeking judicial resolution of a fee dispute that would otherwise be amenable to resolution under the MFAA. Bus & P C §6201(d)(1). See, *e.g.*, State Bar Rule 8.2, applicable to arbitrations conducted by the State Bar.

The client also waives the right to arbitrate by filing an action or pleading seeking affirmative relief against the attorney for damages or other relief based on alleged malpractice or professional misconduct. Bus & P C §6201(d)(2); *Aguilar v Lerner* (2004) 32 C4th 974, 12 CR3d 287. See *Fagelbaum & Heller LLP v Smylie* (2009) 174 CA4th 1351, 1361, 95 CR3d 252 (in cross-demand for non-MFAA arbitration, client's request for affirmative relief based on alleged attorney malpractice waived client's right to MFAA arbitration).

The parties may stipulate, however, to set the waiver aside and proceed with arbitration. Bus & P C §6201(e).

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D. Effect of Requesting Arbitration

§5.21 1. Proceedings Stayed

When a client files and serves a timely request for arbitration, any pending court action or other proceeding brought by the attorney to collect fees is automatically stayed without the need for a court order. Bus & P C §6201(c). To obtain an automatic stay, the client should file with the court clerk a copy of the request for arbitration and the original of the arbitration program's form for staying a court action and serve copies of both on the arbitration program and the other party. The court may impose additional requirements by local rule (see, *e.g.*, State Bar Rule 9.0). See form of Notice of Stay of Proceedings (Judicial Council Form CM-180) in §5.58. For requirements for filing a notice of stay, see Cal Rules of Ct 3.650.

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§5.22 2. Vacating Stay: Exception for Certain Provisional Remedies

Service and filing of a rejection of an arbitration award (see §5.37) automatically vacates any stay under Bus & P C §6201. A court order is not necessary. Bus & P C §6204(b). Moreover, the court may vacate a stay in whole or in part if, after a hearing duly noticed by any party or by the court, it finds that the matter, or some aspect of it, is not appropriate for arbitration under the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206). Bus & P C §6201(c); *Fagelbaum & Heller LLP v Smylie* (2009) 174 CA4th 1351, 1362, 95 CR3d 252; *Loeb & Loeb v Beverly Glen Music, Inc.* (1985) 166 CA3d 1110, 1116, 212 CR 830.

In *Loeb,* the client's request for fee arbitration stayed the law firm's action to attach the assets of the client's music recording company for failure to pay for legal services rendered. The trial court then granted the law firm's motion to order the stay inapplicable to the attachment proceedings. The court ruled that the attachment remedy was not amenable to arbitration, noting that the law firm was not attempting to resist the arbitration procedure but was merely using the attachment remedy to protect against dissipation of assets during the pendency of the nonbinding arbitration and any subsequent civil trial.

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§5.23 3. Time Tolled for Filing Civil Action

The time for filing a civil action seeking judicial resolution of a dispute subject to arbitration under the mandatory fee arbitration statute is tolled from the time an arbitration is initiated in accordance with rules adopted by the State Bar Board of Governors until the earlier of (Bus & P C §6206):

- 30 days after receipt of the findings and award of the arbitrators; or
- Receipt of notice that the arbitration is otherwise terminated.

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§5.24 4. Agreement to Binding Arbitration

Arbitration under the MFAA is not binding, and either party is entitled to trial after the arbitration. The parties may agree in writing, however, to be bound by the award, but only after a fee dispute has arisen. Bus & P C §6204(a). A written agreement to make the arbitration binding may be made at any time before the actual taking of evidence at the hearing. State Bar Rules 5.1-5.2.

Thus, a provision in a retainer agreement requiring binding arbitration does not prevent the client from exercising his or her rights to nonbinding arbitration under the MFAA. *Aguilar v Lerner* (2004) 32 C4th 974, 989, 12 CR3d 287. If the client fails to invoke his or her rights under the MFAA, any agreement for binding arbitration is enforceable against the client. 32 C4th at 989.

In *Schatz v Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C4th 557, 575, 87 CR3d 700, the supreme court held that the MFAA does not prevent enforcement of a valid agreement to arbitrate under the California Arbitration Act (CAA) (CCP §§1280-1294.2). If nonbinding arbitration does not resolve the matter, an agreement for binding contractual arbitration may be enforced over the client's request for a trial de novo. 45 C4th at 572.

NOTE: A binding award may be corrected, vacated, or confirmed by the civil court, but only on the very limited grounds set forth in CCP §§1286.2 and 1286.6. See §5.36.

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IV. THE HEARING

§5.25 A. Preliminary Matters

Arbitrations conducted by the State Bar are heard by its Fee Arbitration Department under rules of procedure established for conducting mandatory fee arbitrations. Local bar associations have their own rules of procedure. These rules must be approved by the State Bar Board of Governors or a committee designated by the Board and comply with the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206) and the Guidelines and Minimum Standards established by the State Bar under Bus & P C §6200(d) (see §5.4). Because local procedural variations are permitted, attorneys and clients participating in a local arbitration program should consult the particular rules from the sponsoring county bar association.

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§5.26 1. Appointment of Arbitrators; Disqualification

Arbitrators are selected by the program that is conducting the arbitration. The program's rules establish whether the dispute will be heard by a single arbitrator or a panel of three. Under State Bar Rule 22.1, a single arbitrator hears disputes of $15,000 or less; a three-member panel hears larger disputes unless the parties stipulate to a single arbitrator. Local variations set by procedural rules are listed on the State Bar website at www.calbar.ca.gov under Approved Programs.

A single arbitrator must be an attorney. A panel of three arbitrators must be composed of two attorneys and one lay person. Bus & P C §6200(e). The client has the option of specifying that the single arbitrator or, for a three member panel, one of the attorney arbitrators, be a civil or criminal practitioner, depending on the nature of the representation. Bus & P C §6200(e). For example, when the representation involves a civil matter, the client may request that at least one attorney arbitrator be a civil practitioner; when the representation involves a criminal matter, the client may request that at least one attorney arbitrator be a criminal practitioner. Bus & P C §6200(e).

Under State Bar Rule 23.0, parties are given notice of the appointment of the arbitrator(s) within 60 days after a response has been filed or the time for responding has expired. If one of the panel members does not appear at the hearing, the parties may stipulate in writing to having the panel chair act as the sole arbitrator, but the hearing may not proceed with two arbitrators or with one lay arbitrator. State Bar Rule 32.5. Local rules occasionally vary.

Either party may request disqualification of an arbitrator or mediator without cause. Bus & P C §6204.5(a). The State Bar allows each party, within 15 days after receipt of notice of the assignment of an original or substitute arbitrator, to file a written disqualification of the arbitrator. Each party may disqualify one arbitrator without cause, and each has unlimited challenges to disqualify arbitrators for cause. State Bar Rule 24.0.

Code of Civil Procedure §1281.9(a)(1) requires arbitrators to disqualify themselves "on any ground specified in [CCP §]170.1" for disqualification of a judge. Arbitrators are under the same duty as judicial officers to render decisions free from any influence or consideration of the parties' race, ethnic origin, or gender. *Betz v Pankow* (1993) 16 CA4th 919, 20 CR2d 834. Arbitrators must disclose "even sporadic business relationships with a party to the arbitration." *Kaiser Found. Hosp. v Superior Court* (1993) 19 CA4th 513, 23 CR2d 431. See also Cal Rules of Ct 3.816 (arbitrator in judicial arbitration has duty to determine whether any cause exists for disqualification under CCP §170.1 governing disqualification of judges). Legislation requiring written disclosures by private contractual arbitrators (CCP §1281.85) does not apply to fee arbitration under the Mandatory Fee Arbitration Program.

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§5.27 2. Issuing Subpoenas

Parties to the arbitration may request the arbitrator to issue subpoenas for the attendance of witnesses and the production of books, papers, and documents pertaining to the proceedings. Bus & P C §6200(g)(3).

In State Bar arbitrations, the State Bar mails blank subpoenas to the party who requested them, who is then responsible for obtaining the arbitrator's signature and serving the subpoenas. A request for subpoenas must be received by the State Bar at least 10 days before the hearing date. The requesting party is responsible for any witness fees and any costs of serving the subpoenas. State Bar Rule 31.0. Local rules may vary.

Although arbitrators have the power to issue subpoenas for the attendance of witnesses and the production of documents by subpoena (Bus & P C §6200(g)(3)), they have no authority to impose sanctions for failing to comply with a subpoena, although the party seeking to compel compliance should be given the opportunity to bring a contempt proceeding in superior court under Bus & P C §6051.

The State Bar arbitration program encourages agreements between the parties as to the issues not in dispute and the voluntary exchange of documents prior to the hearing. State Bar Rule 33.0.

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§5.28 3. Clarification of Issues and Exchange of Documents

The Panel Chair may request that the parties clarify the issues, submit additional documentation, and exchange documents in advance of the hearing. The hearing panel may, in its discretion, decline to admit into evidence at the hearing a party's documents that were required to be exchanged in advance, but were not. State Bar Rule 36.0.

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§5.29 4. Waiver of Personal Appearance; Right to Counsel

Under State Bar procedures, a party may waive personal appearance at the arbitration hearing by filing a waiver of appearance with the State Bar at least 10 days before the hearing. State Bar Rule 28.4. The waiver may be accompanied by (State Bar Rule 28.4):

- One or more declarations under penalty of perjury; and/or
- A written designation of a representative, who need not be an attorney.

Although the statute is silent, the State Bar Rules explicitly provide that either party, at his or her own expense, may be represented by an attorney or, if unable to attend the hearing, designate a nonlawyer representative. State Bar Rule 28.2.

NOTE: The rules of procedure of each local bar association may differ in procedures regarding nonattendance and declarations, and should be reviewed when preparing for hearing.

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B. Testimony

§5.30 1. Administering Oath; Transcripts

Arbitrators are empowered to administer oaths and affirmations and take testimony. Bus & P C §6200(g)(1)-(2). See State Bar Rule 35.0 (State Bar arbitrators must administer an oath).

The attendance of a certified shorthand reporter is permitted at State Bar arbitrations at the party's expense. Each party is entitled to a copy of the reporter's transcript on written request and payment of the expense of copying. State Bar Rule 39.0.

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§5.31 2. Evidence

Generally, formal rules of evidence do not apply to fee arbitrations. The State Bar permits any relevant evidence, regardless of the existence of a common law or statutory rule to the contrary, if it is the kind of evidence "on which responsible persons are accustomed to rely in the conduct of serious affairs." State Bar Rule 35.0.

The arbitrators are responsible after the hearing for returning any exhibit or documents to the parties who submitted them. State Bar Rule 41.9.

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§5.32 a. Discovery Generally Not Permitted

In furtherance of its goal of providing relatively speedy hearing and award, the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206) discourages formal discovery as it is currently practiced in civil actions.

In State Bar arbitrations, no discovery other than the issuance of subpoenas is allowed. State Bar Rule 30.0, 31.0. Some local rules (*e.g.,* Los Angeles and San Mateo) permit limited discovery on written request for a showing of good cause.

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§5.33 b. Attorney-Client Communications and Work Product; Confidentiality

The attorney-client privilege (Evid C §952) and protection for an attorney's work product (CCP §§2018.010-2018.080) do not prohibit the disclosure of any communication relevant to:

- An arbitration hearing under the MFAA;
- A trial after arbitration; or
- Judicial confirmation, correction, or vacation of an arbitration award.

Such disclosure is not construed as a waiver of the confidential character of these matters for any other purpose. Bus & P C §6202.

The State Bar program requires that all arbitration hearings be closed to the public, except for persons (*e.g.,* witnesses) necessary to conduct the hearing. Under State Bar Rule 27.2, the client may be accompanied by another person, and the panel may permit additional persons to attend. These persons are subject to the confidentiality of the arbitration proceedings. Although the arbitration award is public, the arbitration case file, exhibits, and any transcripts of the hearing remain confidential. See State Bar Rule 27.3.

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§5.34 C. Award; Contents

The award must be in writing and signed by the concurring arbitrators and must include a determination of all questions necessary to determine the controversy. Bus & P C §6203(a). In arbitrations by the State Bar, "[a]rbitrators are encouraged, where appropriate, to include findings of fact with their awards." State Bar Rule 41.2.

The award should clearly state the fee, costs, or both that the arbitrator determines were paid by the client to the attorney, and the amount, if any, due the attorney from the client, or the amount to be refunded to the client by the attorney. Bus & P C §6203(a). State Bar Rule 41.2 requires that the name of each responsible attorney be included in the award. See Bus & P C §6203(d) (attorney who has not complied with award may be placed on involuntary inactive status until award has been paid). See also §5.40.

The arbitration filing fee costs may be awarded or reallocated. See, *e.g.,* State Bar Rule 41.8 (filing fee and any fee client paid to file stay with court may be allocated). However, no other costs, including attorney fees for preparation and appearance at the arbitration, may be awarded, even if the parties have a contract that provides for an award of attorney fees to the prevailing party. Bus & P C §6203(a).

Under the statute, evidence of malpractice or professional misconduct is admissible, but the award may not give affirmative relief for such claims. Bus & P C §6203(a).

An original declaration of service of the award must be served on each party with the award. Bus & P C §6203(a). The award must also be served with the "Notice of Your Rights After Fee Arbitration" form (Bus & P C §6204.5(b)). See §5.49. In a State Bar arbitration, the arbitrator sends the original and four copies of the findings and award to the State Bar, which then serves the award on the parties to the arbitration. The State Bar Rules and most, if not all, local rules of procedure provide for service of the award by mail. See, *e.g.,* State Bar Rule 41.9. The original award remains in the possession of the arbitrating association.

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V. POSTARBITRATION PROCEDURES

§5.35 A. Notice of Postarbitration Rights to Judicial Relief

The State Bar, or the local bar association that conducted the arbitration, must notify the parties of their rights to judicial relief after the arbitration proceeding. Bus & P C §6204.5(b). The State Bar-approved form, "Notice of Your Rights After Fee Arbitration," is served with the award. See, *e.g.*, State Bar Rule 41.9; §5.60.

Any party may reject a nonbinding award within 30 days after notice of it is served by (1) initiating a court proceeding by filing an action or (2) rejecting the award and requesting trial in the court where an action is already pending. Bus & P C §6204(b)-(c). If no party acts to reject the award within 30 days after service of notice, the arbitration award becomes binding on the parties by operation of law. Bus & P C §6203(b). On agreement to binding arbitration, see §5.24.

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§5.36 B. Confirmation, Correction, or Vacation of Award

An award made under a mandatory fee arbitration program may be confirmed, corrected, or vacated in the same manner as arbitration awards generally. Bus & P C §6203(b). See CCP §§1285-1294.2. Judicial proceedings after mandatory fee arbitration are governed by the amount-in-controversy rules applicable to civil actions generally. Bus & P C §6203(b). See chap 6. Matters involving less than $5000 may be brought in small claims court. CCP §116.220(a)(4).

With a focus on mandatory fee dispute arbitrations, some of the major requirements for confirming, correcting, or vacating an arbitration award are highlighted in the following paragraphs.

Contents of petition. A petition to confirm, correct, or vacate an arbitration award must set forth the substance of the agreement to arbitrate unless the petitioner denies the existence of such an agreement. CCP §1285.4. Because mandatory fee arbitration is not dependent on an agreement, attaching a copy of the request for arbitration will probably satisfy this requirement. In addition, the names of the arbitrators and a copy of the award and opinion, if any, must be attached or set forth in the petition. CCP §1285.4.

Grounds. Grounds for vacating an arbitration award include, *e.g.,* that the arbitrators acted in excess of their powers or that the arbitrators' misconduct substantially prejudiced a party's rights. See CCP §1286.2(a). See also chap 45. On grounds for correcting an award (*e.g.,* award is imperfect in form or there was an evident miscalculation of figures), see CCP §1286.8.

Service. If an action was already pending before the arbitration, a petition and notice of hearing to confirm, vacate, or correct an award is served by mail or in any other manner permitted by statute on all parties who have appeared. See CCP §§1003-1020. Otherwise, service is governed by the arbitration statute. See CCP §§1285-1294.2; Bus & P C §6203(b).

Timing. For time limits on filing petition to vacate or correct arbitration award, see CCP §1288 (100 days after date of service of signed copy of award on petitioner). Note that if a party is filing a petition to confirm an award, the time limit is 4 years after the date of service of the award.

Response to petition. The response to the petition may request the court to dismiss the petition or to confirm, correct, or vacate the award. CCP §1285.2. The response must be filed within 10 days after service of the petition within California; otherwise the allegations of the petition are deemed to be admitted. CCP §§1290, 1290.6. If served outside California, the response must be filed within 30 days after service. CCP §§1290.4(b)(2), 1290.6.

Rehearing. If the award is vacated, the court may order a rehearing before new arbitrators. If the award is vacated on the grounds that, *e.g.,* the arbitrators exceeded their powers or prejudicially refused a continuance to a party, with the consent of the parties, the court may order a rehearing before the original arbitrators. CCP §1287.

Confirmation of award. If the award is confirmed, judgment must be entered in conformity with the award. CCP §1287.4. It may then be enforced in the same manner as any other civil judgment.

NOTE: Because of the unusually short time to respond to a petition to confirm, vacate, or correct an arbitration award that is served in California, prompt attention to filing a response is essential.

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§5.37 C. Rejection of Award and Trial After Arbitration

If the arbitration was not made binding by the parties' written agreement (see §5.24), either party within 30 days after the mailing of notice of the arbitration award may file a rejection of the award and a request for trial after arbitration. On service and filing of the rejection of the award, any stay of a pending action entered under Bus & P C §6201 is vacated without necessity of court order. Bus & P C §6204(b).

If no action is pending, the trial after arbitration must be initiated by filing an action within 30 days after service of notice of the award in the court having jurisdiction over the amount of money in controversy. Bus & P C §6204(c).

PRACTICE TIP: Small claims Judicial Council forms are available for requesting a trial de novo in that forum.

Service. Service of the rejection of the arbitration award and the request for trial after arbitration may be made by mail on any party who appeared in a pending action. Otherwise, service must be in the same manner as on parties who have not yet appeared in original civil proceedings. Bus & P C §6204(b). See chaps 17 (service of process), 18 (service in pending actions).

Arbitration award inadmissible at trial. Except as necessary to decide who the prevailing party is in order to fix attorney fees and costs after the trial (see §5.39), the arbitration award and the arbitrators' determinations are inadmissible at a trial after arbitration. The arbitration award cannot operate as collateral estoppel or res judicata in any action or proceeding. Bus & P C §6204(e).

NOTE: A client who loses a binding fee arbitration conducted under the mandatory fee arbitration statute may file a subsequent action against the attorney based on the same allegations of misconduct or breach of contract as the fee dispute, but the client may not seek to recover as damages any part of the fee that the arbitrator awarded the attorney. *Liska v The Arns Law Firm* (2004) 117 CA4th 275, 281, 12 CR3d 21.

Failure to appear at arbitration hearing. A party who failed to appear at an arbitration hearing may lose the right to a trial after arbitration. A party who failed to appear at the arbitration has the burden of proving to the court that the failure to appear was not willful. The court may consider the arbitrators' findings, if any, on the party's failure to appear. Bus & P C §6204(a).

Repudiation of rejection of award and request for trial. A party that rejects a fee award after an MFAA arbitration and files a complaint that is later involuntarily dismissed for failure to prosecute effectively repudiates its previous rejection of the arbitration award and its request for trial. *Perez v Grajales* (2008) 169 CA4th 580, 605, 86 CR3d 784 (attorney rejected MFAA award in favor of client and filed complaint that was dismissed for failure to prosecute). Under such circumstances, the opposing party is entitled to request an order confirming the arbitration award and entering judgment on such confirmation. *Perez v Grajales, supra*.

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D. Attorney Fees and Costs

§5.38 1. After Award Confirmed, Corrected, or Vacated

A court confirming, correcting, or vacating an award may give the prevailing party reasonable fees and costs incurred in obtaining confirmation, correction, or vacation of the award, including (if applicable) fees or costs of appeal. Bus & P C §6203(c). Neither party, however, may recover costs or attorney fees incurred in the underlying fee arbitration proceeding, except the filing fee paid under Bus & P C §6203(a). Bus & P C §6203(c).

The prevailing party is the party obtaining judgment confirming, correcting, or vacating the award. Bus & P C §6203(c). A party who did not appear at the arbitration hearing and did not follow the procedures provided for waiving personal appearance (see §5.29), however, is not entitled to attorney fees or costs on confirmation, correction, or vacation of the award. Bus & P C §6203(c).

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§5.39 2. After Postarbitration Trial; Prevailing Party Defined

At the court's discretion, the prevailing party may be entitled to reasonable attorney fees and costs incurred as a result of the trial after arbitration. In fixing the attorney fees, the court must consider the earlier arbitration award, the determinations of the arbitrators, and any other relevant evidence. Bus & P C §6204(d).

The party seeking trial after arbitration is the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award. In all other cases, the other party is the prevailing party. Bus & P C §6204(d).

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§5.40 E. State Bar Enforcement

When an attorney is required—by a binding arbitration award (or one that became binding by operation of law) that is final, by a judgment, or by an agreement reached after mediation—to refund fees or costs to the client and fails to do so, the State Bar may obtain an order from the State Bar Court placing the attorney on involuntary inactive status in order enforce the award, judgment, or agreement. Bus & P C §6203(d). See State Bar Rules 45.2, 46.3. The award, judgment, or agreement must be enforced if the State Bar shows that the attorney failed to satisfy a binding fee arbitration award, judgment, or agreement, and has not reached a payment plan acceptable to the client or the State Bar. Bus & P C §6203(d)(2).

The award, judgment, or agreement will not be enforced if the attorney proves that he or she lacks the financial ability to pay the refund or lacks personal responsibility for making or ensuring payment of the award. Bus & P C §6203(d)(2). State Bar Rules 47.0-47.5. The State Bar may require an attorney who violates this section to pay an administrative penalty, reasonable costs, or both. The maximum administrative penalty is the greater of 20 percent of the award or $1000. Bus & P C §6203(d)(3). Unpaid penalties and costs are added to the attorney's bar dues for the following calendar year. Bus & P C §6203(d)(4); State Bar Rule 48.0.

The client must make the request for enforcement within four years after the date the award was mailed, the judgment entered, or the agreement signed. In an arbitrated matter, the request for enforcement may not be made earlier than 100 days after the date of service of a signed copy of the award. Bus & P C §6203(d)(5); State Bar Rule 44.1. The State Bar may move the State Bar Court to enforce an unpaid award by placing the attorney on involuntary inactive status until the refund is paid. See State Bar Court Rules of Procedure 700-711. When the award is appealed, a request for enforcement must be made after 100 days from the date the award became final. Bus & P C §6203(d)(5).

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VI. LITIGATING A FEE COLLECTION ACTION

§5.41 A. Pleading Service of Notice of Right to Arbitrate Fee Dispute

Litigation of a fee collection suit is procedurally similar to other civil suits with the following exception: Failure to give the client defendant written notice of the right to arbitrate a dispute for fees, costs, or both is grounds for dismissing an action to collect fees and costs charged for professional services covered by the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206). Bus & P C §6201(a).

Because service of the notice of the client's right to arbitration is necessary to avoid dismissal, pleading it is advisable. Failure to serve the required notice is not jurisdictional, however. The burden is on the client to move for dismissal on the ground that the statutory notice was not given. *Aheroni v Maxwell* (1988) 205 CA3d 284, 294, 252 CR 369.

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§5.42 B. Overcoming Presumption of Undue Influence

A preliminary consideration in approaching the collection of a disputed fee is determining whether there is a presumption of undue influence on the part of the attorney in the making of the fee agreement at a time when a fiduciary relationship with the client existed. Fee agreements made while the attorney-client relationship exists are subject to the presumption of undue influence. *Gleason v Klamer* (1980) 103 CA3d 782, 787, 163 CR 483. Fee agreements entered into before the attorney-client relationship is established, however, are not subject to a presumption of undue influence. *Walton v Broglio* (1975) 52 CA3d 400, 404, 125 CR 123.

In the context of the attorney-client relationship, the presumption of undue influence is designed to implement the public policy in favor of the security of those who entrust themselves or their property to the administration of others. See Evid C §605; *Rebmann v Major* (1970) 5 CA3d 684, 688, 85 CR 399 (effect of presumption is to shift burden of proof and impose burden of proof as to nonexistence of presumed undue influence on attorney; trial judge must determine whether evidence offered showed, by preponderance of evidence, that there was no undue influence).

If a fee agreed on before the attorney-client relationship was established is later reduced to a promissory note or an account stated at a time while the fiduciary relationship existed, it is conceivable the promissory note or the account stated would be subject to the presumption of undue influence, whereas the original agreement would not. See *Gleason v Klamer, supra* (account stated held not to be result of undue influence, because fiduciary relationship had ceased and client had new attorney).

To overcome the presumption that a fee agreement entered into during the fiduciary relationship was *not* the result of undue influence, the attorney must fully disclose and explain the circumstances surrounding the agreement to the client. *Trafton v Youngblood* (1968) 69 C2d 17, 28, 69 CR 568 (in any business transaction between attorney and client, client must be able to act meaningfully, voluntarily, and with full legal advice).

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§5.43 C. Compliance With Fee Agreement Statute

Although there are exceptions, written fee agreements are usually required. If no valid written fee agreement exists when one is required, the agreement is voidable at the option of the client and the attorney is entitled only to a reasonable fee. Bus & P C §§6147(b), 6148(c).

A contingent fee agreement with a merchant who employs ten or more employees to recover a claim against another merchant need not be in writing. Bus & P C §6147.5. If the agreement is not in writing, however, attorney fees are limited to the amounts set forth in that section.

Bills for an attorney's services must comply in many instances with Bus & P C §6148. Failure to comply renders the fee agreement voidable at the client's election, but the attorney may still be entitled to a reasonable fee. Bus & P C §6148(c).

A fee-sharing agreement that does not comply with Cal Rules of Prof Cond 2-200 (financial arrangements among attorneys) is unenforceable. *Chambers v Kay* (2002) 29 C4th 142, 148, 126 CR2d 536; *Margolin v Shemaria* (2000) 85 CA4th 891, 102 CR2d 502.

For further discussion, see chap 3.

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§5.44 D. Proving Fee Agreement

An attorney's right to enforce a fee agreement—subject as it is to many statutory, ethical, regulatory, and presumptive tests—is otherwise similar to the enforcement of any contract. An action to enforce a fee agreement requires proof of the fee agreement, performance of the attorney's contractual obligations, the occurrence of the contingencies if it is a contingent fee agreement, and proof of the fee due.

Generally, the client's prevention of the attorney's performance of the fee agreement cannot be successfully used by the client to bar the attorney's recovery of a fee. *Stone v Carpenter* (1963) 211 CA2d 491, 496, 27 CR 203 (contingent fee when client refused to sign necessary documents).

Contingent fees. When there is a valid written contingent fee agreement and the client has changed attorneys before the contingency has been satisfied, the former attorney is entitled to a reasonable fee based on quantum meruit after the contingency has occurred. *Fracasse v Brent* (1972) 6 C3d 784, 792, 100 CR 385. If a fee dispute arises, the value of services rendered will be determined in light of the actual award. See *Spires v American Bus Lines* (1984) 158 CA3d 211, 216, 204 CR 531 (when reasonable fee in contingent fee case would exceed amount of recovery realized in action, prorata distribution of fee is required).

Business records. To be admissible at a trial on a fee dispute, time records must be kept in a manner that satisfies the business record exception to the hearsay rule. See Evid C §§1270-1271 (*e.g.,* writing must be shown to have been made in the regular course of business).

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§5.45 E. Determining Reasonable Attorney Fees in Absence of Fee Agreement; Guidelines

When a written fee agreement is required and there is none, or it is defective, the attorney may still be entitled to a reasonable fee. Bus & P C §§6147(b), 6148(c). To prove the reasonable value of the services rendered, expert testimony is admissible. See *Spencer v Collins* (1909) 156 C 298, 307, 104 P 320. A plaintiff's attorney is usually qualified to express an opinion on the reasonableness of the fee, but that opinion is not likely to be as persuasive as an independent expert's opinion. See *Freese v Pennie* (1895) 110 C 467, 469, 42 P 978 ("[a]ttorneys are inclined to place a very high estimate upon the value of their services when rendered in important litigation").

JUDICIAL PERSPECTIVE: Although the court has the discretion to determine for itself the reasonableness of a fee (see 110 C at 470), it is difficult to see how it can conscientiously do so in complicated cases without the aid of expert testimony on the subject. The economics of law practice, the billing procedures in various specialties, and the reasonableness of fees charged in certain cases can be complex problems in which judges may be inclined to seek enlightenment from expert witnesses.

Some guidelines in determining the reasonableness of a fee appear in Cal Rules of Prof Cond 4-200. This rule is designed to set a standard by which unconscionable fees can be judged, and it lists factors that bear on the size of fees that would be found acceptable. The fees charged by other practitioners in the geographical area involved can also be used as a guide to the reasonableness of a fee. *Matthiesen v Smith* (1936) 16 CA2d 479, 483, 60 P2d 873. For further discussion, see chap 3 (representation agreements). In addition, the State Bar has issued an advisory on the topic of reasonable fees in the context of fee arbitrations. See Arbitration Advisory 98-03 (filed June 23, 1998; available on the State Bar website at www.calbar.ca.gov).

When an attorney is entitled to fees, the separately itemized services performed by the attorney's paralegal that are not included in the overhead component of the attorney's hourly rate may be included in deter mining the reasonableness of the fee. *Guinn v Dotson* (1994) 23 CA4th 262, 28 CR2d 409 (attorney fees as sanctions under CCP §411.35). See also *Missouri v Jenkins* (1989) 491 US 274, 105 L Ed 2d 229, 109 S Ct 2463; *Sundance v Municipal Court* (1987) 192 CA3d 268, 237 CR 269.

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F. Client's Defenses to Action for Fees

§5.46 1. Attorney's Unjustified Withdrawal

An attorney's voluntary withdrawal from a contingent fee agreement on the ground that the attorney-client relationship has broken down may be sufficient to defeat an attorney's right to fees after the client's claims are settled by negotiation. See *Estate of Falco* (1987) 188 CA3d 1004, 1018, 233 CR 807 (court held clients' refusal to settle was within their rights and was not good cause for attorneys' withdrawal). On rules for attorney's permissive and mandatory withdrawal, see chap 4. See chap 4 on entitlement to fees.

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§5.47 2. Illegal Fee Agreements

In various circumstances it is illegal to agree to a fee for services, or the fee is limited by law, and the client may thus repudiate the fee agreement. For discussion of situations in which fee agreement is illegal, see chap 3.

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§5.48 3. Discharge of Attorney

Historically, an attorney who was discharged for cause by the client was still entitled to a fee, but it might not be the fee agreed on. The attorney's recovery for fees was the reasonable value of the services rendered up to the time of discharge. *Salopek v Schoemann* (1942) 20 C2d 150, 153, 124 P2d 21. See §5.45. In *Fracasse v Brent* (1972) 6 C3d 784, 792, 100 CR 385, the California Supreme Court held that an attorney discharged, with or without cause, is "entitled to recover the reasonable value of his services rendered to the time of discharge." The discharged attorney is also entitled to fee recovery whether or not the contract is divisible. *Fracasse v Brent, supra; Estate of Falco* (1987) 188 CA3d 1004, 233 CR 807.

NOTE: The supreme court in *Fracasse* concluded that discharge of an attorney, with or without cause, is not treated as a breach of the representation contract by the client. *Fracasse*, 6 C3d at 790. On client's right to discharge attorney, see chap 4.

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VII. FORMS

§5.49 A. Form: Notice of Client's Right to Arbitration

Notice of Client's Right To Arbitration

Client's Name _____ Attorney's Name _____

Client's Address _____ Attorney's Address _____

You have an outstanding balance for fees and/or costs for professional services in the amount of $_____

charged to you in the matter of _____

☐ I have filed a lawsuit against you in the:

Court _____ Case No. _____

Address _____

☐ I have filed an arbitration proceeding against you with the:

Agency _____ Case No. _____

Address _____

☐ No lawsuit or arbitration proceeding has yet been filed but may be filed if we do not resolve this claim.

You have the right under Sections 6200-6206 of the California Business and Professions Code to request arbitration of these fees or costs by an independent, impartial arbitrator or panel of arbitrators through a bar association program created solely to resolve fee disputes between lawyers and clients.

You will LOSE YOUR RIGHT TO ARBITRATION UNDER THIS PROGRAM if:

1. YOU DO NOT FILE A WRITTEN APPLICATION FOR ARBITRATION WITH THE BAR ASSOCIATION WITHIN 30 DAYS FROM RECEIPT OF THIS NOTICE USING A FORM PROVIDED BY THE LOCAL BAR ASSOCIATION OR STATE BAR OF CALIFORNIA FEE ARBITRATION PROGRAM; OR
2. YOU RECEIVE THIS NOTICE AND THEN EITHER (1) ANSWER A COMPLAINT I HAVE FILED IN COURT; OR (2) FILE A RESPONSE TO ANY ARBITRATION PROCEEDING THAT I HAVE INITIATED FOR COLLECTION OF FEES, AND/OR COSTS, WITHOUT FIRST HAVING SERVED AND FILED A REQUEST FOR ARBITRATION UNDER THIS PROGRAM; OR
3. YOU FILE AN ACTION OR PLEADING IN ANY LAWSUIT WHICH SEEKS A COURT DECISION ON THIS DISPUTE OR WHICH SEEKS DAMAGES FOR ANY ALLEGED MALPRACTICE OR PROFESSIONAL MISCONDUCT.

I have the right to file a lawsuit against you if you give up your right to mandatory fee arbitration. If I have already filed a lawsuit or arbitration, you may have the lawsuit or arbitration postponed after you have filed an application for arbitration under this program.

I have determined that:

☐ There is a local program which may have jurisdiction to hear this matter. The address of the arbitration program you should contact is:

Name of Program _____

Address _____

City _____ State _____ Zip Code _____

Telephone No _____

☐ There is no approved local program which has jurisdiction to hear this matter.

The State Bar of California will conduct fee arbitration (1) where there is no approved local program, (2) where there is a local program but it declines for any reason to hear your case, (3) where there is a local program and you wish non-binding arbitration of this dispute and the local program refuses to allow non-binding arbitration of your dispute, or (4) if you believe you cannot receive a fair hearing before the local bar named above. If you need assistance, please contact Mandatory Fee Arbitration, State Bar of California, 180 Howard Street, San Francisco, CA 94105-1639, (415) 538-2020.

Date _____ Attorney _____

(State Bar Approved Form Rev. April 1, 2007)

Comment: This form is mandatory; it must be used in State Bar and all local bar association arbitrations. See discussion in §5.7 (jurisdiction).

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Source: Civil Litigation/California Civil Procedure Before Trial/5 Client Fee Dispute Arbitrations/§5.50 B. Form: Client's Request for Arbitration of a Fee Dispute

§5.50 B. Form: Client's Request for Arbitration of a Fee Dispute

Print

Case No. _____-A-_____
Please refer to this number when contacting this office.

Client's Request for Arbitration of a Fee Dispute

State Bar fee arbitration matters are governed by the rules of procedure which were sent to you with this form. If you do not have a copy, contact this office **IMMEDIATELY**. You should read the rules carefully and, if you have questions after you have done so, contact this office.

Mail this form and filing fee to:

The State Bar of California
Mandatory Fee Arbitration Program
180 Howard Street
San Francisco, CA 94105-1639
Telephone (415) 538-2020

Please print or type.

1. (a) **CLIENT**:

Name

Box or street address

City State Zip Code

( ) Area Code Daytime Telephone Number

(b) **NAME OF INDIVIDUAL ATTORNEY** (with whom there is a dispute):

Name

Box or street address

City State Zip Code

( ) Area Code Telephone Number

2. If you are, or will be, represented by an attorney in the arbitration, provide the name, address and telephone number:

Name

Box or Street Address

City State Zip Code

( ) Area Code Telephone Number

3. The hearing in this matter will take place in the county where most of the legal services were provided. In what county were the services provided?

County

4. (a) When did you hire or first talk with the attorney?

__/__/__ Month Day Year

(b) When did the attorney stop representing you?

__/__/__ Month Day Year

5. What type of case was the attorney handling for you (divorce, criminal, etc.)?

6. Do you have a written fee agreement? (If yes, **ATTACH A COPY.**) ❑ Yes ❑ No

7. (a) Did the attorney give you a written notice of your right to arbitration? (If yes, **ATTACH A COPY OF THE NOTICE.**) ❑ Yes ❑ No

(b) If yes, what date did you receive the written notice?

__/__/__ Month Day Year

8. (a) Has the attorney filed a lawsuit against you to collect the fees or costs? (If yes, **ATTACH A COPY OF THE COMPLAINT.**) ❑ Yes ❑ No

(b) If you have been sued, have you answered the suit? (If yes, **ATTACH A COPY OF YOUR ANSWER.**) ❑ Yes ❑ No

9. Have you filed a lawsuit against the attorney? (If yes, **ATTACH A COPY OF THE COMPLAINT.**) ❑ Yes ❑ No

10. Were the fees ordered by the court or set by law? (If yes, explain on a separate sheet and **ATTACH A COPY OF THE COURT ORDER.**) ❑ Yes ❑ No

rev 10/99

Print

11. What are your reasons for using the State Bar to arbitrate this dispute instead of a local bar program?

- ☐ There is not a local bar program available.
- ☐ I do not believe that I will receive a fair hearing through the local bar program.
- ☐ The local bar does not waive filing fees.
- ☐ I do not agree to binding arbitration.
- ☐ The local bar will not arbitrate with incarcerated clients.
- ☐ Other _____.

12. Amount you already paid the attorney $ _____

13. Additional amount, if any, the attorney says you still owe $ _____

14. Add lines 12 and 13 $ _____

15. Total amount you think the attorney should be paid $ _____

16. Subtract line 15 from line 14. **This is the disputed amount.** $ _____ Disputed amount.

17. Filing Fee: (5% of the disputed amount shown on line 16 with a minimum fee of $50.00 and a maximum fee of $3,500.) $ _____

Make your check or money order payable to the State Bar of California. Do not send cash.

18. Please describe why you think the attorney's fee is too high. Attach additional sheets if necessary. _____

_____

_____

19. If the fee dispute is for $10,000 or less, it is heard by one (1) arbitrator. If it is for more than $10,000, it is heard by three (3) arbitrators. If both you and the attorney agree, you can have the dispute heard by one (1) arbitrator even if the dispute is for more than $10,000.

- ☐ My dispute is for $10,000 or less.
- ☐ My dispute is for more than $10,000 and I ***agree*** to one arbitrator
- ☐ My dispute is for more than $10,000 and I ***do not agree*** to one arbitrator.

20. Unless **both** you and the attorney agree in writing to **BINDING ARBITRATION**, this arbitration is **NON-BINDING**. This means that if you or the attorney are not happy with the award, **either** of you has the right to ask for a new trial in a *civil court* within 30 days from the date the award is mailed to you. If neither of you ask for a new trial in 30 days, the award ***automatically becomes final and binding***.

If you and the attorney **BOTH** agree in writing to make the arbitration **BINDING**, a new trial may *not* be requested and the award will *immediately* become final and binding on both of you.

Do you agree to binding arbitration? ❑ Yes ❑ No

21. If the attorney represented you in a civil matter you are entitled to chose an arbitrator who practices civil law; if your attorney represented you in a criminal matter you are entitled to chose an arbitrator who practices criminal law. Please indicate your choice below.

- ☐ I do not have a preference.
- ☐ I want an attorney who practices civil law as an arbitrator.
- ☐ I want an attorney who practices criminal law as an arbitrator.

I declare under penalty of perjury under the laws of the State of California that my statements on this request and any attachments are true and correct.

_____ _____

Client's Signature Date

State Bar Use Only		
Filing Fee Received		
Date	Amount	Check No.
Paid by:		

Comment: This form is used in fee arbitrations conducted by the State Bar only. Forms for use in other arbitrations must be obtained from the local bar association conducting the arbitration. See §§5.1, 5.4.

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§5.51 C. Form: Attorney's Reply to Client's Request for Arbitration

Print

Attorney's Reply to Client's Request for Arbitration

Please mail this form – and any supporting documents that you wish to submit – **along with an additional:**

- **two (2) copies** – of this form and your supporting documents – **if the disputed amount is less than $10,000**

-OR-

- **four (4) copies** – of this form and your supporting documents – **if the disputed amount is $10,000 or more**

to the following address:

The State Bar of California
Mandatory Fee Arbitration Program
180 Howard Street, 6th Floor
San Francisco, CA 94105-1639

Telephone (415) 538-2020

_____
Client

_____
Attorney

Case No. _____ **– A –** _____

ATTORNEY'S REPLY (Attach additional sheets as necessary):

If the fee dispute is for less than $10,000, it is heard by one (1) arbitrator. If it is for $10,000 or more, the dispute is heard by three (3) arbitrators. If both you and the client agree, you can have the dispute heard by one (1) arbitrator even if the dispute is for $10,000 or more.

Do you agree to one arbitrator? ☐ **Yes** ☐ **No**

Unless both you and the client agree in writing to BINDING ARBITRATION, this arbitration is NON-BINDING. This means that if you or the client are not happy with the award, either of you has the right to ask for a new trial in a civil court within thirty (30) days from the date the award is mailed to you. If neither of you asks for a new trial in thirty (30) days, the award *automatically* becomes final and binding.

If you and the client both agree in writing to make the arbitration BINDING, a new trial may **NOT** be requested by you or the client, and the award will immediately become final and binding on both of you.

Do you agree to binding arbitration? ☐ **Yes** ☐ **No**

I declare under the penalty of perjury under the laws of the State of California that my statements on this request and any attachments are true and correct.

_____
Attorney's Signature

_____
Date

revised 01/2000

Comment: This form is used in fee arbitrations conducted by the State Bar only. Forms for use in other arbitrations must be obtained from the local bar association conducting the arbitration. See §§5.1, 5.4.

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§5.52 D. Form: Attorney's Request for Arbitration of a Fee Dispute

Print

Attorney's Request for Arbitration of a Fee Dispute

Mail this form and filing fee to:

The State Bar of California
Mandatory Fee Arbitration
180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2020

Please print or type.

1. (a) Attorney:

Name
Box or street address
City State Zip code
Area code Telephone number

(b) Client:

Name
Box or street address
City State Zip code
Area code Telephone number

2. If you are or will be represented by an attorney in the arbitration, please provide name, address and telephone number.

Name
Box or street address
City State Zip code
Area code Telephone number

3. What county were most of the legal services provided in? _____

4. (a) When did the legal services begin? ___/___/___ (month / date / year)

(b) When did the legal services end? ___/___/___ (month / date / year)

5. What type of case is involved in the dispute (divorce, criminal, etc.)? _____

6. Do you have a written fee agreement with the client? (If yes, **attach a copy**) ❑ Yes ❑ No

7. (a) Did you give the client a written notice of right to arbitration? ❑ Yes ❑ No
(If yes, attach a copy of the Notice)

(b) If yes, when was the Notice served? ❑ Yes ❑ No

8. Have you filed a lawsuit against the client to collect the fees? ❑ Yes ❑ No
(If yes, **attach a copy of the complaint**)

9. If you have filed a lawsuit, has the client answered it? ❑ Yes ❑ No

Print

10. **Were the fees ordered by the court or set by law?** ❑ Yes ❑ No
(If yes, explain on a separate sheet.)

11. **What are your reasons for using the State Bar instead of a local bar to arbitrate your dispute?**

_____

_____

_____

13. **What is the total amount of the fee charged?** $_____

14. **How much of the fee has the client paid?** $_____

15. **How much of the fee is in dispute?** $_____

16. **Filing Fee: (5% of the disputed amount shown on line 13, with a minimum fee of $50.00 and a maximum fee of $3,500.) Make your check or money order payable to the State Bar of California. Do not send cash.** $_____

16. **Please give a description of the fee dispute. Attach additional sheets if necessary.** _____

_____

_____

17. If the fee dispute is for less than $10,000, it is heard by one (1) arbitrator. If it is for $10,000 or more, the dispute is heard by three (3) arbitrators. If both you and the client agree, you can have the dispute heard by one (1) arbitrator even if the dispute is for $10,000 or more.

Do you agree to one arbitrator? ❑ Yes ❑ No

18. Unless both you and the client agreed in writing to BINDING ARBITRATION, this arbitration is NON-BINDING. This means that if you or the client are not happy with the award, either of you has the right to ask for a new trial in a civil court within 30 days from the date the award is mailed to you. If neither of you ask for a new trial in 30 days, the award automatically becomes final and binding on both of you.

Do you agree to binding arbitration? ❑ Yes ❑ No

I declare under penalty of perjury under the laws of the State of California that my statements on this request and any attachments are true and correct.

_____ _____

Attorney's signature Dated

STATE BAR USE ONLY		
Filing Fee Received		
Date	Amount	Check No.
Paid by:		

Comment: This form is used in fee arbitrations conducted by the State Bar only. Forms for use in other arbitrations must be obtained from the local bar association conducting the arbitration. See §§5.1, 5.4.

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§5.53 E. Form: Client's Consent to Arbitration of a Fee Dispute

Print

Client's Consent to Arbitration of a Fee Dispute

_____
Attorney

_____
Client

_____ has asked for arbitration of the fee dispute between you. A copy of the attorney's request for arbitration is attached.

IF you agree to arbitrate this dispute, it will be submitted to an independent, impartial arbitrator or panel of arbitrators who will hear both sides of the dispute and make an award that is fair to both parties.

The law says that a client does **NOT** have to arbitrate unless he or she wants to. If you want to arbitrate this dispute, please fill out this form and return it to us within 30 days of (date) _____. Before you decide whether to arbitrate, you may wish to read the enclosed Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California. These rules explain how fee arbitration takes place.

If you do wish to arbitrate this dispute, please fill out this form and return it to:

The State Bar of California
Mandatory Fee Arbitration Program
180 Howard Street, 6th Floor
San Francisco, CA 94105-1639
Telephone (415) 538-2020

Number of Arbitrators:

If the fee dispute is for less than $10,000, it is heard by one (1) arbitrator. If it is for $10,000 or more, the dispute is heard by three (3) arbitrators. If both you and the client agree, you can have the dispute heard by one (1) arbitrator even if the dispute is for $10,000 or more.

Do you agree to one arbitrator? ❑ Yes ❑ No

Print

Response to Attorney's Arbitration Request:

Please give us your response to the attorney's arbitration request, including the reason(s) you believe that the attorney's fees are too high (attach additional sheets as necessary).

_____

_____

_____

_____

_____

Effect of Arbitration:

Unless both you and the client agreed in writing to binding arbitration, this arbitration is NON-BINDING. This means that if you or the attorney are not satisfied with the award, either of you has the right to ask for a new trial in a civil court within thirty (30) days from the date the award is mailed to you. If neither of you ask for a new trial within thirty (30) days, the award **AUTOMATICALLY** becomes final and binding on both of you.

Do you agree to binding arbitration? ❑ Yes ❑ No

I, _____, agree to submit the fee dispute mentioned above to mandatory Fee Arbitration by the State Bar of California .

I declare under penalty of perjury under the laws of the State of California that my statements on this consent form and any attachments are true and correct.

_____ _____

Client's signature Date

Comment: This form is used in fee arbitrations conducted by the State Bar only. Forms for use in other arbitrations must be obtained from the local bar association conducting the arbitration. See §§5.1, 5.4.

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§5.54 F. Form: Waiver of Personal Appearance

Print

FEE ARBITRATION DEPARTMENT
STATE BAR OF CALIFORNIA

Waiver of Personal Appearance

_____
Client Name

_____
Attorney Name

I, _____, am the ❑ client ❑ attorney in this matter. I will be unable to attend the hearing and, under Rule 26.1, Rules of Procedure for the Hearing of Fee Arbitrations by the State Bar of California, I waive my personal appearance.

My written testimony and/or exhibits are:

- ❑ attached to this document
- ❑ included with the Client's Request for Arbitration
- ❑ included with the Attorney's Reply

In addition, under rule 26.2, I ❑ designate ❑ do not designate a representative to attend the hearing for me. That person's name, address and telephone number are:

_____
(Name)

_____
(Address)

_____
(City, State, Zip)

_____
(Day time area code and telephone number)

I declare under penalty of perjury under the laws of the State of California that any statements in this waiver form and exhibits attached to this document are true and correct.

_____ _____
Signature **Date**

Comment: This form is used in fee arbitrations conducted by the State Bar only. Forms for use in other arbitrations must be obtained from the local bar association conducting the arbitration. See §§5.1, 5.4.

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§5.55 G. Form: Notice of Attorney Responsibility

Print

State Bar of California
Mandatory Fee Arbitration
Notice of Attorney Responsibility

In the Matter of

Case No.

To Attorney _____:

This proceeding is being conducted under the provisions of Business and Professions Code sections 6200-6206. PLEASE BE ADVISED that if (1) the client in this matter is awarded a refund of previously paid fees and/or costs; or (2) you and the client reach a mediated agreement which includes a refund of previously paid fees and or costs and you do not comply with that award once it has become final, or the written mediated agreement, the State Bar of California may place you on temporary inactive status until the refund is paid.

Accordingly, if you believe that you would not be personally responsible for any refund of fees and/or costs to the client, **you must notify this program in writing of the name and address of the person(s) responsible within fifteen (15) days of the date this notice was mailed. Failure to do so may result in your being held personally responsible for any such refund and subject to the enforcement provisions of Business and Professions Code section 6203(d).** Any person designated by you as the responsible attorney will be added as a party to the proceeding. If there is a dispute over responsibility for the fees and/or costs and the matter is resolved through arbitration, the arbitrator(s) will determine responsibility based upon the evidence presented. If this matter is resolved through mediation, any agreement reached shall include the name of the responsible attorney and shall be signed by the responsible attorney. Any communications in this regard should be mailed to this program at the following address with a copy provided to the client:

State Bar of California
Mandatory Fee Arbitration
180 Howard Street
San Francisco, CA 94105-1639

cc: Client

Date this notice was mailed:

[forms\attyresp.sb 017]

Comment: This form is used in fee arbitrations conducted by the State Bar only. Forms for use in other arbitrations must be obtained from the local bar association conducting the arbitration. See §§5.1, 5.4.

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§5.56 H. Form: Stipulation to Binding Arbitration

Print

THE STATE BAR OF CALIFORNIA
MANDATORY FEE ARBITRATION PROGRAM

Stipulation to Binding Arbitration

CLIENT

vs.

ATTORNEY

Case Number:

We agree to binding arbitration in the above referenced fee arbitration case and we understand that the award will **immediately** become final and binding and that a new trial may **not** be requested.

_____ _____
Client's Signature Dated

_____ _____
Attorney's Signature Dated

Comment: This form is used in fee arbitrations conducted by the State Bar only. Forms for use in other arbitrations must be obtained from the local bar association conducting the arbitration. See §§5.1, 5.4. Attorney and client may stipulate to binding arbitration, but only after the dispute arises. See §5.24.

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§5.57 I. Form: Subpoena Duces Tecum

Print

The State Bar of California
Fee Arbitration Department

In the matter of a Fee dispute between)
)
)
_____)
Petitioner,)
) SB No._____
and)
)
)
)
_____)
Respondent.)
_____)

SUBPOENA DUCES TECUM

TO:_____

You are hereby directed to appear and attend before_____ _____arbitrator or arbitrator panel, in the above fee dispute arbitration to be held at_____ at_____a.m./p.m. on _____, then and there to testify and bring with you the following:

_____
_____
_____
_____
_____
_____

This Subpoena is issued under the authority granted by Business and Professions Code section 6200, subdivision (g)(3) and Code of Civil Procedure section 1282.6, subdivision (b).

Dated:_____ _____
Chief or Sole Arbitrator

Subpoena was requested from the arbitrator by:
Name:_____ Address:_____

City:_____ State:_____ Zip:_____

Date:_____

Print

PROOF OF SERVICE BY MAIL	State Bar Case Number:_____-A-_____
Petitioner/Plaintiff:	Respondent/Defendant:

1. I am at least 18 years of age, not a party to this action, and I am a resident of or employed in the county where the mailing took place.
2. My residence or business address is:_____
Street Address
_____
City *State* *Zip*

3. I served a ☐ Subpoena ☐ Subpoena Duces Tecum
by enclosing it in an envelope AND
   a. ☐ depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.
   b. ☐ placing the envelope for collection and mailing on the date and at the place shown in item 4 following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service on a sealed envelope with postage fully prepaid.

4. The envelope was addressed and mailed as follows:

   a. Name of person served:_____

   b. Address:_____
   Street Address
   _____
   City *State* *Zip*

   c. Date mailed:_____/_____/_____
   Mo. *Day* *Year*

   d. Place of mailing:_____, _____
   City *State*

5. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:_____

Name_____Signature_____
(Type or Print) *(Of person completing form)*

Comment: This form is used in fee arbitrations conducted by the State Bar only. Forms for use in other arbitrations must be obtained from the local bar association conducting the arbitration. See §§5.1, 5.4. On discovery and subpoenas, see §§5.27, 5.32.

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Source: Civil Litigation/California Civil Procedure Before Trial/5 Client Fee Dispute Arbitrations/§5.58 J. Form: Notice of Stay of Proceedings (Judicial Council Form CM-180)

§5.58 J. Form: Notice of Stay of Proceedings (Judicial Council Form CM-180)

Print

CM-180

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
NOTICE OF STAY OF PROCEEDINGS	CASE NUMBER: JUDGE: DEPT.:

To the court and to all parties:

1. Declarant *(name):*
   a. ☐ is ☐ the party ☐ the attorney for the party who requested or caused the stay.
   b. ☐ is ☐ the plaintiff or petitioner ☐ the attorney for the plaintiff or petitioner. The party who requested the stay has not appeared in this case or is not subject to the jurisdiction of this court.
2. This case is stayed as follows:
   a. ☐ With regard to all parties.
   b. ☐ With regard to the following parties *(specify by name and party designation):*
3. Reason for the stay:
   a. ☐ Automatic stay caused by a filing in another court. *(Attach a copy of the Notice of Commencement of Case, the bankruptcy petition, or other document showing that the stay is in effect, and showing the court, case number, debtor, and petitioners.)*
   b. ☐ Order of a federal court or of a higher California court. *(Attach a copy of the court order.)*
   c. ☐ Contractual arbitration under Code of Civil Procedure section 1281.4. *(Attach a copy of the order directing arbitration.)*
   d. ☐ Arbitration of attorney fees and costs under Business and Professions Code section 6201. *(Attach a copy of the client's request for arbitration showing filing and service.)*
   e. ☐ Other:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT) (SIGNATURE)

Form Adopted for Mandatory Use
Judicial Council of California
CM-180 [Rev. January 1, 2007]

CEB Cal. Rules of Court, rule 3.650
www.courtinfo.ca.gov

Comment: The foregoing form is the mandatory form of Notice of Stay of Proceedings (Judicial Council Form CM-180). It should be filed when a client has requested arbitration of attorney fees and costs under Bus & P C §6201. See item 3d. See also §5.21.

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§5.59 K. Form: Findings and Award of the State Bar of California

Print

FINDINGS AND AWARD OF THE STATE BAR OF CALIFORNIA

In the matter of the arbitration between:

_____
Client

vs.

_____
Attorney

Case No.

INTRODUCTION

The matter was heard on [TYPE DATE HERE] at [TYPE TIME HERE] before a single arbitrator/a panel of three arbitrators, [TYPE NAME HERE], [TYPE NAME HERE], and [TYPE NAME HERE]. The Petitioner, [TYPE NAME HERE], was present/not present. The Petitioner was represented by [TYPE NAME HERE]. The Respondent, [TYPE NAME HERE], was present/not present. The Respondent was represented by [TYPE NAME HERE].

This arbitration is: ☐ Binding ☐ Non-Binding

RESPONSIBLE ATTORNEY

Pursuant to Business and Professions Code 6203(d), the responsible attorney in this matter is [TYPE NAME HERE].

FEES INCURRED AND AMOUNT IN DISPUTE

1. The amount that the Petitioner claims the services were worth: $_____
2. The amount that the Respondent claims the services were worth: $_____
3. The amount that the client has paid the attorney: $_____
4. If there was a written fee agreement, under the fee agreement, what fees are owed: $_____
5. The amount that the arbitrator/panel determines that the services were worth: $_____

Print

6a. The filing fee was paid to the State Bar of California by the client/attorney: [TYPE NAME HERE]

6b. The amount of the filing fee paid to the State Bar of California: $_____

STATEMENT OF FACTS/ISSUES IN DISPUTE

DISCUSSION (Statement of Reasoning)

Print

AWARD

The arbitrator/panel finds that the total amount of fees and/or costs which should have been charged in this matter are: $_____

Of which, the client is found to have paid: $_____

In addition, the fee arbitration filing fee shall be allocated:

Client: $_____

Attorney: $_____

For a net amount of: $_____

Accordingly, the following award is made:

☐ (a) Client, [TYPE NAME HERE], shall pay attorney, [TYPE NAME HERE]: $_____

OR

☐ (b) Attorney, [TYPE NAME HERE], shall refund client, [TYPE NAME HERE]: $_____

OR

☐ (c) Nothing further shall be paid by either attorney or client.

_____	_____	_____
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated
_____	_____	_____
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated
_____	_____	_____
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated

REMINDER: The Findings and Award *must* be sent to the State Bar of California's Mandatory Fee Arbitration Program. DO NOT send it directly to the parties. The MFA Program will serve a copy of this findings and award on the parties, and a photocopy will be sent to the arbitrator(s). Thank you.

Comment: This form is used in fee arbitrations conducted by the State Bar only.

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§5.60 L. Form: Notice of Your Rights After Fee Arbitration

Print

Notice of Your Rights After Fee Arbitration

(Revised October 5, 2001)

Your arbitration of attorney's fees has been decided. The arbitrator's award is enclosed. Please read the award carefully.

This notice will explain the rights you may have now that the arbitration is completed. To understand your rights, you must determine whether the award is **binding** or **non-binding**, which should be stated in the award.

If you are not satisfied with the award, you should follow the instructions below to protect your rights. If you are satisfied with the award, please see Part 1E below if your award is non-binding or Part 2C and D if your award was binding or has become binding. If you are unsure of your rights or have questions after reading this pamphlet, you should consult an attorney.

PART 1 - Rights After Non-Binding Arbitration

If the arbitration award is non-binding, you may have a right to a trial in court. However, if you did not appear at your fee arbitration hearing, you will have to prove to the court that you had a good reason for not being there. If the court determines that your failure to appear was willful, you may not be entitled to a trial after arbitration.

A. HOW LONG DO I HAVE TO ACT?

If you want a trial in court, you must act within **30 days** after the date the arbitration award was **served** on you.

The **date the arbitration award was served** is printed on the Proof of Service attached to the award.

B. HOW DO I GET A TRIAL IN COURT?

You must file **documents** in the **proper court** within the 30 day limit.

C. WHAT DOCUMENTS MUST I FILE? IN WHAT COURT MUST I FILE THEM?

That depends upon whether a lawsuit about the fees has already been filed.

(1) Yes - *lawsuit already filed.*

If a lawsuit about the fees has already been filed, then you must file a "Rejection of Arbitration Award and Request for Trial" with the same court. The bar association does not provide this document. If the lawsuit was filed in Superior Court, you may need a lawyer's help to file your

"Rejection of Arbitration Award and Request for Trial." If the lawsuit was filed in Small Claims Court, you may discuss this with a Small Claims Court Advisor. The Small Claims Court has Judicial Counsel forms to use, (forms SC-100 and SC-101) for this purpose.

(2) No - *lawsuit not yet filed.*

If no lawsuit about the fees has been filed yet, then you must file your own **lawsuit** in the **proper court**.

(a) Proper Court.

The Small Claims Court is the proper court if the amount in dispute is $5,000 or less, otherwise, the Superior Court is the proper court.

(b) How to file a lawsuit.

A lawsuit is brought by filing a "complaint" with the court. A complaint is a legal document that tells the court what you want and why you are entitled to it. The bar association **does not** have such forms. You may need a lawyer's help to file your complaint if you are filing in the Superior Court. To reject an award, you still must file a complaint, even if you are not seeking monies from the other party.

D. DO I RISK ANYTHING BY FILING FOR A TRIAL IN COURT?

Yes. The "losing party" in court **may** be ordered to pay the prevailing party's attorney's fees and costs. You will be the "losing party" if you do no better in court than you did in the arbitration.

E. WHAT IF I AM SATISFIED WITH THE AWARD?

If you are satisfied with the award, wait 30 days. The award will become binding automatically if the other party does not file for a trial in court within the 30 day period after service of the award. Once the award becomes binding, see Part 2C and D to find out what to do next.

PART 2 - Rights After Binding Arbitration

A. WHAT ARE MY RIGHTS IF THE ARBITRATION AWARD IS BINDING?

If the arbitration award is **binding**, you must abide by it. There is no appeal from a binding award. Even so, a binding award can be corrected or "vacated" (overturned) by a court, but only on limited grounds as set forth in Code of Civil Procedure section 1286.2 (see attached excerpts of the statute).

B. WHAT IF I AM DISSATISFIED WITH A BINDING AWARD?

A court has the power to "vacate" (overturn) an arbitration award, but only on very narrow grounds. A court can also correct obvious mistakes in the award, such as an arithmetic error.

If you think you are entitled to correct or vacate the arbitration award, please follow the instructions below to protect your rights.

(1) What must I do to vacate or correct a binding arbitration award?

You must file a **petition** in the **proper court**.

(2) How long do I have to act?

(a) If you want to correct or vacate the award, you must file a petition within 100 days after the date the arbitration award was served. The date of service is on the proof of service attached to the award.

(b) However, if you wish to petition to vacate or correct the award but receive notice that the other side has filed a petition to confirm the award, **you no longer have 100 days to file your petition**. You must then respond by filing, in a timely manner, your opposition to the petition to confirm the award and your petition to vacate/correct the award.

(3) What is a petition?

A **petition** is a legal document that tells the court what you want and why you are entitled to it. The bar association **does not** provide forms for these petitions. You may need a lawyer's help to prepare your petition.

(4) In what court do I file my petition?

That depends upon whether a lawsuit about the fees has already been filed.

(a) **Yes - *lawsuit already filed.***

If a lawsuit about the fees has already been filed, you will file your petition to vacate or correct the award with that same court.

(b) **No - *lawsuit not yet filed.***

If no lawsuit about the fees has been filed, then you will file your petition with the court that has jurisdiction over the amount of the arbitration award. The Small Claims Court is the proper court if the amount of the arbitration award is $5,000 or less, otherwise, the Superior Court is the proper court.

Print

(5) Do I risk anything by petitioning the court to correct or vacate the award?

Yes. If you lose, the court may order you to pay the prevailing party's attorney's fees and costs.

C. WHAT IF I AM SATISFIED WITH THE ARBITRATION AWARD AND AM OWED MONEY?

If the arbitration award grants you a refund, you should write the other party a letter and demand payment. If you are not paid, and you are the **client**, you have the right to ask the State Bar to assist you in enforcing the award. If you want the State Bar to assist you and:

(1) 100 days have passed from service of the award and the award is binding, or

(2) the award has become a final judgment following a trial after arbitration or a petition to vacate, correct or confirm the award, and

(3) The award was served less than four years ago, you may request a form for enforcement of the award by contacting the following office:

The State Bar of California
Mandatory Fee Arbitration Program
180 Howard Street, 6th Floor
San Francisco, CA 94105
(415) 538-2020

You will be required to complete a State Bar "Client's Request for Enforcement of an Arbitration Award" form. The attorney on the other side will be given an opportunity to respond to your request and agree to a payment plan. He or she will also be able to ask for an opportunity to prove that he or she is not responsible for paying you or is financially unable to pay the award.

The State Bar Court may place the opposing attorney on involuntary inactive status until the award is paid. An attorney on inactive status is not entitled to practice law. (Business and Professions Code section 6203(d)). Any party may contact the State Bar at the address above for a copy of the rules that govern this procedure.

Any party who is owed money has the right to request court orders allowing that party to take property or money from the other party's paycheck, and/or bank accounts. To get those court orders, you must first obtain a judgment confirming the arbitration award.

(1) How do I obtain a judgment confirming the arbitration award?

To obtain a judgment confirming the arbitration award, whether it was the result of a hearing or a stipulated agreement, you must **petition** for confirmation with the **proper court**.

Print

(a) What is a petition for confirmation?

A petition for confirmation is a legal document that tells the court what you want and why you are entitled to it. The bar association **does not** have forms for these petitions. You may need a lawyer's help to prepare your petition.

(b) What is the proper court?

That depends on the amount you are owed. If it is $5,000 or less, the Small Claims Court is the proper court, otherwise, the Superior Court is the proper court.

(2) How long do I have to file my petition for confirmation?

You must file your petition for confirmation within four years of the date the arbitration award is served on you. That date appears on the proof of service attached to the award.

(3) What are my rights after the arbitration award is confirmed?

When the arbitration award is confirmed, it becomes a judgment of the court. Once you have a judgment, as a judgment creditor, you have a right to "execute" the judgment. That means you may be entitled to court orders allowing you to collect your money by garnishing the other party's paycheck or bank accounts, and/or placing a lien on his or her property. The court has forms to use when you execute. The bar association has **no such forms**.

D. WHAT IF I AM SATISFIED WITH THE ARBITRATION AWARD AND I OWE MONEY?

If you owe money, pay it. If you do not pay the award, the other party has a right to obtain a judgment confirming the award and collect the judgment.

Attached are excerpts from the California Business and Professions Code and the California Code of Civil Procedure. The first excerpt, from the Business and Professions Code, is the law that governs fee arbitrations between attorneys and their clients, as well as the authority to request a trial following non-binding arbitration . The second excerpt, from the Code of Civil Procedure, sets forth the law on confirming, vacating or correcting arbitration awards.

You can find further information at your county law library or online at www.calbar.org.

WATCH THOSE DEADLINES!

The deadlines we have explained in this notice are important. You can lose certain rights if you do not act before the deadlines pass.

Comment: The State Bar Board of Governors has approved this form for mandatory use in arbitrations it conducts and in arbitrations conducted by local bar associations. It must be served at the same time as the arbitrator's award. See Bus & P C §6204.5(b); §5.35.

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6

California Jurisdiction

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I. INTRODUCTION

§6.1 A. Scope of Chapter

This chapter discusses subject matter jurisdiction over the action and personal jurisdiction over the defendant. Service of process is discussed in chap 17.

Subject matter jurisdiction (*i.e.,* whether a California court is competent to hear and determine a particular type of civil action) is discussed in §§6.4-6.39. The relationship between state and federal subject matter jurisdiction is discussed in §§6.40-6.51, limitations on subject matter jurisdiction are discussed in §§6.52-6.57, and challenging subject matter jurisdiction is discussed in §§6.58-6.59.

Personal jurisdiction (*i.e.,* whether a California court may make a ruling affecting a particular individual in a civil action) is covered in §§6.60-6.106. In rem and quasi in rem jurisdiction are discussed in §§6.107-6.110. Diagnostic questions are provided in §6.111. On challenging jurisdiction over the parties, see chap 19.

Personal jurisdiction should be distinguished from service of process, which is discussed in chap 17.

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§6.2 B. Governing Law

Subject matter jurisdiction of California courts (*i.e.,* competence of a court to adjudicate a particular civil action) is governed by the state constitution and regulated by statute. See Cal Const art VI, §§11-12 (Supreme Court); Cal Const art VI, §§10-11 (courts of appeal); Cal Const art VI, §10 (superior courts); see generally §§6.4-6.39. Limited civil cases are governed by CCP §§85-89; in particular, unlimited civil cases are defined by CCP §88. Economic litigation for limited civil cases is governed by CCP §§90-100. Jurisdiction of small claims court is governed by CCP §116.220.

Personal jurisdiction is governed by CCP §410.10.

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§6.3 C. Related Issues

Concurrently with the questions of subject matter and personal jurisdiction, the attorney should consider several related questions before filing a California civil action. These are (1) the appropriate venue for the action, *i.e.,* the geographical location of the court in which the action can be tried (see generally CCP §§392-403; see also chap 8); (2) the steps that must be followed to effect proper service of process in the action, without which the court does not acquire jurisdiction (CCP §412.20; see §17.4); and (3) if the action arises from events that occurred in more than one state or country, the applicable substantive law (see, *e.g., Hurtado v Superior Court* (1974) 11 C3d 574, 114 CR 106; *Reich v Purcell* (1967) 67 C2d 551, 63 CR 31).

Venue is ordinarily not jurisdictional, *i.e.,* an otherwise valid judgment is not rendered void when the court is not located in the proper county for trial of the action. *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 119, 101 CR 745. Venue is jurisdictional, however, when a statute specifies a place of trial as part of a grant of subject matter jurisdiction. For discussion of venue, see chap 8.

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II. SUBJECT MATTER JURISDICTION

§6.4 A. General Principles

A threshold question for an attorney preparing to institute or defend a California civil action is whether a court has jurisdiction to hear the action against the proposed defendant. In its strict sense "jurisdiction" means a court's power to hear or determine the case, *i.e.,* its authority over the subject matter and the parties. If the court lacks authority over either, it lacks jurisdiction in the strict sense. *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 288, 109 P2d 942. See also *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 120 n24, 101 CR 745.

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§6.5 1. Conferred by California Constitution

Subject matter jurisdiction of California courts (*i.e.,* competence of a court to adjudicate a particular civil action) is conferred by the state constitution and regulated by statute. See Cal Const art VI, §§11-12 (Supreme Court); Cal Const art VI, §§10-11 (courts of appeal); Cal Const art VI, §10 (superior courts).

Once subject matter jurisdiction and jurisdiction over the parties attach, the court has jurisdiction over all subsequent proceedings until final judgment is entered. CCP §410.50(b); *Riley v Superior Court* (1957) 49 C2d 305, 316 P2d 956; *Serrano v Stefan Merli Plastering Co*. (2008) 162 CA4th 1014, 1031, 76 CR3d 559 (transcript fee dispute). A court may be divested of subject matter jurisdiction, however, by statutory enactment. *Ball v Tolman* (1902) 135 C 375, 67 P 339.

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§6.6 2. Consent, Waiver, or Estoppel

Unlike personal jurisdiction, subject matter jurisdiction cannot be conferred on a court by consent of the parties (*Sampsell v Superior Court* (1948) 32 C2d 763, 197 P2d 739, disapproved on other grounds in *Robinson v Superior Court* (1950) 35 C2d 379, 218 P2d 10), by waiver (*Consolidated Theatres, Inc. v Theatrical Stage Employees Union, Local 16* (1968) 69 C2d 713, 73 CR 213), or by estoppel (*Summers v Superior Court* (1959) 53 C2d 295, 1 CR 324).

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§6.7 3. Judgment Void If Court Lacks Subject Matter Jurisdiction

A judgment rendered by a court that does not have subject matter jurisdiction is void and unenforceable (*Kee v Becker* (1942) 54 CA2d 466, 129 P2d 159) and may be attacked anywhere, directly or collaterally, by parties or by strangers to the judgment (*Davis v Myre* (1964) 228 CA2d 616, 39 CR 682).

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§6.8 4. Exclusive Concurrent Jurisdiction

The established rule of "exclusive concurrent jurisdiction" provides that, when two or more courts possess concurrent subject matter jurisdiction over a cause, the court that first asserts jurisdiction assumes it to the exclusion of all others, thus rendering "concurrent" jurisdiction "exclusive" with the first court. *Scott v Industrial Acc. Comm'n* (1956) 46 C2d 76, 81, 293 P2d 18; *Franklin & Franklin v 7-Eleven Owners for Fair Franchising* (2000) 85 CA4th 1168, 1175, 102 CR2d 770.

This rule does not apply when two courts are not of the same sovereignty, such as when one court is in California and another in Minnesota. *Advanced Bionics Corp. v Medtronic, Inc.* (2002) 29 C4th 697, 128 CR2d 172. When two courts in different states have concurrent jurisdiction over a case, although California has the power to restrain persons within the state from prosecuting actions in other domestic or foreign jurisdictions (*Speckels v Hawaiian Commercial & Sugar Co.* (1897) 117 C 377, 378, 49 P 353), this power should be used sparingly. 29 C4th at 705. A TRO may be appropriate to prevent a conflict between different California state courts, but the possibility of potentially inconsistent adjudications does not outweigh the deference due to independent foreign proceedings. Thus, California's strong interest in protecting its employees from noncompetition agreements did not justify a TRO restricting pursuit of a Minnesota action. *Advanced Bionics Corp. v Medtronic, Inc., supra*.

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§6.9 B. Supreme Court

The California Supreme Court has original jurisdiction to issue extraordinary writs of mandamus, certiorari, prohibition, and habeas corpus. Cal Const art VI, §10. The supreme court has indirect powers to review civil judgments and orders of all lower state courts and administrative agencies. It may, for example, transfer to itself before decision a case pending in a court of appeal. Cal Const art VI, §12(a). It may also, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which the cause is transferred has jurisdiction. Cal Const art VI, §12(a). The supreme court may, after a decision in the court of appeal, review that decision in any matter. Cal Const art VI, §12(b); Cal Rules of Ct 8.512(c). On the grounds for granting review, see Cal Rules of Ct 8.500(b).

The California Supreme Court has direct appellate jurisdiction only in criminal cases when judgment of death has been pronounced. Cal Const art VI, §11. The court has exclusive jurisdiction to review final decisions (except in complaint or enforcement proceedings) of the Public Utilities Commission pertaining to water corporations (Pub Util C §1756(f)), and disciplinary recommendations of the California State Bar (Cal Rules of Ct 9.13). For further discussion, see 2 Witkin, California Procedure, *Courts* §§333-334 (5th ed 2008); California Civil Appellate Practice §1.7 (3d ed Cal CEB 1996).

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§6.10 C. Courts of Appeal

The California courts of appeal have appellate jurisdiction over all civil actions in which the superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes as prescribed by statute, except for limited civil cases. See Cal Const art VI, §11(a)-(b) (appellate division of superior court has jurisdiction in appeal of limited civil cases). The courts of appeal have original jurisdiction over all petitions for extraordinary writs of mandamus, certiorari, prohibition, and habeas corpus. Cal Const art VI, §10.

For further discussion, see 2 Witkin, California Procedure, *Courts* §§335-338 (5th ed 2008); California Civil Appellate Practice §1.8 (3d ed Cal CEB 1996).

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§6.11 D. Superior Courts

The California Constitution sets the jurisdiction for the California Supreme Court and the courts of appeal and states that the superior courts "have original jurisdiction in all other causes." Cal Const art VI, §10.

NOTE: Thus, the superior court is a court of general jurisdiction, and consequently has original subject matter jurisdiction over all causes of action arising in California, except for matters in which the California legislature has limited its jurisdiction (*e.g.*, governmental immunity, failure to exhaust administrative remedies) and matters involving federal law in which Congress has conferred exclusive jurisdiction on the federal courts.

The superior courts have original jurisdiction to issue extraordinary writs, *i.e.,* mandamus, certiorari, prohibition, and habeas corpus. Cal Const art VI, §10. Although the constitution also gives original jurisdiction in writ proceedings to the courts of appeal and the California Supreme Court, application must first be made to the superior court unless a sufficient showing is made to justify an initial application to an appellate court. Cal Rules of Ct 8.486(a)(1). Superior courts may not issue extraordinary writs, however, in cases in which subject matter jurisdiction is vested exclusively in other tribunals, *e.g.,* writs directed to the Public Utilities Commission (see Pub Util C §1759).

Although subject matter jurisdiction is vested in the superior court as a whole, as a matter of convenience the superior court is divided into departments (*e.g.,* the probate department), and the legislature may require certain matters to be heard in a particular department. *Estate of Bowles* (2008) 169 CA4th 684, 695, 87 CR3d 122 (probate department had original jurisdiction over Prob C 17000 action and concurrent jurisdiction over civil complaint; local rule determines whether civil action should be assigned to probate department).

For further discussion, see 2 Witkin, California Procedure, *Courts* §§210-216 (5th ed 2008).

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§6.12 1. Trial Court Unification

The superior court has subject matter jurisdiction over civil matters formerly within the municipal court's jurisdiction, which are classified as "limited civil cases." CCP §§85-85.1 (defining "limited civil cases" as all actions or special proceedings in which the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000). See also CCP §88 (unlimited civil cases). Except for procedures specifically designed to lower litigation costs in limited civil cases, the rules of procedure generally applicable to civil actions also apply to limited civil cases. CCP §90. See, *e.g.*, Cal Rules of Ct 2.100-2.119 (form and format of papers), 3.1100-3.1312 (civil law and motion rules).

Procedural distinctions that have been preserved include:

- Limited pleadings (CCP §92);
- Limited discovery (CCP §§93-96);
- Admissibility of affidavits in lieu of live testimony (CCP §98);
- Lower filing fees (compare, *e.g.,* Govt C §70611 (initial filing fee in civil action) with Govt C §70613 (initial filing fee in limited civil action)); and
- Appeal to appellate division of superior court (CCP §904.2).

Judicial arbitration in unlimited and limited civil cases is governed by CCP §1141.11.

Statutes providing for telephonic trial-setting conferences in superior court also apply to cases formerly within the municipal court's jurisdiction. See CCP §367.5(b)(2).

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/ 2. Unlimited Civil Cases/§6.13 a. Amount in Controversy Exceeds $25,000

2. Unlimited Civil Cases

§6.13 a. Amount in Controversy Exceeds $25,000

Actions in law in which the amount in controversy exceeds $25,000 are "unlimited civil cases." See CCP §88. See also CCP §§85-85.1 (defining "limited civil cases" as all actions or special proceedings in which the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000); *Stern v Superior Court* (2003) 105 CA4th 223, 130, 129 CR2d 275.

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/§6.14 b. Unlimited Civil Cases by Statute

§6.14 b. Unlimited Civil Cases by Statute

In addition, there are a number of actions that by statute that are considered unlimited civil cases regardless of the amount in controversy or the nature of the relief sought. These include:

- Guardianship, conservatorship, and probate proceedings (Prob C §§2200, 7050);
- Adoption proceedings (Fam C §§200, 8500-9206);
- Juvenile court proceedings (Welf & I C §245);
- Actions under the Uniform Interstate Family Support Act (Fam C §§200, 4900-4976);
- Eminent domain proceedings (CCP §1250.010);
- Escheat proceedings (CCP §1410);
- Corporate dissolution proceedings (Corp C §§1800, 1904, 2000);
- Support actions under the Family Code (Fam C §200);
- Proceedings under the Family Conciliation Court Law (Fam C §§1800-1842; see Fam C §1810); and
- Marital dissolutions and other proceedings under the Family Code (see Fam C §200).

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3. Limited Civil Cases

§6.15 a. Amount in Controversy Does Not Exceed $25,000

Limited civil cases include all actions or special proceedings in which the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000, and in which the relief sought is of the type that can be granted in limited civil cases. CCP §85. See CCP §85(c) for specific examples of types of relief that can be granted in limited civil cases. Absent an amendment to a complaint in a limited civil case to conform to proof, the plaintiff may not be awarded damages in excess of the amount plaintiff claimed he sustained as stated in the complaint. *Wozniak v Lucutz* (2002) 102 CA4th 1031, 126 CR2d 310, disapproved on other grounds in *Le Francois v Goel* (2005) 35 C4th 1094, 29 CR3d 249.

The first document filed in a limited civil case must identify the case as such and must state whether the amount in controversy is greater or less than $10,000. CCP §422.30(b); Cal Rules of Ct 2.111(9)-(10). See Govt C §70613 (filing fee lower when amount in controversy under $10,000). The clerk will classify the case accordingly. CCP §422.30(b). The existence of a statute relating to the court's authority in a limited civil case does not, by itself, imply that the same authority does or does not exist in an unlimited civil case. CC §89(a). Similarly, the existence of a statute relating to the court's authority in an unlimited civil case does not, by itself, imply that the same authority does or does not exist in a limited civil case. CC §89(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/§6.16 b. Limited Civil Cases by Statute

§6.16 b. Limited Civil Cases by Statute

The following proceedings are among those that have been designated by statute as limited civil cases:

- **Value of property does not exceed $25,000.** An action at law in which the demand or the value of the property in controversy amounts to $25,000 or less, exclusive of interest, unless the case involves the legality of a tax, impost, assessment, toll, or municipal fine. CCP §86(a)(1).
- **Partnership dissolution when assets are under $25,000.** An action for partnership dissolution when the partnership assets do not exceed $25,000; interpleader actions when the amount of money or the value of property interpleaded does not exceed $25,000. CCP §86(a)(2).
- **Canceling or rescinding contract in connection with action to recover under $25,000.** An action to cancel or rescind a contract in connection with an action to recover money not exceeding $25,000, or property of a value not exceeding $25,000, paid or delivered under, or in consideration of, the contract, and actions to revise a contract when the relief is sought in an action on the contract if the action is otherwise a limited civil action. CCP §86(a)(3).
- **Unlawful detainer claim under $25,000.** A proceeding in forcible entry or forcible or unlawful detainer when the amount of the claim is $25,000 or less. CCP §86(a)(4).
- **Personal property lien under $25,000.** An action to enforce or foreclose a personal property lien when the amount of the lien is $25,000 or less. CCP §86(a)(5).
- **Mechanics' lien under $25,000.** An action to enforce and foreclose, or a petition to release, a mechanics' lien or an assessment lien on a common-interest development (*e.g.,* condominium project) when the amount of the lien is $25,000 or less. But note that, when the total amount of the liens on the property exceeds $25,000, the action is not a limited civil case. CCP §86(a)(6).
- **Declaratory relief in limited circumstances.** An action for declaratory relief (1) concerning a right of indemnity with respect to the relief demanded in an action that is otherwise a limited civil case, or (2) concerning the right to conduct a trial after a nonbinding attorney fee arbitration award for $25,000 or less under Bus & P C §§6200-6206. CCP §86(a)(7).
- **Temporary restraining orders.** An action to issue a temporary restraining order or preliminary injunction, or to take an account, when necessary to preserve the property or rights of any party; to enforce a judgment; to appoint a receiver; or to determine title to personal property seized in a limited civil case. CCP §86(a)(8).
- **Recovery of interest in personal property under $25,000.** An action for recovery of an interest in personal property or to enforce the liability of the debtor of a judgment debtor, when the value of the interest or debt does not exceed $25,000. CCP §86(a)(9).
- **Arbitration agreement when amount in controversy under $25,000.** A petition related to an arbitration agreement (see CCP §§1292-1293.2), in which the amount in controversy (or the award, if filed after the award is final) is $25,000 or less. CCP §86(a)(10).
- **Confirming, correcting, vacating attorney fee arbitration award under $25,000.** A petition brought to confirm, correct, or vacate a binding attorney fee arbitration award that does not exceed $25,000 (see Bus & P C §§6200-6206). CCP §86(a)(10).
- **Title to personal property under $25,000.** An action to try title to personal property when the amount involved does not exceed $25,000. CCP §86(b)(1).
- **Limited civil cases when equitable defense is made.** An action that meets other requirements for classification as a limited civil case in which an equitable defense is put forward. CCP §86(b)(2).
- **Action to vacate judgment**. An action brought to vacate a judgment or an order in a limited civil case. CCP §86(b)(3).
- **Action under Long-Term Care, Health, Safety, and Security Act of 1973 (Health & S C §§1417-1439.8).** An action brought under this Act if civil penalties are not sought or amount to $25,000 or less. CCP §86.1.

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§6.17 c. Appellate Jurisdiction in Limited Civil Cases

The appellate divisions of the superior courts have appellate jurisdiction in limited civil cases. Cal Const art VI, §11(b); CCP §904.2. See also CCP §77; Cal Rules of Ct 8.800-8.936 and 10.1100-10.1108.

For further discussion, see 2 Witkin, California Procedure, *Courts* §341 (5th ed 2008).

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§6.18 4. Small Claims Courts

Each superior court in the state must have a small claims division. The small claims division may be known as the "small claims court." CCP §116.210.

For statutes governing small claims courts, see CCP §§116.210-116.950. For additional rules concerning plaintiffs incarcerated in a Department of Corrections facility or a Youth Authority facility, see CCP §116.220(e)-(g).

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§6.19 a. Jurisdiction Derived From Statute

Small claims courts derive their jurisdiction solely from statute. CCP §§116.110-116.950. Under CCP §116.220(a), the subject matter jurisdiction of small claims courts is limited to:

- **Recovery of money under $5000.** Actions seeking recovery of money when the amount claimed does not exceed $5000 (on determining amount in controversy, see §6.25) (CCP §116.220(a)(1));
- **Personal property taxes under $5000.** Actions to enforce payment of delinquent unsecured personal property taxes in an amount that does not exceed $5000, as long as the legality of the tax is not contested (CCP §116.220(a)(2));
- **Writs of possession when amount does not exceed $5000.** Proceedings for issuance of a writ of possession under CC §§1861.5 and 1861.10 when the amount of the demand does not exceed $5000 (CCP §116.220(a)(3));
- **Confirming, correcting, vacating arbitration awards under $5000.** Actions to confirm, correct, or vacate an arbitration award for attorney fees that do not exceed $5000, and de novo hearings after nonbinding arbitration of a fee dispute between an attorney and client involving $5000 or less (CCP §116.220(a)(4)); and
- **Injunctions or other equitable relief.** Actions for an injunction or other equitable relief only when a statute expressly authorizes a small claims court to award that relief (CCP §116.220(a)(5)).

Jurisdiction over a defendant guarantor required to respond based on the default, actions, or omissions of another is limited to demands that do not exceed $2500, if the guarantor does not charge a fee for its guarantor or surety services. If the defendant guarantor charges for its guarantor or surety services, the limit increases to $4000 for an action brought by a natural person, and $6500 for an action brought by an entity other than a natural person. CCP §116.220(c).

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§6.20 b. Attorney Assistance to Litigants

Attorneys are not permitted to take part in the conduct or defense of small claims except as litigants. CCP §116.530(a)-(b). An attorney may, however, provide advice to a litigant, testify to matters of which he or she has personal knowledge, represent a party in an appeal to the superior court, and represent a party in connection with enforcement of a judgment. CCP §116.530(c). Representatives of insurers and "other experts" are also permitted to assist litigants, except in the conduct of the case, and to testify to matters on which they are competent witnesses. CCP §116.541. The court may permit another individual (not an attorney) to assist a party who does not speak English well enough to proceed without assistance. CCP §116.550(a).

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§6.21 c. Equitable Relief

In any actions seeking relief authorized by CCP §116.220(a)(1)-(a)(4), a small claims court may grant equitable relief in the form of rescission, restitution, reformation, or specific performance in lieu of, or in addition to, money damages. CCP §116.220(b).

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§6.22 d. Appeals of Small Claims Cases

Appeals of small claims cases continue to be heard in the superior court. In small claims appeals, the superior court tries the action de novo, before a judicial officer other than the judicial officer who heard the action in the small claims division. CCP §116.770(a). A defendant may appeal only on a plaintiff's claim and not on any cross-claim, whereas a plaintiff may appeal only on a cross-claim. CCP §116.710(b); *Skaff v Small Claims Court* (1968) 68 C2d 76, 65 CR 65.

The superior court's judgment in small claims appeals is final and not appealable. CCP §116.780(a). A superior court hearing a small claims appeal has no jurisdiction to consider a motion to vacate a judgment under CCP §473, a motion for a new trial, a motion to vacate judgment under CCP §663, or a petition for rehearing under Cal Rules of Ct 8.889. *ERA-Trotter Girouard Assoc. v Superior Court* (1996) 50 CA4th 1851, 58 CR2d 381; *Eloby v Superior Court* (1978) 78 CA3d 972, 144 CR 597. The court in *ERA-Trotter Girouard Assoc.* assumed that the court could entertain a motion to vacate or reconsider based on fraud on the court or void acts in excess of the court's jurisdiction. *ERA-Trotter Girouard Assoc.,* 50 CA4th at 1857.

The appellate division of the superior court has jurisdiction over appeals from small claims court postjudgment enforcement orders. *General Elec. Capital Auto. Fin. Servs. v Superior Court* (2001) 88 CA4th 136, 105 CR2d 552.

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§6.22A e. Res Judicata and Collateral Estoppel Effect of Small Claims Judgments

It is well established that the claim preclusion aspect of the doctrine of res judicata applies to small claims judgments. *Allstate Ins. Co. v Mel Rapton, Inc.* (2000) 77 CA4th 901, 92 CR2d 151.

In general, however, small claims judgments are not accorded any collateral estoppel issue preclusion effect because of the informality of the proceedings in small claims court. *Sanderson v Niemann* (1941) 17 C2d 563, 571, 110 P2d 1025. In *Perez v Bruno* (1980) 27 C3d 875, 168 CR 114, the supreme court revisited *Sanderson*, holding that a superior court judgment issued in an appeal from a small claims judgment may have a collateral estoppel effect. The court in *Perez* distinguished an appellate judgment in a small claims matter from the original judgment by finding that the appellate proceeding in superior court had, in fact, afforded the defendant the formalities of a normal trial. 27 C3d at 885.

Subsequently, the court of appeal considered small claims court procedures enacted after *Perez* was decided and found that the trial de novo proceedings in superior court on appeal from a small claims court judgment "are now virtually indistinguishable from original proceedings in the small claims court." *Rosse v De Soto Cab Co.* (1995) 34 CA4th 1047, 1052, 40 CR2d 680. Therefore, the *Rosse* court found that *Perez* no longer applies and that *Sanderson's* holding of no collateral estoppel effect extends to superior court appeals proceedings as well as to the original judgment in small claims court. 34 CA4th at 1052.

A small claims judgment may have a collateral estoppel effect to prevent relitigation of an issue expressly decided against the plaintiff (in contrast to an issue decided against the defendant) in a small claims court action. See *Pitzen v Superior Court* (2004) 120 CA4th 1374, 1385, 16 CR3d 628. In *Pitzen*, the court held that "[f]undamental fairness dictates that such a plaintiff, having chosen to litigate in an informal setting by bringing an action in small claims court, cannot cite the informality of that forum to gain a second chance to litigate a previously decided issue in a related matter." 120 CA4th at 1385.

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/ 5. Classification of Case as Limited or Unlimited/§6.23 a. Importance of Correct Classification

5. Classification of Case as Limited or Unlimited

§6.23 a. Importance of Correct Classification

The jurisdictional classification of a case means its classification as a limited civil case or unlimited civil case. CCP §32.5. Important procedural differences exist between limited civil cases (*e.g.*, lower court costs, simplified discovery) and other matters. Thus, it is necessary to classify actions correctly.

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§6.24 b. Classification by Party Initiating Case

The party initiating the action must classify the case as a limited or unlimited civil case in the first instance, depending on the nature of the action, *e.g.,* actions in law that are designated as unlimited civil cases by statute (see §6.14), or because the amount in controversy exceeds $25,000. See CCP §88. See also CCP §§85-85.1 (defining "limited civil cases" as all actions or special proceedings in which the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000). On defining a limited civil case, see CCP §85, discussed in §§6.15-6.17.

NOTE: The caption of every pleading filed in a limited civil case must contain the words "Limited Civil Case." CCP §422.30(b); Cal Rules of Ct 2.111(10). In addition, on the complaint, petition, or application filed in a limited civil case, below the character or the action or proceeding, the amount demanded must be stated as follows: "Amount demanded exceeds $10,000" or "Amount demanded does not exceed $10,000." Cal Rules of Ct 2.111(9). See §11.26.

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/§6.25 (1) Determining Amount in Controversy

§6.25 (1) Determining Amount in Controversy

The following guidelines for determining the amount in controversy seem likely to be of continued use in determining how a case should be classified or reclassified under CCP §§403.010-403.090:

- In computing the amount in controversy, claims for interest are excluded. CCP §85(a); *Christian v Superior Court* (1898) 122 C 117, 54 P 518 (interest on note cannot be added to principal to determine amount in controversy even when parties stipulated in note that unpaid interest would be treated as principal and itself bear interest).
- A complaint that states only that damages are "in excess of $25,000" is sufficient; a specific figure is not required. See *Engebretson & Co. v Harrison* (1981) 125 CA3d 436, 444, 178 CR 77 (upholding superior court's subject matter jurisdiction based on complaint seeking damages "in excess of $5,000," which was jurisdictional amount at that time). The demand must be in good faith. *Sellery v Ward* (1942) 21 C2d 300, 131 P2d 550.
- A court hearing a complaint properly classified as an unlimited civil case should also be able to entertain a cross-complaint arising from the same transaction, even if it seeks damages of $25,000 or less. *Sullivan v California Realty Co.* (1904) 142 C 201, 75 P 767.
- Costs are not included in computing the amount in controversy. CCP §85(a); *Henigan v Ervin* (1895) 110 C 37, 42 P 457.
- Attorney fees are not included in determining the amount in controversy. CCP §85(a).
- A plaintiff may not state any amount for punitive damages in a claim. CC §3295(e).

NOTE: It may be that a plaintiff could allege, in order to establish unlimited superior court jurisdiction, that the total amount of damages sought, including punitive damages, exceeds $25,000; but no published decision has yet addressed the issue.

PRACTICE TIP: The way the complaint is framed can make a difference in determining the amount in controversy. Careful drafting may enable an attorney to prosecute a case in a court more advantageously to his or her client than might initially appear possible. Consider, for example, an action based on the loss of personal property resulting from the defendant's wrongful acts. If the complaint seeks recovery of the property, the value of the property determines the amount in controversy. If damages for loss of use are also sought, they may not be included in computing the amount in controversy. *Holm v Davis* (1935) 8 CA2d 328, 47 P2d 537. If, however, the complaint seeks damages for conversion, the total demand of the complaint, not simply the value of the personal property, determines the amount in controversy. *Hall v Cline* (1920) 45 CA 616, 188 P 295.

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§6.26 (2) Aggregation of Claims

The following principles relating to aggregation of damages appear likely to be of continued use in determining how a case should be classified or reclassified under CCP §§403.010-403.090:

- When one plaintiff alleges multiple claims against a single defendant in a complaint, all claim demands are aggregated to establish the amount in controversy. *Hammell v Superior Court* (1932) 217 C 5, 17 P2d 101; *Strahan v Rodney* (1950) 97 CA2d 448, 217 P2d 711.
- When one plaintiff has separate claims against several defendants, aggregation is not permitted. *Myers v Sierra Valley Stock & Agric. Ass'n* (1898) 122 C 669, 55 P 689; *Heavilin v Westchester Fire Ins. Co.* (1936) 12 CA2d 695, 56 P2d 252.
- When the plaintiff has only one claim but alleges different theories of recovery, aggregation is not permitted. *Perry v Farley Bros. Moving & Storage* (1970) 6 CA3d 884, 86 CR 397.
- When several plaintiffs have joint claims against one defendant, the claims are aggregated. *Frost v Mighetto* (1937) 22 CA2d 612, 71 P2d 932.
- When two or more plaintiffs join separate claims under CCP §378 (permissive joinder), aggregation is not permitted. *Winrod v Wolters* (1903) 141 C 399, 74 P 1037; *Colla v Carmichael U-Drive Autos, Inc.* (1930) 111 CA Supp 784, 294 P 378. However, if one of the claims is for more than $25,000, the entire action is properly classified as an unlimited civil action. *Emery v Pacific Employers Ins. Co.* (1937) 8 C2d 663, 67, P2d 1046; *All-Cool Aluminum Awning Co. v Superior Court* (1964) 224 CA2d 660, 36 CR 769. On joinder of causes of action generally, see chap 14.

For further discussion of aggregating claims, see 2 Witkin, California Procedure, *Jurisdiction* §§37-43 (5th ed 2008).

NOTE: The provisions for determining the jurisdictional classification of civil cases in superior court do not apply to small claims. See §6.18.

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/ 6. Reclassification/§6.27 a. Changing Jurisdictional Classification

6. Reclassification

§6.27 a. Changing Jurisdictional Classification

After the initiation of a cause of action, a party or the court may change its jurisdictional classification in the following ways (CCP §§403.010-403.090):

- By amended initial pleading. See CCP §403.020. See §6.28.
- By cross-complaint. See CCP §403.030. See §6.29.
- By a party on a noticed motion. See CCP §403.040(a)-(b). See §6.30.
- By stipulation. See CCP §403.050. See §6.31.
- By court. See CCP §403.040(a). See §6.32.

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/§6.28 (1) By Amended Initial Pleading

§6.28 (1) By Amended Initial Pleading

A party filing an amended initial pleading (complaint, cross-complaint, petition), which changes the jurisdictional classification of the case from limited to unlimited, must at the time of filing the pleading pay the applicable reclassification fee, and the clerk must promptly reclassify the case. If the amendment changes the jurisdictional classification from unlimited to limited, no reclassification fee is required, and the clerk shall promptly reclassify the case. CCP §403.020. For reclassification fees, see CCP §403.050. See also §§6.35-6.36.

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under CCP §403.020 (reclassification by filing amended complaint or other initial pleading) or §403.030 (reclassification by filing cross-complaint), the caption must indicate that the action or proceeding is reclassified by this pleading. Cal Rules of Ct 2.111(11).

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§6.29 (2) By Cross-Complaint

A party to a limited civil case filing a cross-complaint that causes the case to exceed the amount-in-controversy limitation or that requests relief unavailable in a limited civil case may reclassify the case by stating in the caption that the action is a limited civil case to be reclassified by cross-complaint, or words to that effect. The party at the time of filing the cross-complaint must pay the reclassification fees, and the clerk must promptly reclassify the case. CCP §403.030. For reclassification fees, see CCP §403.050. See also §§6.35-6.36.

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§6.30 (3) By Noticed Motion

If a case has been mistakenly classified, any party may make a motion to have it reclassified. See CCP §403.040(a). A plaintiff, cross-complainant, or petitioner may file a motion for reclassification within the time allowed for that party to amend the initial pleading. CCP §403.040(a). A defendant or a cross-defendant may file a motion for reclassification within the time allowed for that party to respond to the initial pleading. CCP §403.040(a)-(b). The motion for reclassification does not extend the moving party's time to amend or answer or otherwise respond. The court must grant the motion, regardless of any fault or lack of fault, if case has been classified in an incorrect jurisdictional classification. CCP §403.040(a).

If the motion is filed after the deadline for amending the party's initial pleading or for filing a responsive pleading, the court must grant the motion and enter an order for reclassification, but only if both of the following conditions are met:

- The case is incorrectly classified.
- The party shows good cause for not seeking reclassification earlier.

CCP §403.040(b).

Whether a party makes a motion or the court raises the jurisdictional issue on its own motion under §403.040(a), the court must provide "sufficient opportunity to respond and offer reasons why [reclassification] should or should not be ordered." Even if no hearing is held, before ordering reclassification, the court must give the parties an opportunity to contest reclassification. *Stern v Superior Court* (2003) 105 CA4th 223, 231, 129 CR2d 275.

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§6.31 (4) By Stipulation

The parties to the action or proceeding may stipulate to reclassification of the case within the time allowed to respond to the initial pleading. CCP §403.050(a). If the stipulation for reclassification changes the jurisdictional classification of the case from limited to unlimited, the reclassification fee provided in CCP §403.060 must be paid at the time the stipulation is filed. CCP §403.050(b). On filing the stipulation and, if required under CCP §403.050(b), the payment of the reclassification fee, the clerk must promptly reclassify the case. CCP §403.050(c).

If a case is reclassified by stipulation under CCP §403.050, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or words to that effect. Cal Rules of Ct 2.111(11). For a sample caption, see §11.26.

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§6.32 (5) By Court

The court may reclassify a case at any time on its own motion. CCP §403.040(a). A court contemplating ordering reclassification on its own motion must also provide notice to the parties. *Stern v Superior Court* (2003) 105 CA4th 223, 231, 129 CR2d 275.

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/§6.33 b. When Reclassification Is Not Required

§6.33 b. When Reclassification Is Not Required

Reclassification is not required in the following circumstances:

- The judgment actually rendered in a case not classified as a limited civil case is one that could have been rendered in a limited civil case. CCP §403.040(e).
- The plaintiff in a case that is misclassified as a limited civil case solely because the demand in the complaint exceeds the amount-in-controversy limitation remits the excess. CCP §403.040(f).

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§6.34 c. Hearing to Obtain Information on Reclassification

A trial court has authority to conduct a pretrial hearing to obtain information on whether the amount of the judgment will require reclassification. The requirements for determining the amount in controversy formerly applied to the "transfer" of a case from superior to municipal court, and continue to apply when a court makes a determination of the amount in controversy for purposes of "reclassification." *Stern v Superior Court* (2003) 105 CA4th 223, 230, 129 CR2d 275.

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d. Reclassification Fees

§6.35 (1) Determination of Fees

If the court grants a motion for reclassification, the payment of the reclassification fee shall be determined, unless the court orders otherwise, as follows (CCP §403.040(c)):

- If a case is reclassified as an unlimited civil case, the party whose pleading causes the action or proceeding to exceed the maximum amount in controversy for a limited civil case or otherwise fails to meet the requirements of a limited civil case shall pay the reclassification fee provided in CCP §403.060 and Govt C §70619.
- If a case is reclassified as a limited civil case, no reclassification fee is required.

The fee for reclassification of a case from a limited civil case to an unlimited civil case is specified by statute. CCP §403.060(a) ($140 as provided in Govt C §70619). This reclassification fee is in addition to any other fee due for that appearance or filing in a limited civil case. No additional amounts are charged for appearance or filing fees paid before reclassification. After reclassification, the fees ordinarily charged in an unlimited case are charged. CCP §403.060(a).

No fee is charged for reclassification of a case from an unlimited civil case to a limited civil case. The fees ordinarily required for filing or appearing in a limited civil case are charged at the time of filing a pleading that reclassifies the case. Parties are not entitled to a refund of the difference between any fees previously paid for appearance or filing in an unlimited civil case and the fees charged in a limited civil case. After reclassification, the fees ordinarily charged in a limited civil case are charged. CCP §403.060(c).

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§6.36 (2) Reclassification Dependent on Payment of Fees

If the court grants an order for reclassification of an action or proceeding, the reclassification shall proceed as follows:

- If the required reclassification fee is paid under CCP §403.060 (reclassification fees) or if no reclassification fee is required, the clerk shall promptly reclassify the case. CCP §403.040(d)(1).
- An action that has been reclassified under CCP §403.040 shall not be further prosecuted in any court until the required reclassification fee is paid. If that fee has not been paid within five days after service of notice of the order for reclassification, any party interested in the case, regardless of whether that party is named in the complaint, may pay the fee, and the clerk shall promptly reclassify the case as if the fee had been paid as provided in CCP §403.060. The fee shall then be a proper item of costs of the party paying it, which is recoverable if that party prevails in the action or proceeding. Otherwise, the fee shall be offset against and deducted from the amount, if any, awarded to the party responsible for the fee, if that party prevails in the action or proceeding. CCP §403.040(d)(2).
- If the fee is not paid within 30 days after service of notice of an order of reclassification, the court on its own motion or the motion of any party may order the case to proceed as a limited civil case, dismiss the action or cross-action without prejudice on the condition that no other action or proceeding on the same matters may be commenced in any other court until the reclassification fee is paid, or take such other action as the court may deem appropriate. CCP §403.040(d)(3). If a reclassification fee is required and not paid at the time an amended complaint or other initial pleading, a cross-complaint, or a stipulation for reclassification is filed under CCP §403.020, §403.030, or §403.050, the clerk shall not reclassify the case, and it shall remain and proceed as a limited civil case. CCP §403.060(b).

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§6.37 e. Abuses of Discretion in Reclassification

Based on case law decided before court unification, it could be argued that a court should not reclassify a case as a limited civil case over the plaintiff's objection unless it determines that the matter will necessarily result in a verdict of $25,000 or less. *Walker v Superior Court* (1991) 53 C3d 257, 262, 279 CR 576 (trial court abused discretion by transferring two cases to municipal court despite settlement recommendation of $25,000 in one and arbitration award of $25,000 in the other). In addition, reclassification is improper when plaintiffs have no notice and no opportunity to contest reclassification and when evidence does not meet the requirement that matter will "necessarily" result in verdict below jurisdictional minimum. *Stern v Superior Court* (2003) 105 CA4th 223, 231, 129 CR2d 275.

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§6.38 f. Review of Trial Court's Reclassification Order

Review of the superior court's order reclassifying (or declining to reclassify) a case is by petition for writ of mandate in the court of appeal for the appellate district in which the superior court is located. The petitioner must serve a copy of the petition on the trial court immediately after filing it in the court of appeal. CCP §403.080.

The deadline for filing the petition is 20 days after service of the order. The superior court may extend the deadline by 10 days on application for extension within the initial 20 days, showing good cause for the extension. CCP §403.080.

The court of appeal may stay proceedings in the trial court pending resolution of the writ petition. CCP §403.080. See also form in §5.58 (Notice of Stay of Proceedings (Judicial Council Form CM-180)).

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§6.39 7. Transfer of Case Mistakenly Filed in Superior Court

The superior court cannot dismiss an appeal or petition mistakenly filed there instead of in the appropriate appellate court. CCP §396(a). An appeal or petition that is erroneously filed in the superior court must be transferred to the appropriate appellate court. CCP §396(b).

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III. RELATIONSHIP BETWEEN STATE AND FEDERAL SUBJECT MATTER JURISDICTION

§6.40 A. Scope of Discussion

In many instances, subject matter jurisdiction of federal courts is concurrent with that of California courts. Consequently, attorneys must recognize the areas of concurrent jurisdiction (see §6.41) and the factors involved in choosing one forum over another when filing an action (see §§6.42-6.51). On federal jurisdiction generally, see chap 7.

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§6.41 B. Exclusive and Concurrent Federal Court Jurisdiction

California courts have concurrent jurisdiction with federal courts in civil actions unless a federal statute provides that federal court jurisdiction is exclusive. *Brown v Pitchess* (1975) 13 C3d 518, 119 CR 204 (federal statute conferring "original jurisdiction" on federal district courts does not mean such jurisdiction is exclusive). See also *Coan v State* (1974) 11 C3d 286, 113 CR 187 (Economic Stabilization Act of 1970 (Pub L 91-379, 84 Stat 796) did not give federal courts exclusive jurisdiction over actions to compel state officials to pay wage increases authorized by state but challenged by federal Cost of Living Council created by that Act); *Miller v Municipal Court* (1943) 22 C2d 818, 850, 142 P2d 297 (state court had concurrent jurisdiction in actions arising under Emergency Price Control Act of 1942 (50 USC App §§901-946)).

The primary areas of exclusive federal court jurisdiction are:

- Admiralty, maritime, and prize cases (28 USC §1333) (but jurisdiction may be concurrent in related nonmaritime cases, *e.g.,* municipal ordinances relating to oil spillage from ships (*Mobil Oil Corp. v Town of Huntington* (Sup Ct 1972) 339 NYS2d 139));
- Bankruptcy proceedings (28 USC §1334) (but state courts have jurisdiction to decide whether the bankruptcy automatic stay of 11 USC 362(a) applies to a proceeding pending before it, over which the court otherwise has jurisdiction (*Lockyer v Mirant Corp*. (9th Cir 2005) 398 F3d 1098));
- Patent, trademark, and copyright cases (28 USC §1338; *Loew's, Inc. v Superior Court* (1941) 18 C2d 419, 115 P2d 983; see also *Adkins v Lear, Inc.* (1967) 67 C2d 882, 64 CR 545, vacated on other grounds in *Lear, Inc. v Adkins* (1969) 395 US 653, 23 L Ed 2d 610, 89 S Ct 1902 (state courts have jurisdiction in actions to enforce or cancel patent-licensing agreements); *Lockwood v Sheppard, Mullin, Richter & Hampton* (2009) 173 CA4th 675, 93 CR3d 220 (state court lacked jurisdiction over case that alleged malpractice by attorneys practicing before U.S. Patent & Trademark Office and that involved substantial questions of federal patent law); *Holiday Matinee, Inc. v Rambus Inc.* (2004) 118 CA4th 1413, 1426, 13 CR3d 766 (state court lacks jurisdiction over questions of patent validity or enforceability, even without allegations of patent infringement or fraud on U.S. Patent Office); but see *Applera Corp. v MP Biomedicals, LLC* (2009) 173 CA4th 769, 93 CR3d 178 (action for breach of patent-licensing agreement arises under state law); *Linear Technol. Corp. v Applied Materials* (2007) 152 CA4th 115, 126, 61 CR3d 221 (claims based on purchase contracts did not involve substantial question of patent law);
- ERISA claims (29 USC §1132) (*Totten v Hill* (2007) 154 CA4th 40, 47, 64 CR3d 357); and
- Flood coverage claims arising from flood insurance policies issued under the National Flood Insurance Program (42 USC §4072) (*McCormick v Travelers Ins. Co.* (2001) 86 CA4th 404, 103 CR2d 258).

For additional areas of exclusive federal court subject matter jurisdiction, see 2 Witkin, California Procedure, *Jurisdiction* §§78-80 (5th ed 2008).

Although not essential to a state court's authority to assert concurrent jurisdiction with federal courts, a specific statement of concurrent jurisdiction is provided in some federal statutes, *e.g.,* naturalization proceedings (8 USC §1421) and actions under the Federal Employers' Liability Act (FELA) (45 USC §56).

Even when state court jurisdiction is concurrent with federal courts, a defendant in a state action may be able to have the matter removed to federal court. For discussion, see chap 22.

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§6.42 C. Factors in Determining Choice of Forum

Both the plaintiff's attorney, who may choose between filing a civil action in a California state court and a federal district court in California, and the defendant's attorney, who may have a California state court action removed to federal court under 28 USC §§1441-1452, must consider numerous differences between the two systems and weigh their importance in the particular case. Although an in-depth discussion of these factors is beyond the scope of this chapter, significant differences will be noted. There are apparently no uniform conclusions in comparing California and federal courts, and the attorney's decision ultimately depends on comparison of a particular California court with a particular federal district court.

For further discussion of factors to consider in determining choice of forum, see chap 22.

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§6.43 1. Geographic Considerations

In deciding whether to file suit in a state or a federal court, or whether to remove an action from a state to a federal court, the attorney should remember that the distances that parties, witnesses, and attorneys must travel to attend trial or pretrial motions and conferences may favor one side in terms of expense and convenience. The difference is more significant in rural than urban areas because, although there is a state superior court in each county, federal district courts in California almost always sit only in San Diego (Southern District), Los Angeles, Riverside, San Bernardino, and Santa Ana (Central District), Sacramento and Fresno (Eastern District), and San Francisco, Oakland, and San Jose (Northern District). See 28 USC §84.

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§6.44 2. Venue and Transfer

A consideration for both plaintiffs' and defendants' attorneys in selecting a California state court or federal court is the possibility of transfer in federal court to a more convenient forum under 28 USC §1404(a). Although a California state court may change venue within California under CCP §§396-402 (see chap 20), it cannot transfer a case to a court outside the state. A federal court may, however, transfer a case to a federal court in any other federal district in the United States on grounds of convenience (28 USC §1404(a)) or when venue is improper in the district in which the action is brought (28 USC §1406(a)).

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§6.45 3. Applicable Substantive Law

Federal courts must apply state substantive law in determining any issue or claim that has its source in state law. *Erie R.R. v Tompkins* (1938) 304 US 64, 82 L Ed 1188, 58 S Ct 817. As between federal and California courts, this rule normally presents no advantage in filing an action in, or removing it to, one forum or the other. A federal court is bound, however, by the decision of an intermediate state appellate court, whereas a suit in a state court may result in a contrary appellate decision by another intermediate court or a higher state court.

PRACTICE TIP: When there is an intermediate state court decision that is adverse to the plaintiff's position, the plaintiff should probably file in state court, if at all, and anticipate litigating that issue on appeal.

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§6.46 4. Applicable Procedural Law

Diversity cases. Federal courts must follow state law in actions based on diversity of citizenship "if required by the federal interest in uniform procedure and the state interest in uniformity of result." *Byrd v Blue Ridge Rural Elec. Corp.* (1958) 356 US 525, 2 L Ed 2d 953, 78 S Ct 893; see also *Erie R.R. v Tompkins* (1938) 304 US 64, 82 L Ed 1188, 58 S Ct 817. Federal courts in diversity cases must apply, *e.g.,* the statutes of limitations (*Guaranty Trust Co. v York* (1945) 326 US 99, 110, 89 L Ed 2079, 65 S Ct 1464) and the conflict of laws rules (*Klaxon Co. v Stentor Elec. Mfg. Co.* (1941) 313 US 487, 85 L Ed 1477, 61 S Ct 1020) of the state in which the district court is located. When the applicability of a federal rule of civil procedure is at issue, however, the *Erie* rule does not apply and a federal court is usually free to follow the federal rule. *Hanna v Plumer* (1965) 380 US 460, 14 L Ed 2d 8, 85 S Ct 1136.

Class actions. In most cases, differences between California and federal procedural rules are not significant. One area in which the respective procedural rules differ widely, however, is class actions. Compare, *e.g., Eisen v Carlisle & Jacquelin* (1974) 417 US 156, 40 L Ed 2d 732, 94 S Ct 2140 (plaintiff must give individual notice at own cost to all class members whose names and addresses are ascertainable with reasonable effort), with *Cartt v Superior Court* (1975) 50 CA3d 960, 974, 124 CR 376, cited with approval in *Archibald v Cinerama Hotels* (1976) 15 C3d 853, 126 CR 811 (individual notice not required if unfeasible as long as notice given has reasonable chance of reaching substantial percentage of class members). Similarly, although federal law prohibits immediate appeal of a denial of a class certification motion, California law does not. *Watkins v Wachovia Corp.* (2009) 172 CA4th 1576, 1591, 92 CR3d 409 (representative plaintiff who settles after denial of class certification is no longer a class member and cannot appeal the denial), criticizing *Larner v Los Angeles Doctors Hosp. Assoc.* (2008) 168 CA4th 1291, 1300, 86 CR3d 324 (representative plaintiff who settles after denial of class certification motion may appeal the denial if plaintiff reserves right to appeal).

PRACTICE TIP: Because the federal rules are more restrictive than the California rules, a plaintiff's attorney who is considering filing a class action will often do better filing it in a California state court, if possible, than in a federal district court.

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§6.47 5. Juries

There are several important differences in the jury systems of the federal courts and California state courts that the attorney should consider in deciding which forum would be better for the client. A jury in federal district court is usually composed of six persons, but may consist of as many as 12 jurors, depending on how many the judge determines are needed (see, *e.g.,* Fed R Civ P 48), whereas in California it is composed of 12 persons unless the parties stipulate to a smaller number (CCP §220).

In federal court, the jury verdict must be unanimous, unless the parties stipulate to accept a verdict rendered by a lesser majority (Fed R Civ P 48); in California a verdict by three-fourths of the jury is sufficient (CCP §§613, 618). In federal court, jury voir dire under Fed R Civ P 47 is conducted primarily or entirely by the judge; in California state courts, the attorneys have a more active role in asking questions in civil cases (see Cal Rules of Ct 3.1540).

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§6.48 6. Calendar Congestion and Management

The relative calendar congestion in federal and state courts is a matter for the attorney's consideration in determining which forum is preferable. The degree of delay varies with the locality. Generally, federal courts move cases faster than state courts, particularly superior courts in large counties. This may be changing, however, with the implementation of delay reduction rules under the Trial Court Delay Reduction Act (Govt C §§68600-68620), enacted to speed up civil litigation at the trial court level. See chap 40.

In federal court, the practice of assigning cases to a particular judge at the time of filing can result in differences in the usual time to trial before one judge and another. Regardless of the particular judge assigned, however, it is often possible to obtain an early setting because the same judge retains control of the case for motions, pretrial, setting, and trial. The same practice provides a federal district court judge with the opportunity to become intimately acquainted with a case, which can be an advantage in complex litigation.

Except for the coordination provisions of CCP §§403-404.9, the master calendar system in some California state courts has not provided these advantages. In master calendar courts, cases are assigned to trial to a court department that is ready and able to hear the case, usually on the day the case is ready for trial. *Grant v Superior Court* (2001) 90 CA4th 518, 524, 108 CR2d 825. Other courts, such as those in the central district of Los Angeles, are "direct calendar" courts, that is, they follow the federal system in assigning one judge for all purposes, including trial. *Zilog, Inc. v Superior Court* (2001) 86 CA4th 1309, 1320, 104 CR2d 173; see, *e.g.,* Los Angeles Ct R 7.3(i). Thus, some attorneys have traditionally felt that federal courts are better equipped than California master calendar courts to adjudicate large, complex cases in which many pretrial motions are anticipated. However, under the delay reduction rules, a state case may be assigned to a single judge for all purposes.

On delay reduction programs generally, see chap 40.

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§6.49 7. Caliber of Judiciary and Opposing Counsel

In some areas, the caliber of the local state court judiciary as compared with federal district court judges is a consideration for attorneys in determining whether to file an action in, or remove one to, federal court. Many attorneys also consider the caliber and experience of opposing counsel. When federal court jurisdiction exists, some attorneys might remove a case filed in state court to federal court when the opposing attorney is unfamiliar with federal court procedures.

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§6.50 8. Attitude of Judiciary

The attorney should consider the respective attitudes of federal and state appellate court judges toward a particular type of case in deciding which court is the more advantageous forum. For example, many California attorneys prefer to file a class action in state court rather than federal court, in part because of the unfavorable attitude toward class actions expressed by the United States Court of Appeals for the Ninth Circuit. See, *e.g., In re Hotel Telephone Charges* (9th Cir 1974) 500 F2d 86, 90; *Kline v Coldwell, Banker & Co.* (9th Cir 1974) 508 F2d 226, 236 (concurring opinion of Duniway, J.).

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§6.51 9. Disqualification of Judge

The ease with which an attorney may disqualify a judge in federal or California courts is a factor to consider in choosing the forum. Generally, there is more flexibility in disqualification in California courts than in federal district courts. Although 28 USC §144 might appear on its surface to provide for disqualification in terms that are analogous to the automatic disqualification in CCP §170.6, the federal provision has been narrowly construed. See, *e.g., Duplan Corp. v Deering Milliken, Inc.* (D SC 1975) 400 F Supp 497.

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IV. LIMITATIONS ON SUBJECT MATTER JURISDICTION

§6.52 A. Governmental Immunity

Government Claims Act. The Government Claims Act (formerly known as the Tort Claims Act) (Govt C §§810-998.3), which governs the circumstances under which a government entity may be held liable for monetary damages in tort, provides that a government entity is liable for injuries only when the entity consents to suit, *e.g.*, by contract (see Govt C §814) or when a statute imposes liability (see Govt C §815). For discussion of the history of the Government Claims Act and its relation to the common law doctrine of sovereign immunity, see, *e.g.*, *Flournoy v State* (1964) 230 CA2d 520, 41 CR 190. For discussion of the substantive law of government tort liability and immunity, see California Government Tort Liability Practice (4th ed Cal CEB 1999). For procedural requirements for filing suit against a government entity imposed under the Government Claims Act, see chap 9.

Governmental immunity to a claim seeking monetary relief is a jurisdictional bar to the action. *County of Sacramento v Superior Court* (1972) 8 C3d 479, 481, 105 CR 374; *Gates v Superior Court* (1995) 32 CA4th 481, 509, 38 CR2d 489. Thus, it is appropriate to raise the defense of governmental immunity in the trial court by demurrer (32 CA4th at 487) or by a motion to dismiss (*Gould v Executive Power of State* (1952) 112 CA2d 890, 247 P2d 424). A writ of mandate or prohibition will lie from the trial court's failure to dismiss the action. See *County of Sacramento v Superior Court* (1972) 8 C3d 479, 486, 105 CR 374; *Gates v Superior Court* (1995) 32 CA4th 481, 487, 38 CR2d 489.

Tribal sovereign immunity. Absent congressional authorization or the Indian tribe's consent, a federally recognized Indian tribe is immune from any suit in state court, even if the activity that is the subject of the lawsuit is purely commercial or occurs on nontribal lands. *Ameriloan v Superior Court* (2008) 169 CA4th 81, 84, 86 CR3d 572. Under the "arms of the tribe" doctrine, the immunity also protects the tribe's for-profit business entities when they operate on behalf of the tribe. Faced with a tribal sovereign immunity challenge to its jurisdiction, a trial court may engage in limited factual and legal pretrial determinations to satisfy itself that it has the authority to hear the case. 169 CA4th at 97.

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§6.53 B. Action Barred by Time Limitations

Although a statute of limitation ordinarily provides only a defense to a civil action and does not divest a court of subject matter jurisdiction, some time limitations have the latter effect. For example, CCP §583.210 requires service of the summons and complaint within 3 years after the complaint has been filed and return of the summons or other proof of service within 60 days after the deadline for service. Unless the plaintiff can take advantage of specific exceptions provided in CCP §§583.220-583.240, failure to meet the statutory deadline for service requires dismissal. CCP §583.250. Courts strictly construe service requirements because a defendant is entitled to adequate notice of the action in order for defendant to take necessary steps to preserve evidence. *Bishop v Silva* (1991) 234 CA3d 1317, 285 CR 910 (plaintiff's failure to effect service on grounds of impossibility not persuasive under CCP §583.240 when the failure to discover relevant facts was not a cause "beyond plaintiff's control").

The strict construction of the service requirements of CCP §583.240 is in contrast to time requirements for trial under CCP §§583.310-583.360. Under the latter sections, a plaintiff's failure to bring a case to trial within the prescribed time is liberally construed because, unlike service, bringing a case to trial is not necessarily within the plaintiff's control. *Bishop v Silva, supra*; 17 Cal L Rev Comm Reports 905 (1984). For further discussion, see 2 Witkin, California Procedure, *Juris* §91 (5th ed 2008).

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§6.54 C. Failure to Exhaust Administrative Remedies

California courts do not have subject matter jurisdiction to review the decision of an administrative agency unless all administrative remedies have been exhausted. See, *e.g., U.S. v Superior Court* (1941) 19 C2d 189, 120 P2d 26 (review of order under Agricultural Marketing Agreement Act of 1937 (50 Stat 246)); *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 109 P2d 942 (proceedings under California Unemployment Insurance Act (Stats 1935, ch 352)); *Anderson v Department of Alcoholic Beverage Control* (1958) 159 CA2d 413, 324 P2d 24 (proceedings under Alcoholic Beverage Control Act (Bus & P C §§23000-25762)).

A litigant must exhaust all administrative remedies whenever the relief that plaintiff seeks could have been obtained through administrative procedures unless the remedy is ineffective. See, *e.g., Glendale City Employees' Ass'n v City of Glendale* (1975) 15 C3d 328, 343, 124 CR 513; *Morton v Superior Court* (1970) 9 CA3d 977, 88 CR 533. In *Caliber Bodyworks, Inc. v Superior Court* (2005) 134 CA4th 365, 36 CR3d 31, the court held that the trial court lacked subject matter jurisdiction over plaintiff's causes of action seeking recovery of civil penalties for violations of Lab C §2699.5 because plaintiff failed to comply with required administrative procedures before filing suit under Lab C §2699.3.

If a statute requires a particular class of controversy to be submitted first to an administrative agency as a prerequisite to judicial consideration, and the parties reasonably dispute whether the controversy comes within that class, then the agency has the power *before* judicial relief is obtained to determine whether the controversy comes within the agency's statutory grant of jurisdiction. *Blanks v Seyfarth Shaw LLP* (2009) 171 CA4th 336, 362, 89 CR3d 710 (actions colorably arising under Talent Agencies Act (see Lab C 1700.44)) must first be presented to the Labor Commissioner).

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§6.55 D. Appellate Jurisdiction Invoked

Once an appeal has been perfected or a reviewing court has issued either a writ or an order to show cause why a writ should not issue, a trial court ordinarily loses jurisdiction over the subject matter of the decision under review, and the appellate court has exclusive jurisdiction over the matter until it returns the case to the trial court. See CCP §§916, 1104. See also *Lerner v Superior Court* (1952) 38 C2d 676, 242 P2d 321; *Sacks v Superior Court* (1948) 31 C2d 537, 190 P2d 602; *Serrano v Stefan Merli Plastering Co*. (2008) 162 CA4th 1014, 1030, 76 CR3d 559.

NOTE: When the subject matter of the appeal from an order or judgment is child custody or visitation or the temporary exclusion under the Family Code (*e.g.,* Fam C §§6321, 6340) of any party from a dwelling, the trial court does not lose jurisdiction. CCP §917.7. See also *Mancini v Superior Court* (1964) 230 CA2d 547, 41 CR 213.

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§6.56 E. Voluntary Dismissal

Unless a defendant has filed a cross-complaint seeking affirmative relief (see chap 26) or has moved for a change of venue under CCP §396b (see chap 20), a California court loses subject matter jurisdiction of the case when the plaintiff voluntarily dismisses an action. CCP §581(b)(1), (h); *Roski v Superior Court* (1971) 17 CA3d 841, 95 CR 312. A lower court order setting aside the dismissal may be vacated by a writ of prohibition. *Simpson v Superior Court* (1945) 68 CA2d 821, 158 P2d 46.

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§6.57 F. Order Changing Venue

When a California court issues an order changing the venue of an action on any ground specified in CCP §397, the transferring court loses subject matter jurisdiction over the action and the receiving court exercises jurisdiction as if the action had begun there. CCP §399(c). Prohibition is available to prevent trial of the case in the transferring court. *Chase v Superior Court* (1908) 154 C 789, 99 P 355. The transferring court may consider a motion under CCP §473 to vacate the order. *Badella v Miller* (1955) 44 C2d 81, 86, 279 P2d 729. For further discussion, see 3 Witkin, California Procedure, *Actions* §916 (5th ed 2008). See also chap 20.

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§6.57A G. Standing

As is the case with federal jurisdiction, the requirement that a party must have standing to seek relief is a limitation on California subject matter jurisdiction. For example, in the Internet context, third parties who were not defendants in the underlying lawsuit lacked standing to challenge, on First Amendment grounds, a discovery order that sought the identity of anonymous posters of allegedly defamatory postings on Internet message boards. *Matrixx Initiatives, Inc. v Doe* (2006) 138 CA4th 872, 42 CR3d 79. Statutes often address whether a plaintiff has standing to seek relief. See, *e.g., In re Tobacco II Cases* (2009) 46 C4th 298, 93 CR3d 559 (standing requirements in class action under Unfair Competition Law (Bus & P C §§17200-17210) apply only to class representatives and not to all absent class members); *Meyer v Sprint Spectrum L.P.* (2009) 45 C4th 634, 641, 88 CR3d 859 (Consumers Legal Remedies Act (CLRA) (CC §§1770-1784) requires damage from exposure to unlawful practice); *Amalgamated Transit Union, Local 1756 v Superior Court* (2009) 46 C4th 993, 1005, 95 CR3d 605 (plaintiffs lack standing to bring action under Unfair Competition Law or Labor Code Private Attorneys General Act of 2004 (Lab C §§2698-2699.5) if they have not suffered injury in fact; associations suing under these statutes not exempt from standing requirement); *Reycraft v Lee* (2009) 177 CA4th 1211, 99 CR3d 746 (California Disabled Persons Act (CC 54.3) requires that plaintiff must have suffered an actual denial of equal access); *Farber v Bay View Terrace Homeowners Ass'n* (2006) 141 CA4th 1007, 46 CR3d 425 (former property owner lacked standing to enforce condominium association's CC&Rs under CC §1354(a)).

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V. CHALLENGING SUBJECT MATTER JURISDICTION

§6.58 A. Timing and Procedures

A defendant may, before judgment, challenge the assertion of subject matter jurisdiction by a demurrer or answer (CCP §430.10(a)) or by a motion to dismiss (see *Estate of Crisler* (1948) 83 CA2d 431, 188 P2d 772). A demurrer for lack of subject matter jurisdiction cannot be used to enforce a forum selection clause. *Miller-Leigh LLC v Henson* (2007) 152 CA4th 1143, 1149, 62 CR3d 83. Unlike a challenge to personal jurisdiction, an attack on subject matter jurisdiction is not waived by a failure to make it initially and may be made for the first time at any stage of the litigation, including appeal. CCP §430.80(a); *Consolidated Theatres, Inc. v Theatrical Stage Employees Union, Local 16* (1968) 69 C2d 713, 721, 73 CR 213; *Applera Corp. v MP Biomedicals, LLC* (2009) 173 CA4th 769, 781, 93 CR3d 178; *Keithley v Civil Serv. Bd.* (1970) 11 CA3d 443, 448, 89 CR 809.

When a trial court rejects a challenge to its subject matter jurisdiction, the challenging party may obtain appellate review before judgment by seeking a writ of mandate or prohibition. Ordinarily, such writs are available only after relief has been denied in the trial court. But see *WCAB v Small Claims Court* (1973) 35 CA3d 643, 645 n3, 111 CR 6 (writ of prohibition to challenge subject matter jurisdiction available in superior court without first seeking relief in small claims court because no procedures exist for challenging in that court).

When subject matter jurisdiction has been challenged unsuccessfully in the trial court before judgment, the party challenging the ruling may, after judgment, attack the ruling directly by, *e.g.,* an appeal (CCP §§904.1(a)(1), 904.2(a)) or a motion to set aside a default and default judgment (CCP §473).

A court's assertion of jurisdiction is also subject to collateral attack after judgment, *e.g.,* by action to prevent enforcing the judgment. However, Evid C §666 provides that, when a court's act is under collateral attack, there is a presumption that the court acted within its jurisdiction.

PRACTICE TIP: Although procedures exist in both trial and appellate courts for challenging a court's assertion of jurisdiction after judgment has been rendered, the most effective methods of challenge are those that raise the issue as early as possible in the litigation.

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§6.59 B. Jurisdiction to Determine Jurisdiction

When a party challenges a California court's assertion of subject matter jurisdiction in a particular case, that court has jurisdiction to determine the issue. *Scott v IAC* (1956) 46 C2d 76, 293 P2d 18. See *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 302, 109 P2d 942. If the court decides it has jurisdiction and orders that the action proceed, the question then becomes whether a court without jurisdiction is proceeding to exercise it, which is a matter of appellate review, *e.g.,* by writ of prohibition. *Rescue Army v Municipal Court* (1946) 28 C2d 460, 171 P2d 8; *Abelleira v District Court of Appeal, supra*.

When a court's decision in favor of asserting subject matter jurisdiction has become final, either by appellate review or by failure to seek review, the decision is, with some exceptions, res judicata and no longer open to attack. See *Chicot County Drainage Dist. v Baxter State Bank* (1940) 308 US 371, 84 L Ed 329, 60 S Ct 317; *Estate of Estrem* (1940) 16 C2d 563, 107 P2d 36. Factors that may be sufficient to create exceptions to this rule and allow collateral attack are set out in Restatement (Second) of Conflict of Laws §97 (1971):

- The lack of subject matter jurisdiction is clear.
- The jurisdictional issue is one of law rather than fact.
- The court is one of limited rather than general jurisdiction.
- The issue of jurisdiction was not actually litigated.
- The policy in favor of res judicata is outweighed by the policy against allowing a court to act without jurisdiction.

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VI. PERSONAL JURISDICTION

A. Introduction

§6.60 1. Statutory Basis; Legislative Intent

A court's authority over the parties depends in turn on whether the court may exercise personal jurisdiction over the defendant and on whether the defendant has been properly served. See §17.4.

Personal jurisdiction in California courts is governed by CCP §410.10, which provides that a court may exercise jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." In its Comment to CCP §410.10 ("General Principles of Judicial Jurisdiction"), the Judicial Council summarized the criteria for California's exercise of personal jurisdiction as follows:

> [A] state has power to exercise judicial jurisdiction over a person (including a natural person, a partnership, an unincorporated association, and a corporation) if the person's relationship to the state is such as to make the exercise of such jurisdiction reasonable under contemporary standards. [Citations omitted.] This relationship includes all physical and nonphysical circumstances which may serve to link a person with a state.

See *International Shoe Co. v Washington* (1945) 326 US 310, 90 L Ed 95, 66 S Ct 154. For further discussion of legislative intent, see Gorfinkel & Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 Hastings LJ 1163 (1970).

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2. Constitutional Limitations on Nonresidents

§6.61 a. Due Process Clause

As mentioned in §6.60, California courts may exercise jurisdiction over nonresidents on any basis not inconsistent with the constitution of this state or of the United States. CCP §410.10. The statute manifests an intent to exercise the broadest possible jurisdiction limited only by constitutional considerations. *Sibley v Superior Court* (1976) 16 C3d 442, 445, 128 CR 34; *Integral Dev. Corp. v Weissenbach* (2002) 99 CA4th 576, 583, 122 CR2d 24.

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. *Pedus Bldg. Servs. v Allen* (2002) 96 CA4th 152, 162, 116 CR2d 542 (quoting *Burger King Corp. v Rudzewicz* (1985) 471 US 462, 85 L Ed 2d 528, 105 S Ct 2174).

The constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum state. *Pedus Bldg. Servs. v Allen, supra*. See §6.62.

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§6.62 b. "Minimum Contacts"

The federal Constitution permits a state to exercise jurisdiction over a nonresident defendant if the defendant has sufficient "minimum contacts" with the forum such that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v Washington* (1945) 326 US 310, 316, 90 L Ed 95, 66 S Ct 154.

The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Pedus Bldg. Servs. v Allen* (2002) 96 CA4th 152, 162, 116 CR2d 542 (citing *Hanson v Denckla* (1958) 357 US 235, 253, 2 L Ed 2d 1283, 78 S Ct 1228).

This purposeful availment requirement ensures that a defendant will not be hauled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person. Jurisdiction is proper, however, when the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state. Thus when a defendant has deliberately engaged in significant activities within a state, or has created continuing obligations between himself and residents of the forum, he or she manifestly has availed him- or herself of the privilege of conducting business there, and because those activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him or her to submit to the burdens of litigation in that forum as well. *Pedus Bldg. Servs. v Allen, supra* (citing *Burger King Corp. v Rudzewicz* (1985) 471 US 462, 471, 85 L Ed 2d 528, 105 S Ct 2174).

The substantial connection between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directly toward the forum state. *Asahi Metal Indus. Co. v Superior Court* (1987) 480 US 102, 112, 94 L Ed 2d 92, 107 S Ct 1026.

If the defendant has sufficient contacts with the forum state for it to exercise its specific jurisdiction, the court must consider these contacts in conjunction with other factors to decide whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." Such factors include the burden on the defendant of litigating the matter in the forum state, the forum state's interest in adjudicating the claim, the plaintiff's interest in convenient and effective relief within the forum, judicial economy, and the shared interest of the several states in furthering fundamental substantive social policies. *Pedus Bldg. Servs.,* 96 CA4th at 164.

NOTE: A California court cannot refuse to take jurisdiction of a claim arising in California solely because the *plaintiff* is a nonresident; the main question is whether subjecting the nonresident defendant to the jurisdiction of the California court comports with fair play and substantial justice. *Epic Communications, Inc. v Richwave Technol., Inc.* (2009) 179 CA4th 314, 317, 101 CR3d 572 (jurisdiction over Taiwan corporate defendants proper based on minimum contacts even though principal corporate plaintiff also resided in Taiwan).

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§6.63 c. General and Specific Jurisdiction

Personal jurisdiction may be either "general" or "specific." *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 445, 58 CR2d 899; *Integral Dev. Corp. v Weissenbach* (2002) 99 CA4th 576, 583, 122 CR2d 24. A nonresident defendant is subject to the forum's general jurisdiction if defendant's contacts are "substantial … continuous and systematic." *Vons Cos. v Seabest Foods, Inc., supra* (quoting *Perkins v Benguet Consol. Mining Co.* (1952) 342 US 437, 445, 96 L Ed 485, 72 S Ct 413). In that situation, the cause of action need not be related to the defendant's contacts. *Vons Cos. v Seabest Foods, Inc., supra*; *Cornelison v Chaney* (1976) 16 C3d 143, 147, 127 CR 352. Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction. *Vons Cos. v Seabest Foods, Inc., supra*. Stated another way, general jurisdiction results when the defendant's contacts with the forum state are so systematic and so continuous as to make it consistent with traditional notions of fair play and substantial justice to subject the defendant to the jurisdiction of the forum, even when the cause of action is unrelated to the contacts. *VirtualMagic Asia, Inc. v Fil-Cartoons, Inc.* (2002) 99 CA4th 228, 236, 121 CR2d 1.

Even if the nonresident defendant does not have substantial and systematic contacts with the forum state, the defendant may be subject to that state's specific jurisdiction. *Vons Cos. v Seabest Foods, Inc.,* 14 C4th at 446.

Specific jurisdiction arises when (1) the defendant has purposefully availed himself or herself of forum benefits with result to the matter in controversy, (2) the controversy is related to or arises from the defendant's contacts with the forum, and (3) the exercise of jurisdiction would comport with fair play and substantial justice. *Pavlovich v Superior Court* (2002) 29 C4th 262, 269, 127 CR2d 329; *VirtualMagic Asia, Inc. v Fil-Cartoons, Inc., supra*. In such cases, the defendant has availed him- or herself of the privilege of conducting business in the forum, and because his or her activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require the defendant to submit to the burdens of litigation in that forum as well. *Tri-West Ins. Servs. v Seguros Monterrey Aetna, S.A.* (2000) 78 CA4th 672, 677, 93 CR2d 78.

For discussion of general and specific jurisdiction with corporate defendants, see §§6.94-6.95.

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§6.64 d. Forum Non Conveniens

The litigants' convenience is a factor for California courts to consider in determining whether it is reasonable under the due process clause of the Fourteenth Amendment to subject a nonresident defendant to personal jurisdiction in California. *International Shoe Co. v Washington* (1945) 326 US 310, 317, 90 L Ed 95, 66 S Ct 154; *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 750, 1 CR2d 556. More specifically, in deciding whether to assume personal jurisdiction in a close case, a court may consider (1) whether rejection of jurisdiction will lead to a multiplicity of actions or will deny a California resident a convenient forum in which to litigate a claim (see *Buckeye Boiler Co. v Superior Court* (1969) 71 C2d 893, 906, 80 CR 113) and (2) the availability of evidence and the relative burden of the defense and prosecution of an action in one forum as compared with another (see *Fisher Governor Co. v Superior* Court (1959) 53 C2d 222, 1 CR 1*,* explained in *Martin v Detroit Lions, Inc.* (1973) 32 CA3d 472, 108 CR 23).

In determining whether to grant a motion based on forum non conveniens**,** a court must first determine whether the alternate forum is a "suitable" place for trial. A suitable forum is one in which the action can be brought, even if it cannot be won there. *Roman v Liberty Univ., Inc*. (2008) 162 CA4th 670, 683, 75 CR3d 828 (Florida was suitable forum even though plaintiff's negligence was complete bar to recovery under Florida law). Comparative law questions are irrelevant in forum non conveniens analysis unless the alternative forum does not provide any remedy. *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 764, 1 CR2d 556.

If the alternative forum is suitable, the court considers the litigants' private interests and the public interest in retaining the action for trial in California. 54 C3d at 751. No single factor predominates in weighing the private and public interests. *Roman,* 162 CA4th at 684.

The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of a compulsory process for the attendance of unwilling witnesses. *Piper Aircraft Co. v Reyno* (1981) 454 US 235, 259, 70 L Ed 2d 419, 437, 102 S Ct 252; *Stangvik v Shiley Inc., supra*.

The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called on to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. *Piper Aircraft Co.,* 454 US at 259; *Stangvik v Shiley, Inc., supra*.

PRACTICE TIP: The convenience of litigants as a factor in determining whether a court has personal jurisdiction over a defendant must be distinguished from the doctrine of forum non conveniens (or inconvenient forum). Although the respective analyses are similar, the contexts are different. Rather than challenge a court's personal jurisdiction, a motion to dismiss on grounds of forum non conveniens concedes jurisdiction and asks the court to use discretion in declining to exercise jurisdiction because it is more convenient to litigate the action in a forum outside California. On motions to dismiss for forum non conveniens generally, see chap 21.

Also to be distinguished from the convenience of litigants as a factor in determining whether a court has personal jurisdiction is the convenience of witnesses as a ground for a change of venue. A motion for a change of venue concedes personal jurisdiction but seeks to transfer the matter from one California court to another. For further discussion of convenience of witnesses as it relates to motions to change venue, see chap 20.

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§6.65 3. Motion to Quash; Burden of Proof

When a defendant moves the trial court to quash service of summons for lack of personal jurisdiction, the plaintiff has the initial burden of proving that sufficient contacts exist between the defendant and California to justify the exercise of personal jurisdiction. *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 449, 58 CR2d 899; *Malone v Equitas Reinsurance Ltd.* (2000) 84 CA4th 1430, 1435, 101 CR2d 524. If that burden is met, the burden shifts to the defendant to demonstrate that the assumption of jurisdiction would be unreasonable. *Malone v Equitas Reinsurance Ltd., supra*.

A petition for writ of mandate is the appropriate method to challenge an order denying a motion to quash service of summons for lack of personal jurisdiction. *McCorkle v City of Los Angeles* (1969) 70 C2d 252, 256, 74 CR 389; *Hunt v Superior Court* (2000) 81 CA4th 901, 905, 97 CR2d 215.

On whether a motion to quash service of summons on grounds of lack of personal jurisdiction constitutes a general appearance, see §6.72.

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B. Jurisdiction Over Individuals

§6.66 1. Introduction

The California Judicial Council has recognized the following bases for exercise by a California court of personal jurisdiction over an individual:

- Presence in the state;
- Domicile;
- Residence;
- Citizenship;
- Consent;
- Appearance in an action;
- Doing business in the state;
- Doing an act in the state;
- Doing an act elsewhere that causes an effect in the state;
- Ownership, use, or possession of a thing in the state; and
- Other relationships to the state that make the exercise of jurisdiction reasonable.

See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals").

PRACTICE TIP: In considering these bases, the attorney should keep in mind the distinction between general and specific jurisdiction over a person (see §6.63) because not all bases of jurisdiction confer the same degree of judicial power. Because the principles governing personal jurisdiction are flexible and fluid, the facts of a particular case must be compared with those of published decisions before the attorney can develop an informed opinion on personal jurisdiction. The guiding principle is always whether jurisdiction is reasonable in light of contemporary standards. See Comment to CCP §410.10.

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§6.67 2. Domicile

California courts may exercise general jurisdiction (see §6.63) over an individual who is domiciled in California, even though the person is absent from the state when process is served. *Milliken v Meyer* (1940) 311 US 457, 85 L Ed 278, 61 S Ct 339; *Allen v Superior Court* (1953) 41 C2d 306, 311, 259 P2d 905. Jurisdiction over an individual is proper if he or she is domiciled in or a resident of the state when the action is commenced or when process is served. *Allen v Superior Court, supra*. Jurisdiction is also proper if the individual is a domiciliary or resident when the cause of action arises, as long as the action arises from his or her activities in the state. *Owens v Superior Court* (1959) 52 C2d 822, 345 P2d 921; *Soule v Soule* (1961) 193 CA2d 443, 14 CR 417.

Domicile is the place of a person's settled connection and where he or she intends to make a home. *DeYoung v DeYoung* (1946) 27 C2d 521, 165 P2d 457; *Estate of Glassford* (1952) 114 CA2d 181, 249 P2d 908. Although a person may maintain more than one residence, no one has more than one domicile at a time. *Johnson v Johnson* (1966) 245 CA2d 40, 44, 53 CR 567. When a person maintains more than one residence, the person's place of domicile is determined by his or her intentions, as manifested by acts and declarations (*Chambers v Hathaway* (1921) 187 C 104, 200 P 931; *Marriage of Leff* (1972) 25 CA3d 630, 102 CR 195), *e.g.,* where he or she registers to vote and files tax returns.

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§6.68 3. Residence

A state has power to exercise jurisdiction over an individual who is a resident of the state unless the individual's relationship to the state is so attenuated that it makes exercise of such jurisdiction unreasonable. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(3) Residence"), quoting Restatement (Second) of Conflict of Laws §30, Comment *a* (1971). A person's residence is the place where the person lives or has settled for a time, even if he or she has no intention of making that location a permanent home. *Smith v Smith* (1955) 45 C2d 235, 239, 288 P2d 497. For jurisdiction to attach, however, the residence must create a close relationship between the individual and the state. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(3) Residence").

Among the factors to be considered are:

- The amount of time the individual spends in the state;
- The nature of his or her place of abode in the state;
- His or her objective attitude of mind toward the state; and
- The things he or she does in the state.

For a state to have judicial jurisdiction over an individual on the basis of residence, it is necessary, at the least, that the individual spend a considerable portion of his or her time there. The nature of his or her place of abode, if any, in the state is important. He or she is more likely to have the required relationship to a state where he or she has a fixed dwelling place than in one where he or she lives only in hotels or boarding houses. He or she is also more likely to have the required relationship to the state if the state is one to which he goes of his own free choice and not on account of economic or other necessity. What the individual does in the state is significant. The greater his or her activity in the state, the closer is his or her relationship to the state and therefore the better the reason for holding that the state has judicial jurisdiction over him or her. See *Soule v Soule* (1961) 193 CA2d 443, 14 CR 417. See also Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(3) Residence").

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§6.69 4. Citizenship

A state has power to exercise jurisdiction over an individual who is a citizen of the state unless the nature of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(4) Citizenship"). Under the Fourteenth Amendment to the Constitution, a person born or naturalized in the United States and subject to its jurisdiction is a citizen of the United States and of the state in which he or she resides. A state may exercise general jurisdiction over a United States citizen who is domiciled in the state on grounds of citizenship as well as domicile. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(4) Citizenship"). See also, *e.g., Skiriotes v Florida* (1941) 313 US 69, 85 L Ed 1193, 61 S Ct 924.

The factors to be considered in determining whether jurisdiction can be exercised based on citizenship are generally the same as for jurisdiction based on residence. See §6.68. Jurisdiction based on state citizenship is, as a practical matter, superfluous because it rests on the same basis as jurisdiction based on domicile. 2 Witkin, California Procedure, *Jurisdiction* §138 (5th ed 2008). National citizenship, however, can in itself provide the basis for exercising jurisdiction over a defendant who resides or is domiciled outside the United States. See *Blackmer v U.S.* (1932) 284 US 421, 76 L Ed 375, 52 S Ct 252.

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§6.70 5. Physical Presence in State

A California court may ordinarily exercise general jurisdiction (see §6.63) over an individual who is physically present in the state, as long as he or she is properly served with process at that time. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(1) Presence"); see *Pennoyer v Neff* (1878) 95 US 714, 722, 24 L Ed 565. Presence for any period of time has been deemed sufficient. See, *e.g., Grace v MacArthur* (ED Ark 1959) 170 F Supp 442 (service on nonresident in airplane over state held valid). But such extreme applications may no longer be valid. See 2 Witkin, California Procedure, *Jurisdiction* §122 (5th ed 2008). Proper service requires adherence to California laws on service of process. See CCP §§412.10-417.40, discussed in chap 17.

Although physical presence in the state as a basis for the exercise of personal jurisdiction has been criticized (see, *e.g.,* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale LJ 289 (1956)), it clearly remains a viable and frequently used basis for asserting jurisdiction over an individual. Courts may impose limitations, however, designed to safeguard the rights of the person served. When, for example, physical presence is not voluntary, but rather the result of force or fraud, a court may decline to exercise jurisdiction. Restatement (Second) of Conflict of Laws §82 (1971); see *Guardianship of Smith* (1957) 147 CA2d 686, 691, 306 P2d 86.

In the past, immunity from service of process has been granted to witnesses (*Russell v Landau* (1954) 127 CA2d 682, 274 P2d 681) and parties (*Gerard v Superior Court* (1949) 91 CA2d 549, 205 P2d 109) who come to California to participate in legal proceedings, as well as to legislators and diplomatic officers under certain circumstances (see 3 Witkin, Procedure, *Actions* §§979-980). Its availability for attorneys who come to California to appear as attorneys of record was left open in *Tadge v Byrnes* (1918) 179 C 275, 176 P 439. The court in *Severn v Adidas Sportschuhfabriken* (1973) 33 CA3d 754, 109 CR 328, however, cast doubt on the continued vitality of the immunity doctrine. In that case, the California law of immunity from service of process was reviewed in light of CCP §413.10. The court held that a resident of France who appeared in Florida for a deposition in an action pending there was not immune from California process. The court concluded that the immunity rule exists solely for the court's convenience and extends no rights to the nonresident witness and held that the rule is no longer the law in this state (33 CA3d at 762). For further discussion, see Note, Severn v Adidas Sportschuhfabriken: *California's Long-Arm Powers and Immunity From Service of Process for Nonresidents*, 26 Hastings LJ 512 (1974). For a case extending *Severn* to nonresident *parties,* see *Silverman v Superior Court* (1988) 203 CA3d 145, 149, 249 CR 724.

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§6.71 6. Appearance in Judicial Proceeding

California courts may exercise jurisdiction over an individual who brings an action as a plaintiff or enters an appearance as a defendant in a legal action. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(6) Appearance"); CCP §1014; *Olcese v Justice's Court* (1909) 156 C 82, 103 P 317; *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 81 CR 683. By bringing an action, a plaintiff submits to the court's jurisdiction not only on the cause of action but also on any cross-complaint a defendant may assert. *Adam v Saenger* (1938) 303 US 59, 67, 82 L Ed 649, 58 S Ct 454. By making a general appearance, a defendant submits, however, to the court's jurisdiction only on the cause of action and any related proceedings. *In re Indiana Transp. Co.* (1917) 244 US 456, 61 L Ed 1253, 37 S Ct 717; *The Cadle Co. v Fiscus* (2008) 163 CA4th 1232, 1241, 78 CR3d 238 (nonresident defendant required to submit to California's jurisdiction in revival action). See CCP §410.50.

The effect of a general appearance in an appellate court by a party not properly served at trial is that the trial court, on remand, will have personal jurisdiction over the person without further service being required. *In re Alyssa F.* (2003) 112 CA4th 846, 851, 6 CR3d 1.

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§6.72 a. Acts Constituting General Appearance

The attorney who wishes to challenge a court's jurisdiction over his or her client must be careful to avoid acts that a court might construe as constituting a general appearance. A general appearance occurs when a party, either directly or through counsel, participates in an action in some manner that recognizes the court's authority to proceed. It does not require any formal or technical act. *Mansour v Superior Court* (1995) 38 CA4th 1750, 1756, 46 CR2d 191. Under CCP §1014, a defendant makes a general appearance when he or she answers, demurs, files a notice of motion to strike or a notice of motion to transfer under CCP §396b, moves for reclassification under CCP §403.040, gives the plaintiff written notice of an appearance, or has an attorney give such notice for him or her. The statutory list of acts constituting a general appearance, such as filing an answer, demurrer, or motion to strike, is not exclusive, however; rather, the term may apply to various acts which, under the circumstances, are deemed to confer jurisdiction of the person. *Hamilton v Asbestos Corp.* (2000) 22 C4th 1127, 1147, 95 CR2d 701.

What is determinative is whether the defendant takes a part in the particular action which in some manner recognizes the authority of the court to proceed. *Nam Tai Electronics, Inc. v Titzer* (2001) 93 CA4th 1301, 1307, 113 CR2d 769, disapproved on other grounds in *Pavlovich v Superior Court* (2002) 29 C4th 262, 278 n8, 127 CR2d 329; *Sanchez v Superior Court* (1988) 203 CA3d 1391, 1397, 250 CR 787. The appearance will be considered general in nature if the defendant acts in a manner showing a purpose of obtaining any ruling or order of the court going to the merits of the case. *Nam Tai Electronics, Inc. v Titzer, supra*; *California Overseas Bank v French Am. Banking Corp.* (1984) 154 CA3d 179, 184, 201 CR 400. For example, in *Fireman's Fund Ins. Co. v Sparks Constr. Co.* (2004) 114 CA4th 1135, 8 CR3d 446, defendants filed their answers, cross-complaints, and a motion for summary judgment. Although defendants later learned they had never been properly named or served with the action, the court held they had made a general appearance, subjected themselves to the court's jurisdiction, and become parties to the action.

A motion to quash service of summons on grounds of lack of personal jurisdiction does not constitute a general appearance. CCP §418.10(d). A defendant or cross-defendant may make a motion under CCP §418.10 (to quash for lack of personal jurisdiction, to stay or dismiss on ground of inconvenient forum, or to dismiss for delay in prosecution) and simultaneously answer, demur, or move to strike the complaint or cross-complaint. CCP §418.10(e). Despite CCP §1014, no act by a party that makes a motion under CCP §418.10, including filing an answer, demurrer, or motion to strike, constitutes an appearance, unless the court denies the motion made under §418.10. See, *e.g.*, *Roy v Superior Court* (2005) 127 CA4th 337, 25 CR3d 488 (defendant who asserted lack of personal jurisdiction as affirmative defense, but did not file motion to strike and subsequently participated in litigation, waived objection to jurisdiction). If the court denies the motion under §418.10, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion. CCP §418.10(e)(1).

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§6.73 b. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A motion to dismiss for lack of subject matter jurisdiction does not constitute a general appearance. *Goodwine v Superior Court* (1965) 63 C2d 481, 47 CR 201. A special appearance only to contest subject matter jurisdiction does not also constitute a challenge to personal jurisdiction. See *Jantzen v WCAB* (1997) 61 CA4th 109, 116, 71 CR2d 260 (defendant waived any objection to personal jurisdiction by making special appearance solely to contest subject matter jurisdiction). See also *Greener v WCAB* (1993) 6 C4th 1028, 1037 n11, 25 CR2d 539 (moving party who seeks relief on any basis other than lack of personal jurisdiction makes general appearance).

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§6.74 c. Motion for Attorney Fees

A party who brings a motion for attorney fees in connection with a combined motion to quash for lack of personal jurisdiction and to dismiss on the ground of inconvenient forum does not make a general appearance. *Berard Constr. Co. v Municipal Court* (1975) 49 CA3d 710, 122 CR 825. The court has the inherent power to rule on a motion for attorney fees even following a successful motion to quash. *Shisler v Sanfer Sports Cars, Inc.* (2008) 167 CA4th 1, 6, 83 CR3d 771.

A party makes a general appearance if that party brings a motion for attorney fees after a case has been dismissed for reasons unrelated to personal jurisdiction. *Dial 800 v Fesbinder* (2004) 118 CA4th 32, 12 CR3d 711. In *Dial 800,* two defendants in an interpleader action, an Israeli citizen and a foreign corporation, had contested personal jurisdiction. After the court dismissed the interpleader action sua sponte for lack of subject matter jurisdiction, the defendants filed a motion for attorney fees, claiming that they were the prevailing party under the terms of the contract that had been at issue in the interpleader action. The court found that in seeking attorney fees as the prevailing party, defendants were requesting affirmative relief by asking the court to determine rights under the contract. As a result, the court held that defendants had made a general appearance and were subject to California jurisdiction in the interpleader action. 118 CA4th at 44.

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§6.75 d. Filing Status Conference Questionnaire

A defendant's actions in filing the status conference questionnaire and appearing at the status conference do not constitute a general appearance. *Nam Tai Electronics, Inc. v Titzer* (2001) 93 CA4th 1301, 1307, 113 CR2d 769, disapproved on other grounds in *Pavlovich v Superior Court* (2002) 29 C4th 262, 278 n8, 127 CR2d 329.

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§6.76 e. Filing Answer

A defendant who makes a general appearance by filing an answer in an action submits to the court's jurisdiction even if the answer includes a clause attempting to disclaim the submission or to limit the appearance. *Neihaus v Superior Court* (1977) 69 CA3d 340, 137 CR 905. Similarly, even if the defendants were never properly named or served with an action, when they filed their answers, cross-complaints, and a motion for summary judgment, they had made a general appearance, subjected themselves to the court's jurisdiction, and become parties to the action. *Fireman's Fund Ins. Co. v Sparks Constr. Co.* (2004) 114 CA4th 1135, 8 CR3d 446.

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§6.77 f. Service of Notice of Taking Deposition

A party serving a notice of taking of a deposition and for production of documents subjects him- or herself to jurisdiction, even though the appearance is designated as special and the notice is never filed with a court. *Creed v Schultz* (1983) 148 CA3d 733, 196 CR 252.

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§6.78 7. Consent to Jurisdiction

A California court may exercise jurisdiction over a person who has consented to the exercise of jurisdiction (*National Equip. Rental, Ltd. v Szukhent* (1964) 375 US 311, 315, 11 L Ed 2d 354, 84 S Ct 411), as long as he or she is competent to give consent (*Harrington v Superior Court* (1924) 194 C 185, 228 P 15). See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(5) Consent").

In *Nobel Farms, Inc. v Pasero* (2003) 106 CA4th 654, 656, 130 CR2d 881, a nonresident plaintiff who filed suit in California against particular parties consented to jurisdiction in California when those same parties later sued him in a related action. See also *General Contracting & Trading v Interpole, Inc.* (1st Cir 1991) 940 F2d 20, 22 (reaching similar conclusion). Thus, a Mexican attorney who had previously sued his former clients in California for unpaid legal fees consented to personal jurisdiction in California in a legal malpractice suit by those former clients arising from the same transaction. *Nobel Farms, Inc.,* 106 CA4th 654. In contrast, a defendant does not imply consent to personal jurisdiction by previously having waived jurisdiction as a defendant in litigation brought by a different plaintiff in the same court. See *Dow Chem. Co. v Calderon* (9th Cir 2005) 422 F3d 827. In *Dow Chem.,* the Ninth Circuit agreed "there is nothing unfair or violative of due process about requiring a party that has affirmatively sought the aid of our courts… to submit to jurisdiction in the same forum as a defendant with regard to the same transaction with the same party." 422 F3d at 835. Having only *defended* against two separate actions, the Nicaraguan defendants in *Dow Chem.* had made no "affirmative decision to seek relief" and, thus, there could be "no imputation of a conscious decision to settle all aspects of a dispute in our courts." 422 F3d at 836.

Consent to jurisdiction may be implied by a party's actions. For example, in *Szynalski v Superior Court* (2009) 172 CA4th 1, 9, 90 CR3d 683 a nonresident California class action plaintiff obtained court approval of the action's settlement; retained and benefitted from the services of a court-appointed settlement administrator; agreed to pay the administrator's fees; and understood that the court retained jurisdiction to adjudicate issues arising from the settlement agreement. By these actions, the nonresident plaintiff consented to jurisdiction and had sufficient minimum contacts for specific jurisdiction in the administrator's suit against him for its fees. That the plaintiff attempted in the settlement agreement to reserve his objection to personal jurisdiction could not alter the personal jurisdiction conferred by minimum contacts or consent. 172 CA4th at 11.

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§6.79 8. Forum Selection Clauses

Parties to a contract may agree that any action on the contract will be brought in a particular state. *National Equip. Rental, Ltd. v Szukhent* (1964) 375 US 311, 315, 11 L Ed 2d 354, 84 S Ct 411 (New York had jurisdiction over Michigan residents who consented in lease agreement to be sued in New York); *Smith, Valentino & Smith, Inc. v Superior Court* (1976) 17 C3d 491, 131 CR 374; see *Cal-State Bus. Prod. & Serv. v Ricoh* (1993) 12 CA4th 1666, 16 CR2d 417 (California dealer bound by clause in agreement with New York distributor). This consent rule no longer applies in the context of passenger tickets. See 46 USC App §183c.

There is no public policy reason to deny enforcement of a forum selection clause in a contract that the parties freely made. *Smith, Valentino & Smith, Inc.,* 17 C3d at 495; see *Nam Tai Electronics, Inc. v Titzer* (2001) 93 CA4th 1301, 1312, 113 CR2d 769, disapproved on other grounds in *Pavlovich v Superior Court* (2002) 29 C4th 262, 278 n8, 127 CR2d 329.

A forum selection clause may be mandatory or permissive. A distinction has been drawn, however, between a mandatory and a permissive forum selection clause for purposes of analyzing whether the clause should be enforced. A mandatory clause is ordinarily given effect without any analysis of convenience; the only question is whether enforcement of the clause would be unreasonable. In contrast, when the clause merely provides for submission to jurisdiction and does not expressly mandate litigation exclusively in a particular forum, then the traditional forum non conveniens analysis applies. *Intershop Communications AG v Superior Court* (2002) 104 CA4th 191, 195, 127 CR2d 847.

A forum selection clause may not be enforceable if the clause fails to provide adequate notice to the defendant that he was agreeing to the jurisdiction cited in the contract. *Hunt v Superior Court* (2000) 81 CA4th 901, 908, 97 CR2d 215 (clause in contract of adhesion, giving jurisdiction over disputes to "applicable forum" without clearly naming California as applicable forum, did not give adequate notice to Maryland resident that dispute over contract would be tried in California). To be valid, a forum selection clause "must be clear and unambiguous in designating a forum as exclusive and mandatory." *CQL Original Prods. v National Hockey League Players' Ass'n* (1995) 39 CA4th 1347, 1358, 46 CR2d 412. See also *Berg v MTC Electronics Technols. Co.* (1998) 61 CA4th 349, 71 CR2d 523 (clause that provided for personal jurisdiction in California but did not specify that named forum was exclusive found to be "permissive" forum selection clause).

The forum selection clause must also bind the parties to the instant proceeding, as opposed to third parties. For example, in one action, a Hong Kong-based corporation brought an action against a Yahoo user who posted allegedly defamatory statements on a Yahoo bulletin board. The Yahoo user, a nonresident of California, had consented to Yahoo's terms-of-service agreement, which contained a California forum selection clause. The forum selection clause governed litigation between registered users and Yahoo, not registered users and third parties. Accordingly, the fact that the defendant may have agreed to the terms of service cannot, by itself, justify subjecting him to California jurisdiction for purposes of the present lawsuit. *Nam Tai Electronics, Inc. v Titzer* (2001) 93 CA4th 1301, 1313, 113 CR2d 769, disapproved on other grounds in *Pavlovich v Superior Court* (2002) 29 C4th 262, 278 n8, 127 CR2d 329.

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9. Acts Done in State

§6.80 a. Doing Business in State

A state has the power to exercise jurisdiction over a nonresident individual who does business in the state with respect to a cause of action arising from that business. See *McGee v International Life Ins. Co.* (1957) 355 US 220, 2 L Ed 2d 223, 78 S Ct 199; see Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(7) Doing Business in State"). If the defendant has availed him- or herself of the privilege of conducting business in the forum, and if his or her activities are thus shielded by the benefits and protections of the forum's laws, it is presumptively not unreasonable to require the defendant to also submit to the burdens of litigation in that forum. *Burger King Corp. v Rudzewicz* (1985) 471 US 462, 471, 85 L Ed 2d 528, 105 S Ct 2174; *Pedus Bldg. Servs. v Allen* (2002) 96 CA4th 152, 163, 116 CR2d 542.

Stated otherwise, if the nonresident defendant does not have sufficient contacts with the forum state to subject him or her to its general jurisdiction, he or she still may be subject to the specific jurisdiction of the forum, if the defendant has purposely availed him- or herself of forum benefits, and the controversy is related to or arises from a defendant's contacts with the forum. *Jewish Defense Org. v Superior Court* (1999) 72 CA4th 1045, 1054, 85 CR2d 611. The three-part test for specific jurisdiction is then applied. See *Pedus Bldg. Servs.,* 96 CA4th at 164; *Jewish Defense Org. v Superior Court, supra*. For the three-part test, see §6.63.

"Doing business" has been defined as doing a series of similar acts for the purpose of realizing a pecuniary benefit, or otherwise accomplishing an object, or doing a single act for this purpose with the intention of initiating a series of such acts. *Titus v Superior Court* (1972) 23 CA3d 792, 804, 100 CR 477; Restatement (Second) of Conflict of Laws §35, Comment *a* (1971). For example, a former regional manager, who lived in Texas, availed himself of the privilege of doing business in California. During a nine-year tenure with the plaintiff, a California corporation, the defendant made numerous business trips to California, and after he resigned he met with his superior in California and negotiated a noncompetition and separation agreement, which were to be governed by California law. *Pedus Bldg. Servs. v Allen, supra*.

If the defendant has sufficient contacts with the forum state for it to exercise its specific jurisdiction, the court must consider these contacts in conjunction with other factors to decide whether the assertion of personal jurisdiction would comport with fair play and substantial justice. Such factors include the burden on the defendant of litigating the matter in the forum state, the forum state's interest in adjudicating the claim, the plaintiff's interest in convenient and effective relief within the forum, judicial economy, and the several states' shared interest in furthering fundamental substantive social policies. *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 446, 58 CR2d 899; *Pedus Bldg. Servs. v Allen* (2002) 96 CA4th 152, 163, 116 CR2d 542.

For discussion of nonresident corporations that have been held to be doing business in California, see §6.93.

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§6.81 b. Tort Actions

California courts have jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any tort action arising from the act, unless the nature of the act of the individual's relationship to the state make the exercise of such jurisdiction unreasonable. The principal factors to be considered are the nature and quality of the act or omission, the extent of the relationship of the state to the defendant and to the plaintiff, and the degree of inconvenience that would result to the defendant by being forced to stand suit in the estate on the particular cause of action. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(8) Doing an Act in State"); *Rosenblatt v American Cyanamid Co.* (Goldberg, Cir J, 1965) 15 L Ed 2d 39, 86 S Ct 1. See also *Hess v Pawloski* (1927) 274 US 352, 71 L Ed 1091, 47 S Ct 632 (automobile accident); *Owens v Superior Court* (1959) 52 C2d 822, 345 P2d 921 (ownership and possession of biting dog); *National Life of Fla. Corp. v Superior Court* (1971) 21 CA3d 281, 98 CR 435 (fraud).

Without other contacts with the forum state, a defendant's commission of an out-of-state intentional tort that is directed at a California resident may provide sufficient minimum contacts to support the exercise of personal jurisdiction over the nonresident defendant. *West v Superior Court* (2004) 116 CA4th 1167, 11 CR3d 145; *Integral Dev. Corp. v Weissenbach* (2002) 99 CA4th 576, 586, 122 CR2d 24 (citing *Calder v Jones* (1984) 465 US 783, 79 L Ed 2d 804, 104 S Ct 1482); *Data Disc, Inc. v Systems Technol. Assocs., Inc.* (9th Cir 1977) 557 F2d 1280. For discussion of tort cases in which courts have made a determination of jurisdiction based on a defendant's out-of-state conduct that caused in-state effects, see §6.86.

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c. Contract Actions

§6.82 (1) Execution and Effect of Contract

California's jurisdiction over an individual defendant in an action for breach of contract has been approved, *e.g.,* when the contract was to be performed in the state (*Ault v Dinner for Two, Inc.* (1972) 27 CA3d 145, 103 CR 572), when it was substantially negotiated in the state (*Beirut Universal Bank v Superior Court* (1969) 268 CA2d 832, 74 CR 333), and when it was entered into and to be performed in the state (*Long v Mishicot Modern Dairy, Inc.* (1967) 252 CA2d 425, 60 CR 432).

The place where the contract is formed may be important in determining whether California may exercise jurisdiction over a nonresident defendant; a contract is formed where the last act in its execution is performed. See *Michelin Tire Co. v Coleman & Bentel Co.* (1919) 179 C 598, 603, 178 P 507; *Stone v Texas* (1999) 76 CA4th 1043, 1048, 90 CR2d 657 (signing of contract as "accepted" did not form contract when plaintiff sent counteroffer; contract formed when plaintiff signed memorandum of appointment in Texas). In any event, the place of contracting is not dispositive. *Burger King Corp. v Rudzewicz* (1985) 471 US 462, 478, 85 L Ed 2d 528, 105 S Ct 2174. The place where a contract is executed is far less important than where the consequences of performing that contract come to be felt. *Dunne v Florida* (1992) 6 CA4th 1340, 1345, 8 CR2d 483; see *Stone v Texas, supra*.

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§6.83 (2) Minimum Contacts Required

The plaintiff must show that the requisite minimum contacts exist; in particular, he or she must meet the "purposeful availment" prong of the two-prong minimum contacts test. "Purposeful availment" requires that the defendant have performed some type of affirmative conduct that allows or promotes the transaction of business in the forum state.

A contract with an out-of-state party does not automatically establish purposeful availment in the other party's home forum. Rather, a court must evaluate the contract terms and the surrounding circumstances to determine whether the defendant purposefully established minimum contacts in the forum. Relevant factors include prior negotiations, contemplated future consequences, the parties' course of dealings, and the contract's choice-of-law provision. *D&P Design, LLC v Med-1 Ptnrs, LLC* (SD Cal, Oct 7, 2009) 2009 US Dist Lexis 94700 at *17 (discussing factors contributing to finding that Maryland defendant contracting with California plaintiff, for work in India, did not purposefully avail itself of California law); *Stone v Texas* (1999) 76 CA4th 1043, 1048, 90 CR2d 657; *Goehring v Superior Court* (1998) 62 CA4th 894, 907, 73 CR2d 105 (citing *Burger King Corp. v Rudzewicz* (1985) 471 US 462, 478, 85 L Ed 2d 528, 105 S Ct 2174). An out-of-state defendant's use of e-mail and telephone may also establish sufficient minimum contacts with California to permit the court to exercise jurisdiction. *Hall v LaRonde* (1997) 56 CA4th 1342, 1344, 66 CR2d 399. But see *Shisler v Sanfer Sports Cars, Inc.* (2006) 146 CA4th 1254, 1261, 53 CR3d 335 (Florida automobile dealer's use of website did not create sufficient minimum contacts with California).

Due process requires a "substantial connection" between the contract at issue and the forum state. *McGee v International Life Ins. Co.* (1957) 355 US 220, 223, 2 L Ed 2d 223, 78 S Ct 199 (California had jurisdiction when life insurance policy was delivered in California, the premiums were mailed from here, and the insured remained a resident here until his death; California has manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims). To hold that a foreign corporation has subjected itself to the judicial jurisdiction of California by the simple act of employing a California resident to perform services not within the State of California would be totally inconsistent with both the state and federal constitutions. *Stone v Texas, supra*; *Stanley Consultants, Inc. v Superior Court* (1978) 77 CA3d 444, 451, 143 CR 655.

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§6.84 (3) Employment Agreements

A court may have personal jurisdiction over an out-of-state defendant if the defendant's forum-related activities create ongoing obligations to California residents. For example, in *Martin v Detroit Lions, Inc.* (1973) 32 CA3d 472, 475, 108 CR 23, a nonresident defendant recruited the plaintiff in California to play professional football for it, but the court's exercise of jurisdiction was also based on the required performance of the contract in California and the defendant's substantial economic activity here.

In another case, such obligations were created when Oregon State University recruited a California resident to play basketball and he suffered a fatal stroke while playing a game in California. The nonresident defendants' forum-related activities created ongoing obligations to California residents. *Oregon v Superior Court* (1994) 24 CA4th 1550, 1557, 29 CR2d 909, disapproved on other grounds in *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 465, 58 CR2d 899.

In a third case, the partial execution of a contract in California did not give the state jurisdiction over an out-of-state employer regarding an employment contract wholly performed in Texas. See *Stone v Texas* (1999) 76 CA4th 1043, 90 CR2d 657.

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§6.85 (4) Contracts Involving Purchase of Goods

When an out-of-state resident's only contact with California is a single purchase from a California vendor of goods for delivery out of state, this contact is insufficient to establish personal jurisdiction even if the California vendor supplies financing to the buyer. *Futuresat Indus., Inc. v Superior Court* (1992) 3 CA4th 155, 159, 4 CR2d 74. Although regular purchasing activities in this state may be a basis for jurisdiction over an out-of-state buyer, the predominant rule in federal courts (see *Borg-Warner Acceptance Corp. v Lovett & Tharpe, Inc.* (11th Cir 1986) 786 F2d 1055) and in California is that a nonresident making a one-time purchase of goods from a seller in the forum state cannot be constitutionally subject to the exercise of personal jurisdiction by the courts of the seller's state. *Hunt v Superior Court* (2000) 81 CA4th 901, 906, 97 CR2d 215; *Cornell Univ. Med. College v Superior Court* (1974) 38 CA3d 311, 315, 113 CR 291. Some of the factual situations in which California could not exercise personal jurisdiction include:

- Out-of-state purchaser when her only contact with California was use of California corporation to process, approve, and supply financing for the purchase, which occurred in Maryland between Maryland residents. *Hunt v Superior Court* (2000) 81 CA4th 901, 906, 97 CR2d 215.
- Out-of-state buyer bought goods from California seller when buyer maintained no economic presence and did no business in California, documentation for the purchase was executed outside of California, and California seller provided financing to nonresident buyer. *Futuresat Indus., Inc. v Superior Court* (1992) 3 CA4th 155, 160, 4 CR2d 74.
- Nonprofit New York medical college whose only contact with state in relation to cause of action was ordering equipment by mail from California producer. *Cornell Univ. Med. College v Superior Court* (1974) 38 CA3d 311, 113 CR 291.
- Nonresident purchaser in breach of contract action brought by California seller when defendant's only contacts with California were its dealings with plaintiff through plaintiff's out-of-state agents and by interstate mail and telephone. *Interdyne Co. v SYS Computer Corp.* (1973) 31 CA3d 508, 107 CR 499.
- Out-of-state purchasers of phonograph records from California corporation by mail order and telephone. *Tiffany Records, Inc. v M.B. Krupp Distribs.* (1969) 276 CA2d 610, 81 CR 320.

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§6.86 10. Act Done Outside State Causing Effect in State

California has jurisdiction over a person whose act outside the state was intended, or reasonably could have been expected, to cause an effect in the state, with respect to causes of action arising from the effect, unless the nature of the effect and of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(9) Causing Effect in State by Act or Omission Elsewhere").

Courts utilize an "effects test" to determine whether a defendant's out-of-state conduct has resulted in sufficient in-state effects to give rise to personal jurisdiction, regardless of whether the defendant is a corporation or an individual. See, *e.g., Calder v Jones* (1984) 465 US 783, 79 L Ed 2d 804, 104 S Ct 1482. The focus of inquiry under the effects test, however, has changed over time. Historically, the test emphasized whether, in causing the effect, the nonresident had invoked the benefits and protections of the forum state. See, *e.g., Sibley v Superior Court* (1976) 16 C3d 442, 128 CR 34 (jurisdiction not proper (1) unless the nonresident has invoked the benefits and protections of the forum state's laws in causing the effect, (2) unless the forum state has enacted special legislation relating to the subject matter of the action, or (3) whether it was foreseeable that the out-of-state acts would cause injury to residents of California); *Buckeye Boiler Co. v Superior Court* (1969) 71 C2d 893, 80 CR 113 (nonresident manufacturer of an allegedly defective pressure tank that caused injury in California, when the manufacturer knew, or reasonably should have anticipated, that its products would be resold in the state, was subject to California jurisdiction).

In *Calder v Jones, supra,* the U.S. Supreme Court articulated the effects test to determine whether California had jurisdiction over defendant National Enquirer and other defendants domiciled in Florida that published an allegedly libelous magazine story about actress Shirley Jones, a Florida resident whose television career was centered in California. The Supreme Court held that, under the circumstances presented, California had jurisdiction over the defendants because they had not engaged in mere negligence; rather their "intentional and allegedly tortious actions were expressly aimed at California." 465 US at 789.

Courts have struggled to apply the effects test of *Calder*. Courts have required a defendant's actions to be "expressly aimed" at the forum state for there to be effects jurisdiction. See, *e.g., Pavlovich v Superior Court* (2002) 29 C4th 262, 127 CR2d 329; *In re Automobile Antitrust Cases I & II* (2005) 135 CA4th 100, 37 CR3d 258; *DVI, Inc. v Superior Court* (2002) 104 CA4th 1080, 128 CR2d 683; *Yahoo! Inc. v La Ligue Contre Le Racisme et L'Antisemitisme* (9th Cir 2006) 433 F3d 1199; *Schwarzenegger v Fred Martin Motor Co*. (9th Cir 2004) 374 F3d 797. But see*, e.g., Jewish Defense Org. v Superior Court* (1999) 72 CA4th 1045, 85 CR2d 611 (nonresident defendant's act of making Internet website available to users in forum state can be basis for asserting specific jurisdiction if plaintiff can show that risk of injury from site was foreseeable); *Brayton Purcell LLP v Recordon & Recordon* (ND Cal 2005) 361 F Supp 2d 1135 (plaintiff satisfied effects test by showing that defendant willfully infringed copyrights owned by it and that defendant knew plaintiff's principal place of business was in California); *Zippo Mfg. Co. v Zippo Dot Com, Inc.* (WD Pa 1997) 952 F Supp 1119 (likelihood of personal jurisdiction proportionate to nature of commercial activity conducted over Internet).

The Ninth Circuit has concluded that "express aiming" under *Calder* means "something more" than merely a foreseeable effect. *Pebble Beach Co. v Caddy* (9th Cir 2006) 453 F3d 1151, 1156 (in trademark infringement action, defendant's passive website and domain name alone did not satisfy *Calder's* effects test to establish jurisdiction in California).

In *Pavlovich v Superior Court*, *supra,* plaintiff California corporation alleged that defendant Texas resident misappropriated the corporation's source code by posting it on his Internet website. The site had no interactive features and was not targeted at California. Applying *Calder,* the supreme court held that defendant's knowledge that tortious conduct may harm industries centered in California was insufficient to establish "express aiming" at California. 29 C4th at 268. See also *Yahoo! Inc. v La Ligue Contre Le Racisme et L'Antisemitisme* (9th Cir 2006) 433 F3d 1199, holding that under the effects test, "defendant must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state."

The effects test has been applied in a variety of contexts but primarily in intentional tort and business tort cases, including the following:

- Jurisdiction was not proper over an Ohio car dealership that had allegedly used for advertising purposes a photograph of Arnold Schwarzenegger, a California resident, without his authorization. Defendant's intentional act of creating and publishing the advertisement was aimed at Ohio, not California, so defendant had neither availed itself of the privilege of conducting activities in California nor purposefully directed its activities at California. *Schwarzenegger v Fred Martin Motor Co.* (9th Cir 2004) 374 F3d 797.
- In a suit alleging fraudulent inducement to lease warehouse space in the Netherlands on unfavorable terms, defendants, who were citizens and residents of European countries, were subject to specific personal jurisdiction because their actions were "expressly aimed" at the forum state. Defendants knew that plaintiff's principal place of business was in California, knew that plaintiff's decision makers were in California, and communicated directly with those California decision makers. *Dole Food Co. v Watts* (9th Cir 2002) 303 F3d 1104.
- Jurisdiction over out-of-state defendant was proper under contract that was partially negotiated and formed in California when defendant made certain misrepresentations inducing plaintiff to sell its goods. *Data Disc, Inc. v Systems Technol. Assocs., Inc.* (9th Cir 1977) 557 F2d 1280.
- Plaintiff California consumers presented no evidence that defendant nonresident trade association expressly aimed its allegedly tortious conduct at California consumers. *In re Automobile Antitrust Cases I & II* (2005) 135 CA4th 100, 37 CR3d 258.
- Jurisdiction was proper over an out-of-state telemarketer who initiated a sale to a California customer who had called to buy another product. The telemarketer purposefully availed itself of the privilege of doing business in California and was subject to California jurisdiction for a fraud claim that arose out of that transaction. *West Corp. v Superior Court* (2004) 116 CA4th 1167, 1178, 11 CR3d 145.
- Jurisdiction was proper when evidence showed that Milwaukee archdiocese sought to rid itself of priest by sending him to California, knowing that he was a pedophile and had been convicted in Wisconsin of sexual abuse against a boy. Archdiocese was subject to specific personal jurisdiction in California for that priest's molestation of California resident under "effects" test of *Pavlovich v Superior Court* (2002) 29 C4th 262, 127 CR2d 329. *Archdiocese of Milwaukee v Superior Court* (2003) 112 CA4th 423, 425, 5 CR3d 154.
- Jurisdiction was proper over defendant German citizen, hired by California plaintiff to manage its German subsidiary, for misappropriation of trade secrets and unfair competition that caused harm to the corporation, its customers, and its business revenues in California. *Integral Dev. Corp. v Weissenbach* (2002) 99 CA4th 576, 585, 122 CR2d 24.

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§6.87 11. Ownership, Use, or Possession of Property in State

California courts have jurisdiction over a person who has owned, used, or possessed real property in the state with respect to any cause of action arising from the property during the ownership, use, or possession. The courts have similar jurisdiction over a person who has owned, used, or possessed personal property in the state, unless the nature of the property and of the person's relationship to the state make the exercise of such jurisdiction unreasonable. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(10) Ownership, Use or Possession of Thing in State").

Because real property and fixtures within a state's borders are permanently situated, the state's interest is clear. With respect to personal property, however, which may be moved from state to state, the state's interest is strong when the property is potentially dangerous to life or property (*e.g.,* mechanized equipment) and less substantial when it is not. Therefore, as to nondangerous personal property, the state must have a closer relationship to the defendant to permit exercise of jurisdiction than would be necessary with dangerous personal property. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(10) Ownership, Use or Possession of Thing in State").

Ownership of personal property alone is usually insufficient to permit the exercise of jurisdiction unless the defendant can be considered responsible for its presence in the state. Thus, jurisdiction may not be exercised over the owner when the property has been brought into the state without his or her knowledge or consent, until the owner learns of its presence and has had a reasonable opportunity to reclaim it. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(10) Ownership, Use or Possession of Thing in State").

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§6.88 12. Other Bases

A state has power to exercise judicial jurisdiction over an individual in other situations when the individual has such a relationship to a state that it is reasonable for the state to exercise its jurisdiction. These situations include that of an executor, administrator, guardian, receiver, conservator, trustee, or other legal representative who is appointed or qualified under the laws of this state or has consent to such jurisdiction, or has engaged in conduct that would subject that party to jurisdiction. It is sufficient in these situations if an individual has such a status when the action is commenced or when process is served. In addition, other bases of jurisdiction may be developed in the future that satisfy the basic requirement of reasonableness (see *International Shoe Co. v Washington* (1945) 326 US 310, 90 L Ed 95, 66 S Ct 154). See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Individuals," "(11) Other Relationships").

PRACTICE TIP: If a plaintiff's attorney encounters a situation that does not fall within any of the bases for jurisdiction described in the Comment to CCP §410.10 or in prior judicial decisions, the attorney should consider citing the Judicial Council Comment and presenting to a court all facts from which the court may conclude that to subject the proposed person to jurisdiction in the state "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v Washington* (1945) 326 US 310, 316, 90 L Ed 95, 66 S Ct 154 (quoting *Milliken v Meyer* (1940) 311 US 457, 463, 85 L Ed 278, 61 S Ct 339).

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C. Jurisdiction Over Corporations

§6.89 1. Introduction

In California, a party may obtain personal jurisdiction over a corporation if any of the bases for jurisdiction discussed below are found to exist. These bases apply whether the corporation is incorporated under the laws of a particular state or under those of a foreign country. See, *e.g., Malone v Equitas Reinsurance Ltd.* (2000) 84 CA4th 1430, 101 CR2d 524 (United Kingdom).

In analyzing the various bases for acquiring jurisdiction over a corporation, the lawyer must keep in mind the distinction between general and specific jurisdiction. See §§6.94-6.95.

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§6.90 2. Incorporation in State

California courts have general jurisdiction (see §6.94) over a corporation incorporated here, even though it does no business in the state. *International Shoe Co. v Washington* (1945) 326 US 310, 316, 90 L Ed 95, 66 S Ct 154. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(1) Incorporation in State—Domestic Corporations").

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/§6.91 3. Appointment of Agent in State to Accept Service of Process

§6.91 3. Appointment of Agent in State to Accept Service of Process

California courts have jurisdiction over a foreign corporation that has authorized an agent or public official to accept service of process in actions brought in California against the corporation. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(3) Appointment of Agent—Foreign Corporations"); *Pennsylvania Fire Ins. Co. v Gold Issue Mining & Milling Co.* (1917) 243 US 93, 61 L Ed 610, 37 S Ct 344; *Gray Line Tours v Reynolds Elec. & Eng'g Co.* (1987) 193 CA3d 190, 194, 238 CR 419. For definition of "foreign corporation," see Corp C §171. Foreign corporations that "transact intrastate business" (see Corp C §191 for definition) in California must designate an agent for service of process here and must consent to service on the California Secretary of State if the agent cannot be found with reasonable diligence. Corp C §2105(a); see *Buckner v IAC* (1964) 226 CA2d 619, 624, 38 CR 332.

The jurisdiction conferred, however, is specific, not general. See §6.95. A foreign corporation's authorizing of an agent or public official to accept service of process does not in itself establish California's jurisdiction over the corporation with respect to causes of action not arising from business done in California. Some other basis for jurisdiction will be required in these instances. See *Gray Line Tours v Reynolds Elec. & Eng'g Co., supra*.

Similarly, Corp C §31420 does not create an independent basis for personal jurisdiction for claims arising under the Franchise Investment Law (FIL). Section 31420 is a service of process statute providing that the nonresident consents to appointment of the Commissioner of Corporations as the attorney to receive service of process of a complaint brought under FIL and, despite §31420, grounds for exercising personal jurisdiction over the nonresident defendant must exist. *Thomson v Anderson* (2003) 113 CA4th 258, 268, 6 CR3d 262.

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4. Doing Business in State

§6.92 a. Basic Rule

California courts have jurisdiction over a foreign corporation that does business in the state with respect to causes of action arising from such business (*i.e.,* "specific" jurisdiction). *McGee v International Life Ins. Co.* (1957) 355 US 220, 2 L Ed 2d 223, 78 S Ct 199; *International Shoe Co. v Washington* (1945) 326 US 310, 90 L Ed 95, 66 S Ct 154. For definition of "doing business," see §6.93. A foreign corporation is subject to jurisdiction on causes of action not related to intrastate business (*i.e.,* "general" jurisdiction) if the intrastate business is so continuous and substantial as to make the exercise of such jurisdiction reasonable. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(5) Doing Business in State—Foreign Corporations"); see *Perkins v Benguet Consol. Mining Co.* (1952) 342 US 437, 96 L Ed 485, 72 S Ct 413. For discussion of general and specific jurisdiction, see §§6.94-6.95.

The attorney faced with a problem of acquiring jurisdiction over a foreign corporation should also consider whether specific jurisdiction might be based on the business activities in the state of a corporate subsidiary or parent. See §§6.102-6.103.

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§6.93 b. "Doing Business" Defined

A foreign corporation is doing business in the state if, as a matter of "commercial actuality" (*Empire Steel Corp. v Superior Court* (1961) 56 C2d 823, 834, 17 CR 150), it engages in economic activity in the state (*Buckeye Boiler Co. v Superior Court* (1969) 71 C2d 893, 901, 80 CR 113; see *International Shoe Co. v Washington* (1945) 326 US 310, 90 L Ed 95, 66 S Ct 154). In determining whether a corporation is doing business in the state, courts consider the type of business the corporation conducts. If, *e.g.,* the corporation is a manufacturer, the court will consider whether the company realizes gross income from the purchase or use of its products in the state and either sends its products into the state or reasonably should anticipate that its products will be used there. *Buckeye Boiler Co. v Superior Court* (1969) 71 C2d 893, 902, 80 CR 113. If its products are sold in the state, the corporation can be subjected to jurisdiction even if sales are made only by independent sales representatives. *Cosper v Smith & Wesson Arms Co.* (1959) 53 C2d 77, 346 P2d 409.

If the corporation performs services rather than manufactures products, the court will consider whether the corporation is performing its normal activities in the state. See, *e.g., Harris Rutsky & Co. Ins. Servs. v Bell & Clements Ltd.* (9th Cir 2003) 328 F3d 1122 (London-based insurance broker had sufficient contacts with California); *Malone v Equitas Reinsurance Ltd.* (2000) 84 CA4th 1430, 101 CR2d 524 (foreign insurers who sold policies to California residents lacked sufficient contacts to establish personal jurisdiction); *Martinez v Perlite Inst.* (1975) 46 CA3d 393, 120 CR 120 (New York trade association held to be doing business in California by promoting use of perlite ore in California and deriving income from its promotion); *McClanahan v Trans-America Ins. Co.* (1957) 149 CA2d 171, 307 P2d 1023 (insurance company held to be doing business in California by retaining doctors, investigators, and others necessary to handle claims and litigate cases there, even though no policies were written and no offices maintained in state).

An issue that sometimes arises when jurisdiction is asserted over a foreign corporation on a cause of action arising from intrastate business done by the corporation is the contention that the action is wholly unrelated to the defendant's intrastate activities. The test is whether the action is sufficiently connected with the defendant's intrastate activities that it cannot be said to be "entirely distinct" from the activities. In resolving this issue, courts consider among other factors whether the defendant's economic activity put in motion the events that gave rise to the cause of action, *i.e.,* whether the cause of action would not have arisen but for the economic activity. *Ratcliffe v Pedersen* (1975) 51 CA3d 89, 95, 123 CR 793.

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§6.94 c. Test for General Jurisdiction

General jurisdiction results when the defendant's contacts with the forum state are so systematic and so continuous as to make it consistent with traditional notions of fair play and substantial justice to subject the defendant to the jurisdiction of the forum, even when the cause of action is unrelated to the contacts. *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 445, 58 CR2d 899; *VirtualMagic Asia, Inc. v Fil-Cartoons, Inc.* (2002) 99 CA4th 228, 238, 121 CR2d 1.

The standard for establishing general jurisdiction is fairly high. *Elkman v Nat'l States Ins. Co.* (2009) 173 CA4th 1305, 1315, 93 CR3d 768; *Bancroft & Masters, Inc. v Augusta Nat'l Inc.* (9th Cir 2000) 223 F3d 1082, 1086 (applying the law of California regarding personal jurisdiction). The contacts with the forum state must be of a sort that "approximate physical presence." *Bancroft & Masters, Inc. v Augusta Nat'l Inc., supra.* Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there. *Bancroft & Masters, Inc. v Augusta Nat'l Inc., supra.* The court will focus on the economic reality of the defendants' activities rather than use a mechanical checklist. *Gates Learjet Corp. v Jensen* (9th Cir 1984) 743 F2d 1325, 1331. Even if substantial, or continuous and systematic, contacts exist, the assertion of general jurisdiction must be reasonable. *Amoco Egypt Oil Co. v Leonis Navigation Co., Inc.* (9th Cir 1993) 1 F3d 848, 852.

In applying the "substantial" or "continuous and systematic" contacts test, courts have focused primarily on two areas. First, they look for some kind of deliberate "presence" in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation. See *Perkins v Benguet Consol. Mining Co.* (1952) 342 US 437, 96 L Ed 485, 72 S Ct 413 (finding general jurisdiction when president of Philippines-based corporation maintained office, kept company files, held directors' meetings, distributed salaries, and conducted other company business in forum state). In addition, courts have looked at whether the company has engaged in active solicitation toward and participation in the state's markets, *i.e.*, the economic reality of the defendant's activities in the state. Compare *Theo. H. Davies & Co. v. Republic of the Marshall Islands* (9th Cir 1998) 174 F3d 969, 974 (finding general jurisdiction over two foreign corporations engaged in substantial commercial activity in the United States, including purchase and solicitation of bids for generators in Hawaii), with *Gates Learjet Corp. v Jensen* (9th Cir 1984) 743 F2d 1325, 1331 (finding no general jurisdiction where defendant solicited distributorship in state, made several visits to state, agreed to state choice of law and forum selection clauses in contract, purchased parts from state, and sent numerous letters and telexes to state).

Whether a foreign corporate defendant's business in the state is so "continuous and substantial" to subject it to California jurisdiction when plaintiff's claim did not arise from business done in the state is determined according to the facts of each case. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(5) Doing Business in State—Foreign Corporations"); *Watson's Quality Turkey Prods. v Superior Court* (1974) 37 CA3d 360, 366, 112 CR 345.

Cases in which intrastate business activities were sufficient to sustain jurisdiction include:

- *Perkins v Benguet Consol. Mining Co.* (1952) 342 US 437, 448, 96 L Ed 485, 72 S Ct 413 (continuous and systematic business carried on in Ohio, even though none of company's mining properties located there);
- *Tuazon v R.J. Reynolds Tobacco Co*. (9th Cir 2006) 433 F3d 1163 (North Carolina-based corporation operated in Washington state for over 50 years, generated millions of dollars in net sales each year, and held 29-31 percent market share of cigarettes sold in state, which taken together constituted "continuous and substantial" in-state business to justify general jurisdiction); and
- *Taisho Fire & Marine v The Vessel Montana* (ND Cal 1971) 335 F Supp 1238 (jurisdiction valid when (1) corporation's sole owner came to California to discuss business; (2) sole owner also had wholly owned company in California that engaged in business similar to that of defendant corporation; (3) vice president of California company solicited business for defendant corporation; and (4) corporation placed advertisements in California trade journals holding itself out as practicing in California).

Cases in which the requirements for general jurisdiction were not met include:

- *Fisher Governor Co. v Superior Court* (1959) 53 C2d 222, 225, 1 CR 1 ("more contacts are required for the assumption of [general] jurisdiction than sales and sales promotion within the state by independent nonexclusive sales representatives");
- *Malone v Equitas Reinsurance Ltd.* (2000) 84 CA4th 1430, 1441, 101 CR2d 524 (defendant did not "purposefully avail itself of the privilege of conducting business within forum State, thus invoking the benefits and protections of its laws"); and
- *Watson's Quality Turkey Prods. v Superior Court* (1974) 37 CA3d 360, 366, 112 CR 345 (foreign corporation not doing sufficiently "*continuous and substantial*" business in state to justify general jurisdiction when California business amounted to less than 1 percent of total business in period during which cause of action arose).

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/§6.95 d. Test for Specific Jurisdiction

§6.95 d. Test for Specific Jurisdiction

Specific jurisdiction results when the defendant's contacts with the forum state, though not enough to subject the defendant to the general jurisdiction of the forum, are sufficient to subject the defendant to suit in the forum on a cause of action related to or arising from those contacts. *Specific* jurisdiction exists if (*Snowney v Harrah's Entertainment, Inc*. (2005) 35 C4th 1054, 1062, 29 CR3d 33; *Pavlovich v Superior Court* (2002) 29 C4th 262, 127 CR2d 329; *VirtualMagic Asia, Inc. v Fil-Cartoons, Inc.* (2002) 99 CA4th 228, 236, 121 CR2d 1):

- The defendant has purposefully availed itself of forum benefits with respect to the matter in controversy;
- The controversy is related to or arises from the defendant's contacts with the forum; and
- The assertion of jurisdiction would comport with fair play and substantial justice.

California may assert specific jurisdiction over a foreign corporation that directs a separate person or entity to engage in forum contacts on its behalf. *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 989, 81 CR3d 535. But see *Aquila, Inc. v Superior Court* (2007) 148 CA4th 556, 576, 55 CR3d 803 (general allegations of interconnectedness between parent and subsidiary companies are not sufficient to establish specific jurisdiction).

Specific jurisdiction found. In *VirtualMagic Asia, Inc. v Fil-Cartoons, Inc., supra,* the court held that even though a Philippine corporation lacked sufficient California contacts to subject it to general jurisdiction, California was entitled to exercise specific jurisdiction over it concerning a breach of contract claim that arose from or was related to its California based activities. 99 CA4th at 236. See also *Luberski, Inc. v Oleficio F. LLI Amato S.R.L.* (2009) 171 CA4th 409, 89 CR3d 774 (court had specific jurisdiction over Italian company because negotiations took place in California and Italy, shipment to California was required, and amount of order was substantial).

Specific jurisdiction was also found in *Bridgestone Corp. v Superior Court* (2002) 99 CA4th 767, 773, 121 CR2d 673 (California courts had specific jurisdiction over tire manufacturer that purposefully availed itself of benefits of conducting activities in California and obtained benefits and protections of California's laws by selling its products in Japan to California distributor for resale in California in case stemming from tire explosion) and *West Corp. v Superior Court* (2004) 116 CA4th 1167, 11 CR3d 145 (California may assert jurisdiction over nonresident telemarketing corporation when California resident calls to buy product, but telemarketer then initiates sale of separate product and allegedly makes misrepresentations during sales pitch for separate product).

Specific jurisdiction not found. In contrast, the court in *Elkman v Nat'l States Ins. Co.* (2009) 173 CA4th 1305, 1318, 93 CR3d 768 found neither general nor specific jurisdiction over a defendant insurer that issued a policy to its insured in Florida, then continued to accept premiums from her and process her claims after she moved to California. The insurer did not solicit business in California or purposely avail itself of the privilege of doing business in California; it was the insured who chose to move to California. Similarly, in *Carretti v Italpast* (2002) 101 CA4th 1236, 1246, 125 CR2d 126, an Italian manufacturer that sold products in Italy to a distributor with an office in California did not have sufficient minimum contacts with California to support specific jurisdiction in California under a "stream of commerce" theory. Although there are divergent lines of authority on the proper interpretation of the stream of commerce theory (see *Asahi Metal Indus. Co. v Superior Court* (1987) 480 US 102, 94 L Ed 2d 92, 107 S Ct 1026; *World-Wide Volkswagen Corp. v Woodson* (1980) 444 US 286, 62 L Ed 2d 490, 100 S Ct 559), the circumstances did not amount to the kind of "purposeful contact" with the forum that would justify exercise of specific jurisdiction over the defendant. *Carretti v Italpast* (2002) 101 CA4th 1236, 1246, 125 CR2d 126.

A defendant whose California activities are shown to be sufficiently purposeful under a stream of commerce theory may nevertheless not be subject to specific jurisdiction because the requisite connection between the defendant and the allegations of the lawsuit is missing. For example, in *In re Automobile Antitrust Cases I & II* (2005) 135 CA4th 100, 37 CR3d 258, plaintiffs alleged that defendant car manufacturers and distributors, among others, had conspired unlawfully to prevent the export of Canadian cars into California to increase the price of the same vehicles in state. Plaintiffs established that certain parent manufacturers had purposefully put their product in the "stream of commerce" because they made substantial earnings from their American subsidiaries' sales of vehicles in California. The court held

that the three parent manufacturers were nevertheless not subject to specific jurisdiction because plaintiff presented no evidence connecting the parent manufacturers to the alleged conspiracy; there was no showing that these defendants had even monitored export activity from Canada to California. 135 CA4th at 123.

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§6.95A e. Internet Activity

Increasingly, California courts have addressed personal jurisdiction in the Internet context. In *Snowney v Harrah's Entertainment, Inc*. (2005) 35 C4th 1054, 1062, 29 CR3d 33, the supreme court concluded that defendant Nevada hotels were subject to specific jurisdiction in California because they had purposefully established a substantial connection with California through their Internet activities; their website emphasized the proximity of their hotels to California and provided driving directions from California to their hotels. 35 C4th at 1065.

In *Boschetto v Hansing* (9th Cir 2008) 539 F3d 1011, 1017, the court found that the temporary listing for the sale of an item through eBay was a "one shot affair" that did not create minimum contacts with California. But see *Cybersell, Inc. v Cybersell, Inc*. (9th Cir 1997) 130 F3d 414, 419 (approving of sliding scale analysis under *Zippo Mfg. Co. v Zippo Dot Com, Inc.* (WD Pa 1997) 952 F Supp 1119 to determine jurisdiction).

Similarly, jurisdiction was also lacking in *Pebble Beach Co. v Caddy* (9th Cir 2006) 453 F3d 1151 (owner of lodging establishment had worked in California, but did not demonstrate "individual targeting" of state; website was passive); *Phillips v Worldwide Internet Solutions* (ND Cal, June 20, 2006, No. C 05-5125 SBA) 2006 US Dist Lexis 44152 (Canadian corporation had not performed forum-related activity of directly or indirectly sending "spam" e-mails); and *Clarus Transphase Scientific, Inc. v Q-Ray, Inc*. (ND Cal, Aug. 16, 2006, No. C 06-3450 JF (RS)) 2006 US Dist Lexis 60824 (although general jurisdiction was proper over defendant corporation with "virtual store," specific jurisdiction was lacking over its CEO and sole shareholder regarding claim involving another product with no meaningful contacts with California).

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§6.96 f. Past Business

A California court may exercise jurisdiction over a foreign corporation that has done business in the state in the past but has withdrawn from or surrendered its right to do business here when the action is commenced, but only with respect to actions arising from such business. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(5) Doing Business in State—Foreign Corporations"); see Corp C §2114; *Detsch & Co. v Calbar, Inc.* (1964) 228 CA2d 556, 39 CR 626. Likewise, California has jurisdiction over the surviving corporation in a merger if the merger occurred in this state. See Comment to CCP §410.10; Corp C §1107; *Jackson v Continental Tel. Co.* (1963) 212 CA2d 510, 28 CR 1.

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§6.97 5. Appearance in Judicial Proceeding

California courts may exercise jurisdiction over a foreign corporation that appears in an action as either a plaintiff or a defendant. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(4) Appearance—Foreign Corporations"). The rules governing appearance as a basis for jurisdiction over a corporation are the same as those for individuals. See §§6.71-6.77.

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§6.98 6. Consent to Jurisdiction

California courts have jurisdiction over a foreign corporation that consents to the jurisdiction. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(2) Consent—Foreign Corporations"). The rules governing consent as a basis for jurisdiction over a corporation are the same as those for individuals. See §6.78. The most common form of consent by a corporation is appointment of an agent in the state to receive service of process. For discussion, see §6.91.

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§6.99 7. Act Done in State

California courts have jurisdiction over a foreign corporation with respect to any tort action arising from any act the corporation has done, or caused to be done, in the state, and with respect to any nontort action arising from such an act unless the nature of the act and of the corporation's relationship with the state makes the exercise of jurisdiction unreasonable. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(6) Doing an Act in State—Foreign Corporations"). The rules governing jurisdiction over corporations based on acts done in the state are the same as those governing jurisdiction over individuals. See §§6.80-6.85.

For example, a foreign tire manufacturer, that regularly sold a large volume of tires to a California distributor, one of which allegedly failed and caused injury, purposefully availed itself of the benefits of conducting activities in California and obtained the benefits and protections of California's laws by selling its products to a California distributor for resale in California. *Bridgestone Corp. v Superior Court* (2002) 99 CA4th 767, 771, 121 CR2d 673. Conversely, an Italian manufacturer that sold pasta machines in Italy to a distributor with an office in California did not have sufficient minimum contacts with California to support specific jurisdiction in California under a "stream of commerce theory." The pasta machine had jammed and injured a restaurant worker. *Carretti v Italpast* (2002) 101 CA4th 1236, 125 CR2d 126.

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§6.100 8. Act Done Outside State Causing Effect in State

California courts have jurisdiction over a foreign corporation that has done an act outside the state that was intended, or reasonably could have been expected, to cause an effect in the state, with respect to causes of action arising from the effect, unless the nature of the effect and of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(7) Causing Effects in State by Act Done Elsewhere—Foreign Corporations"). The rules governing this basis for acquiring jurisdiction over corporations are the same as those governing jurisdiction over individuals (see §6.86).

Courts utilize an "effects test" to determine whether a defendant's out-of-state conduct has resulted in sufficient in-state effects to give rise to personal jurisdiction, regardless of whether the defendant is a corporation or an individual. See, *e.g., Calder v Jones* (1984) 465 US 783, 79 L Ed 2d 804, 104 S Ct 1482; *Pavlovich v Superior Cour*t (2002) 29 C4th 262, 127 CR2d 329. For discussion of the effects test, see §6.86.

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Source: Civil Litigation/California Civil Procedure Before Trial/6 California Jurisdiction/§6.101 9. Ownership, Use, or Possession of Property in State

§6.101 9. Ownership, Use, or Possession of Property in State

California courts have jurisdiction over a foreign corporation with respect to any cause of action arising from the ownership, use, or possession of:

- Real property in the state; or
- Personal property in the state unless the nature of the personal property and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable.

See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(8) Ownership, Use or Possession of Thing in State—Foreign Corporations"). The rules governing this basis for acquiring jurisdiction over corporations are the same as those governing jurisdiction over individuals. See §6.87.

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§6.102 10. Parent Corporation's Ownership or Control of Subsidiary in State

A parent company's ownership or control of a subsidiary corporation does not, without more, subject the parent corporation to the jurisdiction of the state where the subsidiary does business. *HealthMarkets, Inc. v Superior Court* (2009) 171 CA4th 1160, 1169, 90 CR3d 527 (no specific jurisdiction over parent unless it deliberately directs its activities at the forum state by causing the subsidiary to engage in contacts in the forum state). A parent holding company may be subject to general jurisdiction only in limited circumstances. These circumstances may include an alter ego relationship or the parent's exercise of such a degree of control of the subsidiary as to "reflect the parent's purposeful disregard of the subsidiary's independent corporate existence." *DVI, Inc. v Superior Court* (2002) 104 CA4th 1080, 1087, 128 CR2d 683; see *VirtualMagic Asia, Inc. v Fil-Cartoons, Inc.* (2002) 99 CA4th 228, 236, 121 CR2d 1. See also *Sammons Enters. v Superior Court* (1988) 205 CA3d 1427, 253 CR 261.

If the nonresident defendant does not have substantial and systematic contacts with the forum state, the defendant may be subject to specific jurisdiction if:

- The defendant has purposefully availed itself of forum benefits with respect to the matter in controversy.
- The controversy is related to or arises out of the defendant's contacts with the forum.
- The exercise of jurisdiction would comport with fair play and substantial justice.

DVI, Inc. v Superior Court (2002) 104 CA4th 1080, 1090, 128 CR2d 683. See §6.95.

PRACTICE TIP: For a comprehensive discussion of three theories (alter ego, agency, and purposeful availment) that have been used to establish jurisdiction over a foreign parent for the acts of its wholly owned subsidiary, see *Sonora Diamond Corp. v Superior Court* (2000) 83 CA4th 523, 99 CR2d 824 (held that California did not have jurisdiction over parent corporation).

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§6.102A 11. Subsidiary or Affiliate Entity Providing Representative Services in State

The "representative services" doctrine, a species of agency, supports the exercise of jurisdiction when a local subsidiary performs a function that is compatible with and assists the parent in the pursuit of the parent's own business (see *Sonora Diamond Corp. v Superior Court* (2000) 83 CA4th 523, 99 CR2d 824), or the grandparent in the pursuit of parent's business (see *Dorel Indus., Inc. v Superior Court* (2005) 134 CA4th 1267, 36 CR3d 742). The representative services doctrine applies even when the entities involved do not have a parent-subsidiary relationship, but are affiliates. *Paneno v Centres for Academic Programmes Abroad, Ltd.* (2004) 118 CA4th 1447, 13 CR3d 759. In *Paneno*, the court found that a British company was subject to general jurisdiction in California when its U.S. affiliate functioned as the sales, marketing, and predeparture administration arm for the British company so that the British company could provide international educational programs to California residents. If the U.S. affiliate had not performed these functions, the British company would have had to perform them itself. 118 CA4th at 1456.

Regardless of whether the relationship is one of affiliate or subsidiary, a plaintiff must present strong evidence of "pervasive control" by the parent entity to warrant application of the representative services doctrine. See *In re Automobile Antitrust Cases I & II* (2005) 135 CA4th 100, 37 CR3d 258 (parent manufacturers did not exercise any day-to-day operations over their local subsidiaries and, thus, plaintiffs' evidence fell far short of excessive control needed for application of representative services doctrine).

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§6.103 12. Foreign Subsidiary Having Parent in State

A state court may not acquire jurisdiction over a foreign corporate subsidiary solely because its parent does business in the state. Jurisdiction over the subsidiary can be exercised, however, if (1) the parent does an act or causes an effect in the state at the direction of the subsidiary or (2) the parent so controls and dominates the subsidiary as in effect to disregard the latter's independent corporate existence. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(9) Other Relationships—Foreign Corporations"). For a case finding sufficient control by the parent to justify jurisdiction over the foreign subsidiary, see *Mathes v National Util. Helicopters Ltd.* (1977) 68 CA3d 182, 137 CR 104.

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§6.104 13. Corporate Officers

When assessing minimum contacts for jurisdictional purposes, each defendant's contacts with the forum state must be assessed individually. *Calder v Jones* (1984) 465 US 783, 790, 79 L Ed 2d 804, 104 S Ct 1482. Thus, an officer or director is not automatically immune from jurisdiction simply because he or she is acting in an official capacity. At the same time, mere status as an officer or director will not subject an individual to personal jurisdiction for alleged wrongs committed by a corporation. Rather, a plaintiff must demonstrate some activity by each individual officer and director that would both subject him or her to personal liability and create sufficient contacts with the state to satisfy the minimum contacts doctrine. See *Seagate Technol. v A. J. Kogyo Co.* (1990) 219 CA3d 696, 701, 268 CR 586.

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§6.105 14. Other Bases

A state has power to exercise judicial jurisdiction over a foreign corporation in situations other than those traditionally recognized when the foreign corporation has such a relationship to the state that it is reasonable for the state to exercise that jurisdiction. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Corporations," "(9) Other Relationships—Foreign Corporations").

PRACTICE TIP: As with personal jurisdiction over individuals, California attorneys faced with novel fact situations should present to the court all the facts from which they can argue that it is reasonable under contemporary standards to subject a foreign corporation to jurisdiction in California.

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§6.106 D. Jurisdiction Over Partnerships and Other Unincorporated Associations

For jurisdictional purposes, California treats partnerships and other unincorporated associations the same as corporations. See Comment to CCP §410.10 ("Bases of Judicial Jurisdiction over Partnerships or other Unincorporated Associations"); *International Aerial Tramway Corp. v Konrad Doppelmayr & Sohn* (1969) 70 C2d 400, 74 CR 908; *Simons v Steverson* (2001) 88 CA4th 693, 708, 106 CR2d 193 (out-of-state law firm, an LLP, that employed attorney licensed in California who performed legal services under California law for California residents); *Checker Motors Corp. v Superior Court* (1993) 13 CA4th 1007, 17 CR2d 618 (out-of-state-partnership and general contractor); *Lewis Mfg. Co. v Superior Court* (1956) 140 CA2d 245, 295 P2d 145. Thus, if a partnership or other unincorporated association is subject to suit in California, a California court may exercise jurisdiction over the partnership or association as long as it could have exercised jurisdiction over a corporation under similar circumstances. On the bases for asserting jurisdiction over corporations, see §§6.89-6.105.

A California court may exercise personal jurisdiction over an out-of-state law firm employing an attorney licensed in California who performed legal services under California law for California resident plaintiffs. Although the attorney denied ever traveling to California to conduct business, his presence or absence in the state is not determinative; the practice of law can occur even if the attorney is not physically present, by his advising a California client on a California legal dispute by phone, fax, or other technological means. *Simons v Steverson* (2001) 88 CA4th 693, 713, 106 CR2d 193.

Although a judgment against a partnership or an association will bind joint property or assets, a personal judgment cannot be rendered against an individual partner or against an individual member of an unincorporated association unless the court has personal jurisdiction over the person and he or she has been properly served with process. CCP §369.5 (former CCP §388(b)). See Comment to CCP §410.10. On the bases for asserting jurisdiction over individuals, see §§6.66-6.88.

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VII. IN REM AND QUASI IN REM JURISDICTION

§6.107 A. Nature of Proceeding

An action or proceeding in rem seeks to affect the interests of all persons in certain real or personal property. 2 Witkin, California Procedure, *Jurisdiction* §243 (5th ed 2008); see *Title & Document Restoration Co. v Kerrigan* (1906) 150 C 289, 306, 88 P 356. Proceedings that are classified as in rem include:

- Probate proceedings, *e.g.,* will contests (*Estate of Baker* (1915) 170 C 578, 585, 150 P 989) and heirship proceedings (*Estate of Radovich* (1957) 48 C2d 116, 120, 308 P2d 14);
- Proceedings to enforce forfeiture of property used in violation of law (see, *e.g., Moore v Purse Seine Net* (1941) 18 C2d 835, 839, 118 P2d 1);
- Escheat proceedings (*U.S. v Klein* (3d Cir 1939) 106 F2d 213, 215); and
- Federal bankruptcy proceedings (*Wells v California Tomato Juice, Inc.* (1941) 47 CA2d 634, 636, 118 P2d 916).

An action or a proceeding quasi in rem is most commonly one in which the plaintiff has a claim against the defendant but, because of an inability to obtain jurisdiction over the defendant and thereby obtain a valid judgment against him or her personally, the plaintiff seeks to satisfy the claim from the defendant's property within the state. 2 Witkin, Procedure, *Juris* §246; see *Hanson v Denckla* (1958) 357 US 235, 246 n12, 2 L Ed 2d 1283, 78 S Ct 1228. Another type of quasi in rem action is that in which the plaintiff asserts an interest in the subject property as against particular defendants, *e.g.,* an action to foreclose a mortgage or other lien (see *Lee v Silva* (1925) 197 C 364, 369, 240 P 1015). 2 Witkin, Procedure, *Juris* §252; see *Hanson v Denckla, supra*. This type of action should be distinguished from in rem actions, which seek to affect the interests of *all* persons in the subject property. Quasi in rem jurisdiction attaches only to the extent of the defendant's interest in the property, *i.e.,* a court can award a judgment only to the extent of the defendant's interest in the property. *Goodwine v Superior Court* (1965) 63 C2d 481, 483, 47 CR 201.

Both in rem and quasi in rem jurisdiction depend on a seizure of the property before judgment. *Lee v Silva* (1925) 197 C 364, 368, 240 P 1015 (in rem); *Goodwine v Superior Court, supra* (quasi in rem). Unless the property is seized, *e.g.,* by use of a provisional remedy such as attachment (see §32.5) or receivership (see chap 33), the judgment is void and the action must be dismissed against the defendant. See *First Nat'l Bank v Eastman* (1904) 144 C 487, 77 P 1043; *Longfellow v Presidente Miguel Aleman* (1974) 36 CA3d 508, 512, 111 CR 643.

A detailed discussion of in rem and quasi in rem jurisdiction is beyond the scope of this chapter. For further discussion, see 2 Witkin, Procedure, *Juris* §§243-269.

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§6.108 B. "Minimum Contacts" Required

In *Shaffer v Heitner* (1977) 433 US 186, 53 L Ed 2d 683, 97 S Ct 2569, the United States Supreme Court reexamined the proposition, derived from *Pennoyer v Neff* (1878) 95 US 714, 24 L Ed 565, that the presence of property in a state gives that state jurisdiction to determine rights in the property regardless of the relationship of the property owner and the underlying dispute to the state. The Court in *Shaffer* noted (433 US at 212):

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

The Court therefore concluded that all assertions of state court jurisdiction, whether personal, in rem, or quasi in rem, must be evaluated according to the minimum contacts standard delineated in *International Shoe Co. v Washington* (1945) 326 US 310, 90 L Ed 95, 66 S Ct 154. 433 US at 212.

The Court acknowledged that the presence of property in a state, although not necessarily establishing the existence of jurisdiction over the owner of the property, "may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation." 433 US at 207. Thus, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it will be unusual for the state where the property is located not to have jurisdiction. 433 US at 207. The presence of property in a state will also favor jurisdiction in cases, such as suits for injuries suffered on the land of an absentee owner, in which the defendant's ownership is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership. 433 US at 208.

When, however, the property that serves as the asserted basis for state court jurisdiction is completely unrelated to the plaintiff's cause of action and there are no other ties among the defendant, the state, and the litigation, the presence of the property alone will not support the state's jurisdiction. 433 US at 208.

Thus the Court in *Shaffer* held that Delaware could not obtain jurisdiction over nonresident defendants in a shareholder's derivative suit simply by sequestering their stock in a Delaware corporation, even though a Delaware statute provided that the situs of all stock in Delaware corporations is considered to be in that state. The stock certificates were not physically present in Delaware and the sequestration was effected by the placing of a "stop transfer" order on the company's books. The Court also rejected Delaware's assertion of jurisdiction based on the nonresident defendants' status as officers in a Delaware-chartered corporation.

The United States Supreme Court subsequently held, following *Shaffer*, that a plaintiff may not obtain quasi in rem jurisdiction over a nonresident defendant in an action for damages arising from an automobile accident that occurred in another state by attaching the contractual obligation of the defendant's insurer, which was doing business in the plaintiff's forum, to defend and indemnify him in connection with the suit. *Rush v Savchuk* (1980) 444 US 320, 62 L Ed 2d 516, 100 S Ct 571.

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§6.109 C. Notice Requirements

Fourteenth Amendment due process requirements on notice and an opportunity to be heard, like those for personal jurisdiction, apply to proceedings in rem and quasi in rem. *Mullane v Central Hanover Bank & Trust Co.* (1950) 339 US 306, 94 L Ed 865, 70 S Ct 652; *Page v W. W. Chase Co.* (1904) 145 C 578, 583, 79 P 278.

Personal service of process in the state is not always necessary, and a state may authorize constructive notice, *e.g.,* by mail, publication, or posting, but the type of notice given must be reasonably calculated under the circumstances to give the person interested in the property knowledge of a pending action affecting the property. *Mullane v Central Hanover Bank & Trust Co., supra*. See *Estate of Davis* (1902) 136 C 590, 69 P 412. The Supreme Court held in *Mullane,* for example, that it was a violation of due process, even though authorized by statute, to publish notice in a newspaper for persons whose names and addresses were known, when notice could have been given by mail. See also *Jones v Flowers* (2006) 547 US 220, 164 L Ed 2d 415, 126 S Ct 1708 (due process requires that additional reasonable steps be taken to notify property owners of sale of their property when notice of tax sale was returned unclaimed). On the types of notice authorized in California (CCP §§410.10-418.11) and other specific statutory provisions, see chap 17.

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§6.110 D. Form of Action and Judgment

A true proceeding in rem is an action against property seized and sought to be held for the satisfaction of an asserted charge against it without regard to the title of individual claimants to the property. *Lee v Silva* (1925) 197 C 364, 368, 240 P 1015. Thus, the action is actually a suit against the property itself and the judgment directly affects the property, *e.g.,* by forfeiture or sale. See, *e.g., People v One 1941 Chevrolet Coupe* (1951) 37 C2d 283, 231 P2d 832 (statutory forfeiture of automobile used in narcotics offense); *Longfellow v Presidente Miguel Aleman* (1974) 36 CA3d 508, 111 CR 643 (action against ship to recover damages for personal injuries allegedly sustained while working on ship). In contrast, an action quasi in rem is personal in form although the judgment also affects property (see, *e.g., Lee v Silva, supra* (quiet title action)) or may be satisfied from the sale of property (see, *e.g., Goodwine v Superior Court* (1965) 63 C2d 481, 47 CR 201 (action for separate maintenance with attachment levied on defendant's real property in contemplation of sale to satisfy judgment)).

If a defendant in an in rem or quasi in rem proceeding makes a general appearance (see §6.72), he or she submits to the court's jurisdiction and the action is converted, as to that defendant, into an action in personam. See, *e.g., Farmers & Merchants Nat'l Bank v Superior Court* (1945) 25 C2d 842, 846, 155 P2d 823 (probate proceeding). A defendant in a quasi in rem proceeding may not defeat the court's jurisdiction by a special appearance to quash service of summons (*Turner v Evers* (1973) 31 CA3d Supp 11, 15, 107 CR 390, disapproved on other grounds in *Javorek v Superior Court* (1976) 17 C3d 629, 641, 131 CR 768), but an appearance to contest the plaintiff's claim on the merits submits the defendant to the court's jurisdiction. In this situation, a defendant can protect his or her property from an unfounded claim only by contesting the claim, and there is authority that this may be done without risking a judgment against the defendant personally (31 CA3d Supp at 16).

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§6.111 VIII. DIAGNOSTIC QUESTIONS

Answers to the following questions may assist counsel in evaluating jurisdictional issues in a particular case:

1. **Which California state court has original subject matter jurisdiction over the action?**
2. **Is the action subject to federal jurisdiction?**
3. **If so, is the federal jurisdiction exclusive or concurrent?**
4. **If concurrent, which court system (state or federal) is more advantageous for the client?**
5. **Are there any other limitations on state court subject matter jurisdiction (*e.g.,* governmental immunity, failure to exhaust administrative remedies) that apply?**
6. **Does California have personal jurisdiction over the defendant(s)?**
7. **Is the jurisdiction general or specific?**
8. **If the action is in rem or quasi in rem, does California have jurisdiction over it?**

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7

Federal Jurisdiction

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I. INTRODUCTION

§7.1 A. Scope of Chapter

Before adjudicating a case or controversy, a court must have subject matter jurisdiction over the case and personal jurisdiction over the litigants. This chapter discusses federal court subject matter jurisdiction. Specifically, it discusses general principles (see §§7.3-7.14), federal question jurisdiction (see §§7.15-7.32), supplemental jurisdiction (see §§7.33-7.47), and diversity jurisdiction (see §§7.48-7.81).

For further discussion, see 15 Moore & Coquillette, Moore's Federal Practice, chaps 102-103 (3d ed 1997); 13-14A Wright, Miller & Cooper, Federal Practice and Procedure §§3521-3712 (3d ed 1998). See chap 6 on personal jurisdiction. See chaps 6, 22 on whether to proceed in state or federal court when there is concurrent jurisdiction. See chap 22 on removing cases from state to federal court.

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§7.2 B. Governing Law

Subject matter jurisdiction involves the authority vested in the courts to decide a particular type of lawsuit. Federal courts are courts of limited, rather than general, jurisdiction. They derive their power only as authorized under Article III of the United States Constitution and particular statutes enacted under that Article. *Bender v Williamsport Area Sch. Dist.* (1986) 475 US 534, 541, 89 L Ed 2d 501, 511, 106 S Ct 1326.

Article III, §1 of the United States Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, §2 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Counsels; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizen of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

On limitation of actions against a state, see US Const amend XI.

Thus, aside from the Supreme Court, which derives its jurisdiction directly from the Constitution, the Constitution does not itself confer jurisdiction on the lower federal courts. Rather, it gives the lower federal courts the capacity to take jurisdiction over the cases enumerated in US Const art III, §2, but an act of Congress is required to confer it. *Kline v Burke Constr. Co.* (1922) 260 US 226, 234, 67 L Ed 226, 232, 43 S Ct 79; *People v Bruce* (9th Cir 1942) 129 F2d 421, 423.

The two general federal jurisdiction statutes are 28 USC §1331, which establishes federal question jurisdiction (see §§7.15-7.32), and 28 USC §1332, which creates diversity jurisdiction. As discussed in §§7.48-7.81, diversity jurisdiction exists under 28 USC §1332 when there is complete diversity and in excess of $75,000 in controversy. Section 1331 (federal question jurisdiction) is not self-effectuating; rather, it is dependent on other specific grants of federal jurisdiction contained in individual federal statutes.

On Congress's power to give, withhold, and restrict lower court jurisdiction subject to the Fifth Amendment due process and just compensation clause, see *Battaglia v General Motors Corp.* (2d Cir 1948) 169 F2d 254.

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II. GENERAL PRINCIPLES

A. Limitations on Federal Court's Subject Matter Jurisdiction

§7.3 1. Case or Controversy Requirement

Article III, §2 of the United States Constitution limits the jurisdiction of the federal courts to the adjudication of "cases" or "controversies." Thus, the issues presented must be justiciable, *i.e.,* they must present a real and present controversy rather than one that is hypothetical or abstract. *Western Mining Council v Watt* (9th Cir 1981) 643 F2d 618, 623; *Stewart v M.M.&P. Pension Plan* (9th Cir 1979) 608 F2d 776, 785. The controversy must also "unequivocally call for the adjudication of rights." *Western Mining Council v Watt, supra*.

EXAMPLE: A plaintiff alleged that the trustees of his pension plan were violating the pension plan rules by limiting the benefits he would receive at retirement. The plaintiff sought a declaratory judgment that the trustees could not deny him these pension benefits. Because the plaintiff's claim was that he might be affected at some future time, it was held invalid. The controversy was remote and hypothetical rather than real and present, as is constitutionally required. *Stewart v M.M.&P. Pension Plan, supra.* On the Declaratory Judgment Act generally, see §7.31.

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§7.4 a. Advisory Opinions

In light of the case or controversy requirement of US Const art III, §2 (see §7.3), a federal court may not render advisory opinions. *Sierra Club v Morton* (1972) 405 US 727, 732 n3, 31 L Ed 2d 636, 641 n3, 92 S Ct 1361; *Norvell v Sangre de Cristo Dev. Co.* (10th Cir 1975) 519 F2d 370, 375.

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§7.5 b. Mootness

If the controversy no longer exists at the time of adjudication, the controversy is moot; no case or controversy exists under US Const art III, §2 (see §7.3), and the court has no jurisdiction. *California v San Pablo & Tulare R.R.* (1893) 149 US 308, 313, 37 L Ed 747, 748, 13 S Ct 876; *Pomerantz v County of Los Angeles* (9th Cir 1982) 674 F2d 1288, 1292.

Generally, a case is not made moot by the voluntary cessation of allegedly illegal conduct. The defendant is free to return to his or her old way and the court may hear and determine the case. *U.S. v W.T. Grant Co.* (1953) 345 US 629, 632, 97 L Ed 1303, 1309, 73 S Ct 894. A case, however, may become moot because (1) the alleged violation cannot reasonably be expected to recur, and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v Davis* (1979) 440 US 625, 631, 59 L Ed 2d 642, 649, 99 S Ct 1379. In such instances, jurisdiction properly acquired will abate. *County of Los Angeles v Davis, supra*.

EXAMPLE: Blind plaintiffs sought declaratory relief and an injunction against the County Jury Commissioner for excluding all blind persons from jury service solely because they were blind. Three weeks after the suit was filed, a State Senate Bill making the blind eligible for jury service was passed, and the Jury Commissioner ceased disqualifying the blind from jury lists. With compliance of the Jury Commissioner with the plaintiffs' demands, the plaintiffs' claims were moot, and there was no jurisdiction over them. *Pomerantz v County of Los Angeles, supra*.

When a case presents several issues and only one issue becomes moot, the constitutional requirement of a case or controversy is supplied by the remaining live issues. *Powell v McCormack* (1969) 395 US 486, 497, 23 L Ed 2d 491, 503, 89 S Ct 1944. On exception to mootness principle, see §7.7.

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§7.6 (1) On Appeal

The case or controversy requirement of US Const art III, §2 applies not only in the lower federal courts but also in the appellate courts, including the United States Supreme Court. See *Honig v Doe* (1988) 484 US 305, 317, 98 L Ed 2d 686, 703, 108 S Ct 592; *Cox v McCarthy* (9th Cir 1987) 829 F2d 800. See also *Williams v Alioto* (9th Cir 1977) 549 F2d 136, 140. If, at the time the plaintiff's claim reaches the appellate court, there is no longer any case or controversy, the case must be dismissed as moot (assuming repetition-evasion exception does not apply; see §7.7). *County of Los Angeles v Davis* (1979) 440 US 625, 634, 59 L Ed 2d 642, 651, 99 S Ct 1379; *Center for Biological Diversity v Lohn* (9th Cir 2007) 511 F3d 960 (killer whale listed as endangered species during appeal); *Cox v McCarthy, supra*.

EXAMPLE: Plaintiffs challenged the constitutionality of the California Penal Code statute permitting the imposition of additional periods of incarceration for misconduct committed inside the penitentiary by parole violators. Before the appellate court's decision, the plaintiffs had surpassed the maximum periods of incarceration permitted under the challenged statute. They had completed their extra period of incarceration and could not be subject to the penalties of the statute again. The court determined, therefore, that the plaintiffs' claims were moot and that the court lacked jurisdiction. Because it was impossible for the plaintiffs to be subjected to an application of the statute again, the capable-of-repetition doctrine (see §7.7) did not apply. The court indicated, however, that a method to avoid mootness and obtain review was available through a habeas corpus class action (see §7.8). *Cox*, 829 F2d at 804.

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§7.7 (2) Repetition-Evasion Exception

There is an exception to the mootness principle known as "the capable of repetition, yet evading review" doctrine that allows a plaintiff to pursue a claim despite the lack of a present controversy. See *Weinstein v Bradford* (1975) 423 US 147, 46 L Ed 2d 350, 96 S Ct 347; *Williams v Alioto* (9th Cir 1977) 549 F2d 136, 142. A court's jurisdiction is not defeated if (a) the challenged law or conduct is capable of repetition and (b) the duration of the challenged action before its cessation or expiration was too short to be fully litigated. See *Williams v Alioto, supra.* This doctrine is applicable, however, only when there is "a reasonable expectation that the same complaining party would be subjected to the same action again" (*Weinstein v Bradford* (1975) 423 US 147, 149, 46 L Ed 2d 350, 353, 96 S Ct 347; *Cox v McCarthy* (9th Cir 1987) 829 F2d 800, 803), although the court has the power to make an exception to this requirement (*Cox v McCarthy, supra*). A mere speculative possibility rather than a reasonable expectation of repetition is insufficient for the mootness exception to apply. *Williams,* 549 F2d at 143.

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§7.8 (3) Class Actions

When the plaintiff brings the suit as a class action and litigates in a representative capacity, the fact that the named plaintiff's claim has become moot subsequent to the filing of the action does not require dismissal of the case, as long as there might be members of the class whose claims are still valid. *Sosna v Iowa* (1975) 419 US 393, 42 L Ed 2d 532, 95 S Ct 553. The requirement of a case or controversy under US Const art III, §2 (see §7.3) is satisfied if the named plaintiff has a case or controversy at the time the complaint is filed and at the time the class is certified under Fed R Civ P 23, and a live controversy exists thereafter between a class member and a named defendant, even though the named plaintiff's claim has become moot. See 419 US at 402, 42 L Ed 2d at 542 (inquiry shifts to ability of named representative to fairly and adequately protect class interests). See also *La Duke v Nelson* (9th Cir 1985) 762 F2d 1318, 1325, modified at 796 F2d 309; *Kuahulu v Employers Ins. of Wausau* (9th Cir 1977) 557 F2d 1334, 1336. Such a live controversy is also required for appellate review. See *Sosna v Iowa, supra.* On the effect if controversy involving named plaintiffs becomes moot before district court rules on certification motion, see 419 US at 402 n11, 42 L Ed 2d at 542 n11.

EXAMPLE: The plaintiff in *Sosna* brought an action seeking injunctive and declaratory relief against the enforcement of an allegedly un-constitutional statutory requirement of one year's residency in the state prior to the filing of a divorce petition. The District Court upheld the statute. Long before the case reached the Supreme Court, the plaintiff had satisfied the one-year residency requirement and had obtained a divorce in a different state. Had she brought the action only on her behalf, her claim would have been moot and required dismissal. However, because the claim was brought as a class action and because the state continued to enforce the statute against persons in the represented class, the appeal was not moot. As the Court said: "the case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion." 419 US at 400.

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§7.9 2. Standing

A plaintiff must have standing to assert his or her claims. A complaining party cannot invoke the power of the federal court in the absence of standing. *Schlesinger v Reservists Comm. To Stop War* (1974) 418 US 208, 215, 41 L Ed 2d 706, 715, 94 S Ct 2925; *American Jewish Congress v Vance* (DC 1978) 575 F2d 939, 943. The focus of standing is on the party seeking to get his or her complaint before the court, not on the issue to be adjudicated. *Simon v Eastern Kentucky Welfare Rights Org.* (1976) 426 US 26, 37, 48 L Ed 2d 450, 460, 96 S Ct 1917.

The standing doctrine has three requirements: (1) plaintiff must have suffered an injury in fact; (2) the injury must be fairly traceable to the challenged action by the defendant; and (3) it must be likely that the injury will be redressed by a favorable court decision. *Lujan v Defenders of Wildlife* (1992) 504 US 555, 560, 119 L Ed 2d 351, 112 S Ct 2130.

"Injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized… and (b) actual or imminent, not conjectural or hypothetical." 504 US at 560. See also *Davis v FEC* (2008) ___ US ___, 171 L Ed 2d 737, 128 S Ct 2759 (injury in fact focuses on circumstances existing when suit is filed); *Massachusetts v EPA* (2007) 549 US 497, 167 L Ed 2d 248, 267, 127 S Ct 1438 (agency's refusal to regulate greenhouse gases presented risk of actual and imminent harm to state); *DaimlerChrysler Corp. v Cuno* (2006) 547 US 332, 164 L Ed 2d 589, 126 S Ct 1854 (taxpayers' alleged injury on basis of corporation's credit against franchise tax was conjectural and hypothetical); *Gest v Bradbury* (9th Cir 2006) 443 F3d 1177 (election signature collectors who experienced "frustration" failed to show injury in fact in action challenging rules for evaluating circulator certifications); *Beeman v TDI Managed Care Serv., Inc.* (9th Cir 2006) 449 F3d 1035 (procedural injuries to California pharmacies, concerning failure of pharmacy benefit managers to comply with statutory rules for reporting drug pricing, established injury in fact).

A credible threat of harm is sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred. *Central Delta Water Agency v U.S.* (9th Cir 2002) 306 F3d 938 (plaintiff alleged that planned action by federal government would result in higher salinity levels in plaintiff's water source).

Even when the constitutional boundaries for standing have been met, a plaintiff may not have standing based on prudential limitations imposed by the court to avoid having to decide "questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a federal claim." See *Sprint Communications Co. v APCC Servs.* (2008) ___ US ___, 171 L Ed 2d 424, 436, 128 S Ct 2531 (assignees of claims may assert their own legal rights); *Warth v Seldin* (1975) 422 US 490, 45 L Ed 2d 343, 95 S Ct 2197 (challenge to exclusionary zoning practices); *City of Los Angeles v County of Kern* (9th Cir 2009) 581 F3d 841 (plaintiffs lacked "prudential standing" when they sought to protect rights to intra, not interstate commerce); *Western Mining Council v Watt* (9th Cir 1981) 643 F2d 618.

The facts demonstrating standing must be clearly alleged in the complaint. *Western Mining Council v Watt* (9th Cir 1981) 643 F2d 618, 624. The Ninth Circuit requires that the plaintiff allege: "(a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedies sought." *People v Andrus* (9th Cir 1979) 608 F2d 1247, 1249, quoting *Bowker v Morton* (9th Cir 1976) 541 F2d 1347, 1349.

EXAMPLE: Individuals with chronic health problems and an organization representing homeless and low-income county residents who rely on county health care system had standing to challenge the closure of a county treatment facility in *Harris v Board of Supervisors* (9th Cir 2004) 366 F3d 754, 760.

EXAMPLE: Plaintiffs sought a declaratory judgment that a federal Act establishing a system of land use planning and management for lands and mines owned by the United States was unconstitutional. Because plaintiffs, who were miners and owners of mining claims, failed to allege that the Act had been applied or threatened to be applied to them, or that they suffered any real or threatened injury under the statute's authority, plaintiffs lacked standing to challenge the Act. *Western Mining Council v Watt, supra*. On Declaratory Judgment Act, see §7.31.

If the issue of jurisdiction is intertwined with the merits of the case, the court must assume the truth of the allegations in the complaint, unless the undisputed facts in the record controvert the allegations. *Warren v Fox Family Worldwide, Inc.* (9th Cir 2003) 328 F3d 1136, 1139; *Cattie v Wal-Mart Stores, Inc.* (SD Cal 2007) 504 F Supp 2d 939, 944.

When the constitutionality of a statute is challenged on First Amendment grounds as facially overbroad, the standing requirement may be satisfied by plaintiff's claim of either

- Specific present objective harm; or
- A threat of specific future harm.

See *Bigelow v Virginia* (1975) 421 US 809, 815, 44 L Ed 2d 600, 608, 95 S Ct 2222; *Dombrowski v Pfister* (1965) 380 US 479, 486, 14 L Ed 2d 22, 28, 85 S Ct 1116. See also *Red Bluff Drive-In, Inc. v Vance* (5th Cir 1981) 648 F2d 1020, 1033 n18 (standing requirement of injury in fact relaxed in case of facial overbreadth challenges because of danger of tolerating existence of penal statute susceptible of sweeping and improper application in area of First Amendment freedoms). Moreover, "actual harm to individual values of an abstract or esoteric nature can provide the basis for standing." *O'Hair v White* (5th Cir 1982) 675 F2d 680, 687 (atheist's action challenging provision of state constitution requiring acknowledgment of existence of supreme being in order to be public office holder). For detailed discussion of injury in fact and standing generally in federal court, see 13 Wright, Miller & Cooper, Federal Practice and Procedure §§3531-3531.10 (3d ed 1998).

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§7.10 3. Ripeness

A court may dismiss a case if it is not ripe for adjudication. The purpose of the ripeness doctrine is to prevent the courts from entangling themselves in "abstract disagreements." *Association of Am. Med. Colleges v U.S.* (9th Cir 2000) 217 F3d 770, 779.

The ripeness doctrine presupposes a case or controversy and hence jurisdiction under US Const art III, §2. *Brown v Ferro Corp*. (6th Cir 1985) 763 F2d 798, 801. It precludes a federal court from adjudicating a hypothetical request for an advisory opinion. *Thomas v Anchorage Equal Rights Comm'n* (9th Cir 2000) 220 F3d 1134, 1141. It does not prohibit a "pre-enforcement review" of a statute. *Buono v Kempthorne* (9th Cir 2008) 527 F3d 758, 774.

Even if a case or controversy is present, the courts analyze the "prudential considerations." The doctrine requires the court to exercise its discretion in determining whether judicial resolution would be desirable under all circumstances. *Brown v Ferro Corp., supra*. The court is directed to evaluate two criteria under the doctrine:

- Whether the issues are fit for judicial decision; and
- The hardship to the parties if the court withholds consideration.

Abbott Labs. v Gardner (1967) 387 US 136, 148, 18 L Ed 2d 681, 87 S Ct 1507, overruled on other grounds in *Califano v Sanders* (1977) 430 US 99, 51 L Ed 2d 192, 97 S Ct 980; *Brown v Ferro Corp., supra*.

NOTE: Although the same facts may sometimes be relevant to both the issue of standing and the issue of ripeness, the two doctrines differ. The standing doctrine is concerned with who may bring the action, *i.e.,* whether the plaintiff is an appropriate party to assert the claim (see §7.9), whereas the ripeness doctrine is concerned with a timing issue, *i.e.,* when in time the court can appropriately take up a matter. *Action Alliance of Senior Citizens of Greater Philadelphia v Heckler* (DC Cir 1986) 789 F2d 931, 940. Whether the jurisdictional inquiry is one of standing or ripeness, the analysis is generally the same. *Thomas,* 220 F3d at 1138 (ripeness inquiry often coincides with injury-in-fact prong of standing analysis).

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§7.11 4. Political Questions

A federal court will not adjudicate a case involving a political question. *Schlesinger v Reservists Comm. To Stop War* (1974) 418 US 208, 215, 41 L Ed 2d 706, 715, 94 S Ct 2925; *Powell v McCormack* (1969) 395 US 486, 518, 23 L Ed 2d 491, 515, 89 S Ct 1944. Such questions are not justiciable primarily because of the doctrine of separation of powers. *Powell v McCormack, supra*. See *American Jewish Congress v Vance* (DC 1978) 575 F2d 939, 943 (presence of political question precludes federal court, under US Const art III, from hearing or deciding case).

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§7.12 5. Abstention

Although a federal court may have jurisdiction, it may refrain from exercising such jurisdiction in narrowly limited special situations under the doctrine (sometimes called doctrines) of abstention. *Zwickler v Koota* (1967) 389 US 241, 248, 19 L Ed 2d 444, 450, 88 S Ct 391. The doctrine may be applied, *e.g.,* to avoid (a) "a premature and perhaps unnecessary decision of a serious federal constitutional question," or (b) "the hazard of unsettling some delicate balance in the area of federal-state relationships." 389 US at 255, 19 L Ed 2d at 454 (concurring opinion, Harlan, J.).

The doctrine is often invoked when a state statute in question has not been interpreted by state courts and could perhaps be interpreted narrowly by a state court so as to avoid all constitutional questions. See, *e.g., Red Bluff Drive-In, Inc. v Vance* (5th Cir 1981) 648 F2d 1020, 1035. See also *Garfinkle v Wells Fargo Bank* (9th Cir 1973) 483 F2d 1074, 1077 (abstention appropriate when precise constitutional question not finally settled by California courts; in court's opinion, one existing state intermediate appellate opinion not dispositive of all issues that might be presented).

***Younger* abstention.** The doctrine of "*Younger* abstention" developed following the Supreme Court's decision in *Younger v Harris* (1971) 401 US 37, 27 L Ed 2d 669, 91 S Ct 746, a case that involved the institution of a federal proceeding while a state court criminal prosecution was pending. The Supreme Court held that, except in exceptional circumstances, fundamental policy forbids a federal court from staying or enjoining pending state court criminal proceedings. 401 US at 53. As explained in *Hicks v Miranda* (1975) 422 US 332, 349, 45 L Ed 2d 223, 95 S Ct 2281, "the rule in *Younger* is designed to permit state courts to try state cases free from interference by federal courts."

Although *Younger* involved potential interference with a state criminal case, the Supreme Court has extended the doctrine to federal cases that would interfere with state civil cases and administrative proceedings. *Ohio Civil Rights Comm'n v Dayton Christian Sch., Inc.* (1986) 477 US 619, 627, 91 L Ed 2d 512, 106 S Ct 2718. See also *Hawaii Hous. Auth. v Midkiff* (1984) 467 US 229, 81 L Ed 2d 186, 104 S Ct 2321 (*Younger* abstention appropriate in civil proceedings involving state land reorganization because abstention required whenever federal claims "have been or could be presented" in ongoing state judicial proceedings); *San Jose Chamber of Commerce Political Action Comm. v City of San Jose* (9th Cir 2008) 546 F3d 1087 (abstention required because city's election commission held proceeding to investigate activities of local political action committee).

A federal court may abstain only after three elements are found:

- There is an ongoing state proceeding.
- The proceeding implicates an important state interest.
- The state proceeding provides the plaintiff an opportunity to litigate its federal claims.

Middlesex County Ethics Comm. v Garden State Bar Ass'n (1982) 457 US 423, 432, 73 L Ed 2d 116, 125, 102 S Ct 2515; *M&A Gabaee v Community Redev. Agency* (9th Cir 2005) 419 F3d 1036, 1039. After these elements are found, the court must abstain if the court's action would have the practical effect of enjoining the ongoing state proceeding. *AmerisourceBergen Corp. v Roden* (9th Cir 2007) 495 F3d 1143, 1148.

Under *Younger*, abstention may be compelled regardless of the state court proceedings stage, or whether the state action was filed first. See *M&A Gabaee*, 419 F3d at 1039 (abstention proper even when redevelopment agency's state court eminent domain proceeding was filed after property owners brought federal action and another state action had not yet reached dispute). See also *San Jose Chamber of Commerce Political Action Comm.,* 546 F3d at 1092 (state administrative agency proceeding was continuing because fine had not been assessed).

In the Ninth Circuit, a decision based on *Younger* abstention is subject to de novo review. *Gilbertson v Albright* (9th Cir 2004) 381 F3d 965, 982 n19. In *Gilbertson*, the court of appeals held that the *Younger* abstention doctrine applies to actions for damages under 42 USC §1983; when damages are at issue, federal courts should not dismiss federal proceedings but stay them until state proceedings are complete. See also *Equity Lifestyle Props., Inc. v County of San Luis Obispo* (9th Cir 2008) 548 F3d 1184, 1197 n3 (*Gilbertson* does not require stay of writ for administrative mandamus or of damages claims that otherwise would be dismissed as untimely or meritless).

Other abstention doctrines. *Younger* abstention is one of many abstention doctrines, including the "*Colorado River*," "*Burford*," and "*Pullman*" doctrines. See *Colorado River Water Conserv. Dist. v U.S.* (1976) 424 US 800, 47 L

Ed 2d 483, 96 S Ct 1236; *Burford v Sun Oil Co*. (1943) 319 US 315, 87 L Ed 1424, 63 S Ct 1098; *Railroad Comm'n v Pullman Co.* (1941) 312 US 496, 500, 85 L Ed 971, 974, 61 S Ct 643.

Courts exercise their discretion to abstain only "within the narrow and specific limits prescribed by the particular abstention doctrine involved." *C-Y Dev. Co. v City of Redlands* (9th Cir 1983) 703 F2d 375, 377. For example, there must be concurrent or pending state court proceedings for *Colorado River Water Conserv. Dist.* abstention. *Kirkbride v Continental Cas. Co.* (9th Cir 1991) 933 F2d 729.

For *Burford* abstention to apply, courts require that:

- The state has concentrated suits involving the local issue in a particular court.
- The federal issues are intertwined with complicated state law issues over which state courts may have special competence.
- Federal review might disrupt state efforts to establish a coherent policy.

Poulos v Caesar's World, Inc. (9th Cir 2004) 379 F3d 654, 671. *Pullman* abstention is appropriate when:

- The complaint requires resolution of a sensitive federal constitutional law.
- The constitutional question could be avoided by a definitive ruling on the state law issues.
- The possibly determinative issue of state law is unclear.

Spoklie v Montana (9th Cir 2005) 411 F3d 1051.

On abstention generally, see *Moore v Sims* (1979) 442 US 415, 60 L Ed 2d 994, 99 S Ct 2371. For detailed discussion of the abstention doctrine and circumstances in which it is applied, see 17A Wright, Miller & Cooper, Federal Practice and Procedure §§4241-4248 (3d ed 1998).

Reservation of federal claims. A litigant who is forced into state court but seeks to preserve his or her federal claims and avoid the possible preclusive effects of an adverse state judgment should make a reservation of federal claims informing the state court of the existence of federal questions and the intent not to litigate them in the state action. See *England v Louisiana State Bd. of Med. Exam'rs* (1964) 375 US 411, 11 LEd2d 440, 84 S Ct 461; *Los Altos El Granada Investors v City of Capitola* (9th Cir 2009) 583 F3d 674 (litigant's two reservations of claims preserved its right to return to federal court even though state court struck its reservation of rights from complaint and district court abstained under *Younger*).

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§7.13 B. Pleading Requirement

In federal district court, under Fed R Civ P 8(a), a pleading that sets forth a claim for relief, whether it be an original claim, counterclaim, cross-claim, or third party claim, must contain, among other allegations, "a short and plain statement of the grounds upon which the court's jurisdiction depends unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it." Following Fed R Civ P 86 is an appendix of forms. Form 2 contains jurisdictional allegations for jurisdiction based on diversity of citizenship, federal question, or the admiralty or maritime character of the claim.

NOTE: A complaint based on diversity of citizenship under 28 USC §1332 may be dismissed if the plaintiff alleges residency rather than citizenship in pleading diversity jurisdiction. See generally *Strain v Harrelson Rubber Co.* (5th Cir 1984) 742 F2d 888, 889. Moreover, the plaintiff must allege the amount in controversy against each defendant unless defendants' liability is joint. *Welker v Metropolitan Life Ins. Co.* (CD Cal 1980) 502 F Supp 268, 271 (discussed in §7.74). On alleging both state of incorporation and principal place of business as to each corporate party, see §§7.57-7.58.

Under 28 USC §1653, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." For the section to be applicable, the jurisdictional allegation must be defective. The section does not permit an allegation to be amended retroactively to create jurisdiction when such jurisdiction has not previously existed. *Aetna Cas. & Sur. Co. v Hillman* (5th Cir 1986) 796 F2d 770, 775 (diversity case). See *Rockwell Int'l Credit Corp. v United States Aircraft Ins. Group* (9th Cir 1987) 823 F2d 302, 304, overruled on other grounds in *Partington v Gedan* (9th Cir 1991) 923 F2d 686, 688 (removal based on diversity; proposed amendment under §1653 not acceptable because it attempted to create jurisdiction when none existed). On plaintiffs being barred from amending allegation under §1653 to assert federal question jurisdiction retroactively when it did not previously exist, see *Boelens v Redman Homes, Inc.* (5th Cir 1985) 759 F2d 504, 511 (§1653 limited to curing technical defects).

Although normally a federal district court resolves the question of subject matter jurisdiction before reaching the issue of personal jurisdiction, federal courts have discretion to resolve a straightforward question of personal jurisdiction first, to avoid reaching a difficult or novel question of subject matter jurisdiction. A district court may dismiss a case based on lack of personal jurisdiction without ever reaching subject matter jurisdiction. *Ruhrgas AG v Marathon Oil Co.* (1999) 526 US 574, 143 L Ed 2d 760, 119 S Ct 1563. Similarly, a district court may dispose of an action based on a defendant's forum non conveniens claim without first addressing issues of subject matter jurisdiction or personal jurisdiction. *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp.* (2007) 549 US 422, 167 L Ed 2d 15, 22, 127 S Ct 1184.

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§7.14 C. Nonwaivability of Defense

Lack of subject matter jurisdiction cannot be waived. A party at any time may raise it by motion or in a responsive pleading, or the trial or reviewing court may raise it sua sponte. *International Union of Operating Eng'rs v County of Plumas* (9th Cir 2009) 559 F3d 1041, 1043 (party that asserted subject matter jurisdiction in its petition for removal not foreclosed from raising lack of subject matter jurisdiction on appeal); *Emrich v Touche Ross & Co.* (9th Cir 1988) 846 F2d 1190, 1194 n2; *Athens Community Hosp. v Schweiker* (DC Cir 1982) 686 F2d 989, 992. See *Dyer v Greif Bros.* (9th Cir 1985) 766 F2d 398, 401 (sua sponte by court). See also Fed R Civ P 12(h)(3).

When lack of jurisdiction is raised for the first time on appeal, the court of appeals will determine whether exercise of jurisdiction in the district court was proper, as well as whether jurisdiction in the court of appeals is proper. See *Bender v Williamsport Area Sch. Dist.* (1986) 475 US 534, 541, 89 L Ed 2d 501, 511, 106 S Ct 1326. See also *First Nat'l Bank v U.S.* (9th Cir 1986) 792 F2d 954 (district court); *In re Exennium, Inc.* (9th Cir 1983) 715 F2d 1401, 1402 (court of appeals). Furthermore, the parties cannot obtain federal subject matter jurisdiction by consent, waiver, estoppel, or stipulation. *Sullivan v First Affiliated Secs., Inc.* (9th Cir 1987) 813 F2d 1368, 1374; *First Nat'l Bank v U.S., supra*. Jurisdiction may never be created by agreement of the parties. See *California v La Rue* (1972) 409 US 109, 112 n3, 34 L Ed 2d 342, 348 n3, 93 S Ct 390.

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III. FEDERAL QUESTION JURISDICTION

§7.15 A. Statutory Authority

The federal question jurisdiction statute, 28 USC §1331, provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

While the statute's "arising under" language parallels that of Article III, §2 of the Constitution (see §7.2), it has been interpreted differently from this same phrase in the Constitution. Although the "arising under" language of US Const art III, §2 has been construed as permitting Congress to extend federal jurisdiction to any case in which federal law potentially "forms an ingredient," the "arising under" language in 28 USC §1331 is interpreted more narrowly. *Franchise Tax Bd. v Construction Laborers Vacation Trust* (1983) 463 US 1, 8 n8, 77 L Ed 2d 420, 430 n8, 103 S Ct 2841; *Verlinden B.V. v Central Bank* (1983) 461 US 480, 494, 76 L Ed 2d 81, 92, 103 S Ct 1962. Thus, Congress has conferred on the federal district courts only a limited measure of the judicial power available under the Constitution. Article "III 'arising under' jurisdiction is broader than federal-question jurisdiction under §1331." 461 US at 495.

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§7.16 B. When Cases Arise Under Federal Law

Perhaps the most well accepted of the tests for determining whether a case "arises under" federal law for the purposes of 28 USC §1331 is that enunciated by Justice Holmes in *American Well Works Co. v Layne & Bowler Co.* (1916) 241 US 257, 260, 60 L Ed 987, 989, 36 S Ct 585: "A suit arises under the law that creates the cause of action." Therefore, the mere involvement of a federal question in a case does not mean the action must be, or even can be, commenced in federal court. Courts have been careful to accept jurisdiction based on federal question jurisdiction only within certain judicially prescribed limitations.

"Arising under" has been more particularly defined by courts in a variety of ways. The court will not have jurisdiction under this section unless the lawsuit "really and substantially involves a dispute or controversy respecting the validity, construction, or effect" of the federal law. *Shulthis v McDougal* (1912) 225 US 561, 569, 56 L Ed 1205, 1211, 32 S Ct 704. The federal question must be a "substantial" and "essential" element of the cause of action. *Demarest v U.S.* (9th Cir 1983) 718 F2d 964; *Smith v Grimm* (9th Cir 1976) 534 F2d 1346, 1350. "The right or immunity created must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Gully v First Nat'l B*ank (1936) 299 US 109, 112, 81 L Ed 70, 72, 57 S Ct 96. The Ninth Circuit generally uses the test that the claim arises under federal law if the result "turns on" the federal question. *Mobil Oil Corp. v City of Long Beach* (9th Cir 1985) 772 F2d 534, 539; *Scope Indus. v Skadden, Arps, Slate, Meagher & Flom* (CD Cal 1983) 576 F Supp 373, 375.On effect of a federal defense and complete preemption doctrine, see §§7.20-7.21.

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§7.17 C. The Well-Pleaded Complaint Rule

The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint rule." Under this rule, whether a case arises under the Constitution or a law or treaty of the United States for jurisdictional purposes is determined from plaintiff's statement of plaintiff's claim contained in the complaint "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Taylor v Anderson* (1914) 234 US 74, 75, 58 L Ed 1218, 1219, 34 S Ct 724; *Provinicial Gov't of Marinduque v Placer Dome, Inc.* (9th Cir 2009) 582 F3d 1083, 1091; *Bright v Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766, 769. A complaint is not well pleaded and does not invoke federal jurisdiction if the federal question "can be raised properly only as an anticipated defense." *Mobil Oil Corp. v City of Long Beach* (9th Cir 1985) 772 F2d 534, 539. See *Franchise Tax Bd. v Construction Laborers Vacation Trust* (1983) 463 US 1, 10, 77 L Ed 2d 420, 431, 103 S Ct 2841. See also §7.20. The face of the complaint must disclose the federal question unaided by the answer (*Phillips Petroleum Co. v Texaco, Inc.* (1974) 415 US 125, 127, 39 L Ed 2d 209, 212, 94 S Ct 1002) or by any counterclaims. *Holmes Group, Inc. v Vornado Air Circulation Sys.*, Inc. (2002) 535 US 826, 153 LEd2d 13, 122 S Ct 1889.

NOTE: Jurisdiction under 28 USC §1331 (see §7.15) is not automatically conferred on anyone who pleads that his or her constitutional rights have been violated. A well-pleaded federal question must appear in the plaintiff's complaint. The plaintiff's complaint must state a cause of action under the particular statute relied on by the plaintiff or there will be no federal question in the case. *McIntosh v Garofalo* (WD Pa 1973) 367 F Supp 501, 506. See *Warrington Sewer Co. v Tracy* (3d Cir 1972) 463 F2d 771, 772 ("[a] bare allegation of violation of the due process clause of the Fourteenth Amendment is not sufficient to confer federal jurisdiction").

On artful pleading doctrine as a limitation on the well-pleaded complaint rule, see §7.19.

Petition to compel arbitration. Before granting a petition to compel arbitration under the Federal Arbitration Act (FAA) (9 USC §§1-16), the federal court must "look through" the petition and determine whether (based on the plaintiff's own statement of the cause of action and not on defendant's defenses or counterclaims), but for the existence of the arbitration agreement, the court would have had jurisdiction over the substantive conflict between the parties. *Vaden v Discovery Bank* (2009) ___US___, 173 LEd2d 206, 129 S Ct 1262. In *Vaden*, a credit card company sued a customer in state court to collect a debt and the customer counterclaimed pleading usury and other state law claims. Because these counterclaims were admittedly preempted by federal law, the bank petitioned the federal court to enforce an arbitration agreement between the parties. The Supreme Court held that the district court in *Vaden* lacked federal question jurisdiction to decide the arbitration petition; under the well-pleaded complaint rule, the controversy did not arise under federal law and could not have been litigated in federal court. See 173 LEd2d 206 at 224, 129 SCt 1262 at 1278.

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§7.18 1. Plaintiff as Master of Complaint

Although the facts concerning a plaintiff's case may support both state and federal claims, the plaintiff may decide to confine his or her claims to those based on state law and proceed in state court. *Connecticut v Levi Strauss & Co.* (D Conn 1979) 471 F Supp 363. See *Fair v Kohler Die & Specialty Co.* (1913) 228 US 22, 25, 57 L Ed 716, 33 S Ct 410 (party bringing suit is master of what law party will rely on, and therefore determines whether to bring suit arising under laws of United States by party's declaration or bill). Thus, the plaintiff is often called the "master" of his or her complaint, and is free to choose the forum in which to bring the action. *Bright v Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766, 769; *Schroeder v Trans World Airlines, Inc.* (9th Cir 1983) 702 F2d 189, 190, overruled on other grounds in *Moore-Thomas v Alaska Airlines, Inc.* (9th Cir 2009) 553 F3d 1241, 1246.

On limitations to the master of the complaint rule, see §7.19.

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§7.19 2. Artful Pleading Doctrine

Despite the well-pleaded complaint rule (see §7.17), courts will not allow a plaintiff "to conceal the true nature of the complaint through 'artful pleading.'" *Bright v Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766, 769. Thus, if a court determines that a plaintiff in its complaint has attempted to state an essentially federal claim in terms of state law merely to avoid the proper federal forum, the court will recharacterize the plaintiff's state law claim as a federal claim. *Hunter v United Van Lines* (9th Cir 1984) 746 F2d 635, 640.

The Ninth Circuit, calling the artful pleading doctrine a "minefield," has cautioned that the doctrine may be invoked only in limited circumstances because it "raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Lippitt v Raymond James Fin. Serv.* (9th Cir 2003) 340 F3d 1033, 1041.

Only two categories of cases apply to the artful pleading doctrine: (1) complete preemption cases and (2) substantial federal question cases, *i.e.,* claims that are "necessarily federal in character." *Lippitt*, 340 F3d at 1042. See also *Hall v North Am. Van Lines, Inc.* (9th Cir 2007) 476 F3d 683, 687 (49 USC §14706 was exclusive basis for contract claims alleging losses to property shipped interstate); *McMaster v Coca-Cola Bottling Co. of Cal.* (ND Cal 2005) 392 F Supp 2d 1107 (state claim was not artfully pled because it was not equivalent to federal tax refund suit and potential need to interpret IRC and IRS regulations did not present federal question).

For additional discussion of the artful pleading doctrine in the context of federal removal, see §22.10.

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§7.20 3. Federal Defense Insufficient

The plaintiff's complaint will not provide the basis for federal jurisdiction if it merely goes beyond a statement of the plaintiff's cause of action and (a) "anticipates or replies to a probable defense" (*Phillips Petroleum Co. v Texaco, Inc.* (1974) 415 US 125, 128, 39 L Ed 2d 209, 212, 94 S Ct 1002) or (b) asserts a claim "in the nature of a defense to a threatened or pending action" (*United Air Lines v Division of Indus. Safety of Dep't of Indus. Relations* (9th Cir 1980) 633 F2d 814, 817). Furthermore, the face of the complaint must disclose the federal question unaided by the answer. See *Phillips Petroleum Co. v Texaco, Inc.* (1974) 415 US 125, 127, 39 L Ed 2d 209, 212, 94 S Ct 1002. Federal question jurisdiction depends on the contents of the complaint and may not be based on counterclaims. *Holmes Group, Inc. v Vornado Air Circulation Sys.*, Inc. (2002) 535 US 826, 153 LEd2d 13, 122 S Ct 1889.

EXAMPLE: A plaintiff sought a declaratory judgment in federal district court that a state court judgment awarding part of his future military retirement pay to his ex-wife as part of the community property settlement was no longer enforceable based on a recent Supreme Court ruling. Although interpretation of federal law was the only issue to be resolved, federal question jurisdiction was held lacking because "[a] case does not arise under federal law … when the federal question is merely an anticipated defense to a state lawsuit." *Armstrong v Armstrong* (9th Cir 1983) 696 F2d 1237, 1238. The plaintiff's federal law issues had "vitality only as defenses to enforcement of the state court judgment." *Armstrong v Armstrong, supra*. On causes of action under the Declaratory Judgment Act generally, see §7.31.

The above rules also apply concerning removal of jurisdiction. See chap 22; *Powers v South Cent. United Food & Commercial Workers Unions & Employers Health & Welfare Trust* (5th Cir 1983) 719 F2d 760, 763. On federal question jurisdiction based on the complete preemption doctrine, see §7.21.

NOTE: Even when the only issue to be resolved is whether a federal law preempts a state law, when the plaintiff's claim is based on state law, and federal law is invoked by way of defense, federal jurisdiction under the well-pleaded complaint rule is lacking. *Hunter v United Van Lines* (9th Cir 1984) 746 F2d 635, 640; *Guinasso v Pacific First Fed. Sav. & Loan Ass'n* (9th Cir 1981) 656 F2d 1364. See §7.21 and chap 22 on complete preemption doctrine.

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§7.21 D. Complete Preemption Doctrine

Although federal question jurisdiction may generally not be based on the defense of federal preemption (see §7.20), an exception exists when the substantive state law relied on by a plaintiff has been entirely displaced by the enactment of federal legislation. "Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar Inc. v Williams* (1987) 482 US 386, 393, 96 L Ed 2d 318, 328, 107 S Ct 2425. The statute's extraordinary preemptive force converts the state law complaint into one asserting a federal claim for the purpose of the well-pleaded complaint rule (see §7.17). *Caterpillar Inc. v Williams, supra*. This is known as the complete preemption doctrine. *Caterpillar Inc. v Williams, supra*. For further discussion of the complete preemption doctrine, see chap 22. State-law based counterclaims do not qualify a case for federal question jurisdiction, even if those counterclaims would be completely preempted by federal law. *Vaden v Discovery Bank* (2009) ___US___, 173 LEd2d 206, 219, 129 S Ct 1262.

NOTE: State law claims brought in federal court also may be dismissed under the complete preemption doctrine. See *e.g., Coughlin v United Van Lines* (CD Cal 2005) 362 F Supp 2d 1166 (court granted defendant's motion to dismiss state law claims for damages to household goods against interstate motor carrier because claims were preempted by the Carmack Amendment to the Interstate Commerce Act (49 USC §14706)).

Federal statutes may also preempt state law claims under the doctrine of *conflict preemption*. Conflict preemption preempts common law causes of action that would impede or thwart Congressional objectives. See *Yarick v PacifiCare of California* (2009) 179 CA4th 1158, 1167, 102 CR3d 379 (rejecting plaintiff's common law duty claims against health insurer because to permit damages under common law would deprive federal authorities of regulatory power over health plan at issue).

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§7.22 E. Federal Claim Must Be Substantial

The principle that a "substantial" federal question is necessary to support jurisdiction is a further limitation on the powers of the federal courts. Federal courts have no jurisdiction over claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit … or no longer open to discussion." *Hagans v Lavine* (1974) 415 US 528, 536, 39 L Ed 2d 577, 587, 94 S Ct 1372, quoting from *Newburyport Water Co. v City of Newburyport* (1904) 193 US 561, 579, 48 L Ed 795, 801, 24 S Ct 553, and *McGilvra v Ross* (1909) 215 US 70, 80, 54 L Ed 95, 101, 30 S Ct 27. See *Hannis Distilling Co. v Mayor of Baltimore* (1910) 216 US 285, 288, 54 L Ed 482, 483, 30 S Ct 326 (question obviously frivolous or plainly insubstantial because (1) it is manifestly devoid of merit, or (2) the subject has been foreclosed by earlier decisions that "leave no room for the inference that the questions sought to be raised can be the subject of controversy").

EXAMPLE 1: Plaintiffs sought compensation from the county water district for a "taking" under the Fifth and Fourteenth Amendments because the district's construction of a sand dike failed to prevent flooding to their property. Earlier decisions foreclosed relief in those circumstances. Thus, it was held that the court lacked jurisdiction of the claim. *PDTC Owners Ass'n v Coachella Valley County Water Dist.* (CD Cal 1978) 443 F Supp 338, 341.

EXAMPLE 2: Plaintiffs challenged the validity of a New York welfare regulation under the equal protection clause of the Fourteenth Amendment and the supremacy clause. Because the Supreme Court was not aware of any cases in its Court that specifically dealt with this or any similar regulation and settled the matter one way or the other, the claim was held not to be either frivolous or insubstantial and was thus within the district court's jurisdiction. *Hagans v Lavine* (1974) 415 US 528, 539, 39 L Ed 2d 577, 589, 94 S Ct 1372.

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§7.23 F. Private Right of Action

A private right of action may be created even though the federal statute relied on does not explicitly provide for it. *Kipperman v Academy Life Ins. Co.* (9th Cir 1977) 554 F2d 377, 380. Traditionally, courts applied certain factors to determine whether a private right of action existed; however, courts are now reluctant to find a private cause of action. Under the current approach, federal courts will create a private right of action only if there is "affirmative evidence of Congress' intent to create a private right of action." *Touche Ross & Co. v Redington* (1979) 442 US 560, 61 L Ed 2d 82, 99 S Ct 2479; *Adler v Taylor* (CD Cal, Feb. 2, 2005, No. 04-8472) 2005 US Dist Lexis 5862.

Congress' intent in enacting the federal statute is the focal point in determining whether the federal statute confers a private cause of action, and the above factors, together with other tools of statutory construction, are guides to discerning that intent. *Thompson v Thompson* (1988) 484 US 174, 179, 98 L Ed 2d 512, 519, 108 S Ct 513. "[T]he essential predicate for implication of a private remedy simply does not exist" if the congressional intent cannot be inferred from the statutory language, the statutory structure, or from some other source. *Northwest Airlines, Inc. v Transport Workers Union* (1981) 451 US 77, 94, 67 L Ed 2d 750, 765, 101 S Ct 1571.

EXAMPLE: Chilkat Indian Village brought an action seeking return of artifacts and monetary damages for their removal, alleging a violation of the federal statute prohibiting embezzlement and theft from Indian tribal organizations. To determine the intent of Congress, the court looked to the legislative history of the statute, which suggested that Congress was concerned with criminal rather than civil objectives. "The clear congressional emphasis seems to have been upon replacing a defective tribal criminal penalty with an effective federal one; a civil remedy cannot be fit easily into the picture." *Chilkat Indian Village v Johnson* (9th Cir 1989) 870 F2d 1469, 1472. In the absence of a basis for inferring congressional intent to create a private remedy, the Court dismissed the village's federal claim. *Chilkat Indian Village v Johnson, supra*.

In *Kipperman v Academy Life Ins. Co., supra,* the court indicated that a limited private right of action to secure restitutionary relief under 39 USC §3009 (which makes mailing of unsolicited merchandise a per se unfair trade practice actionable by the Federal Trade Commission) would be appropriate, but held injunctive relief inappropriate because it would interfere with the Federal Trade Commission's power to enforce the section. See also *Musick, Peeler & Garrett v Employers Ins. of Wausau* (1993) 508 US 286, 124 L Ed 2d 194, 113 S Ct 2085 (right to contribution in suit based on implied private right of action under Securities Exchange Act §10(b) and Rule 10b-5 of SEC).

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§7.24 G. Cause of Action Under Federal Common Law

Under 28 USC §1331, a district court has jurisdiction over actions that arise under the "laws" of the United States. The word "laws" has been construed to include laws created by judicial decisions as well as by federal statute. *Illinois v City of Milwaukee* (1972) 406 US 91, 31 L Ed 2d 712, 92 S Ct 1385. Thus, despite the famous declaration in *Erie R.R. v Tompkins* (1938) 304 US 64, 78, 82 L Ed 1188, 1194, 58 S Ct 817, that there exists "no federal general common law," claims that arise under federal common law provide a basis for federal court jurisdiction under §1331. *Texas Indus. v Radcliff Materials, Inc.* (1981) 451 US 630, 641, 68 L Ed 2d 500, 509, 101 S Ct 2061; *Janakes v United States Postal Serv.* (9th Cir 1985) 768 F2d 1091, 1094. Instances when the court may formulate federal common law, however, are few. *Texas Indus. v Radcliff Materials, Inc., supra*. There are essentially two categories of cases in which courts may have the authority to formulate federal common law (see *Texas Indus. v Radcliff Materials, Inc.* (1981) 451 US 630, 640, 68 L Ed 2d 500, 509, 101 S Ct 2061; *National Audubon Soc'y v Department of Water & Power* (9th Cir 1988) 858 F2d 1409, 1413):

- Those in which the courts have been given power by Congress to develop substantive law (see §7.25), and
- "[T]hose in which a federal rule of decision is necessary to protect uniquely federal interests" (see §7.26).

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§7.25 1. Development of Federal Common Law

Perhaps the most frequent basis for the creation of federal common law is explicit congressional authorization. This seems to be a contradiction, but it is actually not. When Congress wishes to establish a comprehensive regulatory scheme, but does not wish itself to fully regulate in the area, it may empower the federal courts to develop a body of federal common law to supplement the statutory scheme and to define and develop the standards that the statute sets out in general terms. *Menhorn v Firestone Tire & Rubber Co.* (9th Cir 1984) 738 F2d 1496, 1499. For example, Labor Management Relations Act of 1947 (LMRA) §301 has been treated as congressional authorization for the federal courts to develop a federal common law concerning the construction and enforcement of collective bargaining agreements, including "fashioning a remedy that will effectuate [the statute's] policy." *Textile Workers Union v Lincoln Mills* (1957) 353 US 448, 457, 1 L Ed 2d 972, 981, 77 S Ct 912. Similarly, in *Menhorn v Firestone Tire & Rubber Co., supra,* the court concluded that Congress intended for the courts "to formulate a nationally uniform federal common law to supplement the explicit provisions and general policies" in the Employee Retirement Income Security Act of 1974 (ERISA). 738 F2d at 1500.

NOTE: Except as indicated in §7.26, the fact that a federal court is vested with jurisdiction does not in and of itself give the court authority to formulate federal common law in the absence of congressional authorization for the court to formulate substantive rules of decision. *Texas Indus. v Radcliff Materials, Inc.* (1981) 451 US 630, 640, 68 L Ed 2d 500, 509, 101 S Ct 2061.

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§7.26 2. Application of Federal Common Law

Federal common law will be applied when a uniform national rule is necessary to further the interests of the federal government (see *Miree v DeKalb County* (1977) 433 US 25, 29, 53 L Ed 2d 557, 562, 97 S Ct 2490), *i.e.,* when a federal rule of decision is required to protect uniquely federal interests (*Texas Indus. v Radcliff Materials, Inc.* (1981) 451 US 630, 640, 68 L Ed 2d 500, 509, 101 S Ct 2061). Such federal interests generally exist only in the limited areas concerned with:

- The rights and obligations of the United States;
- "[I]nterstate and international disputes implicating the conflicting rights of States or our relations with foreign nations"; and
- Admiralty and maritime cases.

451 US at 641, 68 L Ed 2d at 509.

In the above instances, the court will not allow state law to be applied to resolve the controversy because either (a) "the authority and duties of the United States as sovereign are intimately involved" or (b) it is inappropriate for state law to control because of the controversy's interstate or international nature. *Texas Indus. v Radcliff Materials, Inc., supra*. See, *e.g., Clearfield Trust Co. v U.S.* (1943) 318 US 363, 367, 87 L Ed 838, 842, 63 S Ct 573, in which the plaintiff brought an action to recover the amount of a check drawn on the Treasurer of the United States, which had been paid on a forged endorsement. The court fashioned the controlling federal rule of law without selecting state law as the federal rule. If state law were applied to issuance of commercial paper by the United States, the duties and obligations of the United States would be subjected to great uncertainty. The identical transaction would be subject to the vagaries of each state's laws thereby leading to great diversity in results. Thus, a uniform federal common law was required and applied. *Clearfield Trust Co. v U.S., supra*. Post-*Clearfield* decisions establish, however, that uniform federal law "need not always be applied in government litigation." *Empire Healthchoice Assur., Inc. v McVeigh* (2006) 547 US 677, 165 L Ed 2d 131, 126 S Ct 2121 (reimbursement claim under Federal Employee Health Benefits Act (FEHBA) not within federal jurisdiction when right to reimbursement arose from contract, not from FEHBA, and claim raised only state law issues).

With regard to interstate disputes concerning air pollution, see *National Audubon Soc'y v Department of Water & Power* (9th Cir 1988) 858 F2d 1409, 1416, in which the court indicated that a federal common law nuisance claim based on such activity is recognized only in a very limited context. The court noted that "[i]t appears that the Court considers only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control, and therefore subject to resolution according to federal common law." 858 F2d at 1417.

Under the "act of state doctrine," the federal court has subject matter jurisdiction under 28 USC 1331 over claims challenging the validity of a foreign state's conduct within its own borders. *Provinicial Gov't of Marinduque v Placer Dome, Inc.* (9th Cir 2009) 582 F3d 1083, 1088 (district court lacked subject matter jurisdiction under act of state doctrine when validity of foreign government's actions was not essential element of any of plaintiff's claims).

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§7.27 3. Whether to Adopt State Law as Federal Rule

Once a court has determined that federal common law will provide the rule of decision, the court must determine whether that law is to be a uniform federal common law, or whether relevant state law may be incorporated as the federal rule of decision. *Southern Pac. Transp. Co. v U.S.* (ED Cal 1978) 462 F Supp 1193, 1201. As a general rule, state law will provide the rule of decision unless an overriding federal interest in uniformity exists. *Great Southwest Life Ins. Co. v Frazier* (9th Cir 1988) 860 F2d 896, 899.

In determining whether to adopt state law or fashion a nationwide federal rule, a court will consider:

- Whether application of state law would frustrate specific federal objectives; and
- The extent to which commercial relationships predicated on state law would be disrupted by application of a federal rule.

U.S. v Kimbell Foods, Inc. (1979) 440 US 715, 728, 59 L Ed 2d 711, 724, 99 S Ct 1448; *Great Southwest Life Ins. Co. v Frazier, supra*. See *Yunis v U.S.* (CD Cal 2000) 118 F Supp 2d 1024, 1033 for an example of a situation in which the district court concluded that it was required to fashion a federal rule because application of state law would frustrate the intent of Congress.

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§7.28 H. Private Cause of Action Under International Treaties

Under 28 USC §1331, federal district courts have jurisdiction over actions that arise under the Constitution, laws, or treaties of the United States. Courts rarely find private claims to be so closely connected with a treaty of the United States as to "arise under" the treaty as required by §1331. Without authorizing legislation, a treaty's provisions may be enforced by an individual only when the treaty is self-executing, *i.e.,* when a private right of action is expressly or impliedly provided for in the treaty. *Handel v Artukovic* (CD Cal 1985) 601 F Supp 1421, 1425; *Dreyfus v Von Finck* (2d Cir 1976) 534 F2d 24, 30. In determining whether a treaty is self-executing, the following factors are considered (*People of Saipan v United States Dep't of Interior* (9th Cir 1974) 502 F2d 90, 97):

> the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.

EXAMPLE: Plaintiffs brought a class action for compensatory and punitive damages against the defendant for his alleged involvement in deprivations of life and property suffered by Jews in Yugoslavia during World War II. Plaintiffs based their claims on the Hague Convention and the Geneva Convention. Because the Geneva Convention provided for enforcement of its provisions under the domestic laws of the signatory countries, and because recognition of a private remedy under the Hague Convention would potentially interfere with foreign relations and pose serious problems of fairness in enforcement, the court concluded that the treaties were not self-executing and provided no private cause of action. *Handel v Artukovic, supra*.

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Source: Civil Litigation/California Civil Procedure Before Trial/7 Federal Jurisdiction/§7.29 I. Concurrent State and Federal Jurisdiction

§7.29 I. Concurrent State and Federal Jurisdiction

State and federal courts have concurrent jurisdiction over suits that arise under the Constitution, laws, and treaties of the United States except when Congress has restricted jurisdiction over such suits to the federal courts. *Grubb v Public Utils. Comm'n* (1930) 281 US 470, 476, 74 L Ed 972, 978, 50 S Ct 374; *Cohen v Kar Prods., Inc. (In re Repair & Maintenance Parts Corp.)* (Bankr ND Ill 1982) 19 BR 575. A state court, however, in deciding a federal question case over which there is concurrent jurisdiction, must apply federal law. See *League To Save Lake Tahoe v B.J.K. Corp.* (9th Cir 1976) 547 F2d 1072, 1075 n7.

Although a state and a federal court may have concurrent jurisdiction over a case involving a federal question, if suit is instituted in state court, generally the defendant may have such a case removed to a federal district court unless removal of the particular case is prohibited by a statute. On removal generally, see chap 22.

PRACTICE TIP: In certain instances, if an action over which a state and federal court have concurrent jurisdiction is filed initially in state court, the action cannot be removed to federal court. For such actions, see chap 22. Thus, a plaintiff, by filing such a case initially in state court, can control the forum by precluding the case from being heard in federal court if the plaintiff so desires.

Below is a list of statutes on which claims are often based over which state and federal courts have concurrent jurisdiction. The list is not meant to be exhaustive.

NOTE: Some of these statutes are listed here because it appears from their language that concurrent jurisdiction exists. Counsel must, however, check case law, as there may be no Ninth Circuit case directly on point.

- *Age Discrimination in Employment Act (ADEA)* (29 USC §§621-634)—creates a federal cause of action for age discrimination. See *Mathis v Allied Wholesale Distrib., Inc.* (MD Ga 1988) 680 F Supp 1545, 1547; *Jacobi v High Point Label, Inc.* (MD NC 1977) 442 F Supp 518.
- 42 USC §1981—protects individuals against discrimination in the making and enforcement of contracts. See *De Horney v Bank of America Nat'l Trust & Sav. Ass'n* (9th Cir 1989) 879 F2d 459.
- 42 USC §1983—gives individuals who are deprived of any right, privilege, or immunity secured by the Constitution or laws a right of action against any person acting under color of state law who deprives them of such rights. See *Kutzik v Young* (4th Cir 1984) 730 F2d 149; *Long v District of Columbia* (DC Cir 1972) 469 F2d 927.
- 42 USC §1985—gives individuals who are injured in their person or property, or who are deprived of any right or privilege of a citizen of the United States, an action for damages against any one or more of those who interfere with his or her civil rights. See *Bennum v Board of Governors* (D NJ 1976) 413 F Supp 1274, 1279.
- *Civil Rights Act of 1964* (Title VII) (42 USC §§2000(e)-2000(e)(17))—permits suits against employers for employment discrimination on the basis of race, color, religion, sex, or national origin. *Donnelly v Yellow Freight Sys.* (1990) 494 US 820, 108 L Ed 2d 834, 110 S Ct 1566.
- *Consumer Leasing Act of 1976* (15 USC §§1667-1667e)—establishes a claim for relief concerning a consumer lease against any lessor who fails to make required lease disclosures or fails to comply with provisions governing a lessee's liability on expiration or termination of the lease. See 15 USC §1667d(c).
- *Electronic Fund Transfer Act* (15 USC §§1693-1693r)—creates a claim for damages against any person who fails to comply with provisions under this subchapter governing electronic fund transfers. See 28 USC §1693m(g).
- *Equal Credit Opportunity Act* (15 USC §§1691-1691f)—gives an aggrieved credit applicant a right of action against any creditor who fails to comply with prohibitions in this subchapter against racial discrimination. See 15 USC §1691e(f).
- *Fair Credit Reporting Act* (15 USC §§1681-1681t)—gives any consumer a claim against any consumer reporting agency or user of information which willfully fails to comply with fair and accurate credit reporting practices

(§1681n) or negligently fails to comply with the requirements under this subchapter (§1681o). See 15 USC §1681p; *Haun v Retail Credit Co.* (WD Pa 1976) 420 F Supp 859 (removal allowed); *Ruth v Westinghouse Credit Co.* (DC Okla 1974) 373 F Supp 468 (removal denied).

- *Fair Debt Collection Practices Act* (15 USC §§1692-1692o)—provides a claim against any debt collector who fails to comply with provisions of this subchapter prohibiting abusive, deceptive, and unfair debt collection practices. See 28 USC §1692k(d); *Peterson v United Accounts, Inc.* (8th Cir 1981) 638 F2d 1134.
- *Fair Labor Standards Act* (29 USC §§201-219)—allows actions by employees against employers for unpaid compensation. See 29 USC §216.
- *Federal Employers' Liability Act* (FELA) (45 USC §§51-60) (railroads)—gives a right of action to railroad employees who suffer on-the-job injuries due to the railroad's negligence. See 45 USC §56.
- *Interstate Land Sales Full Disclosure Act* (15 USC §1701-1720)—allows any purchaser or lessee to bring an action against a developer or agent if an interstate sale or lease of property was made in violation of §1703(a) of this title prohibiting misrepresentations or material omissions in connection with the sale or lease of any lot. See 15 USC §1719.
- *Jones Act* (46 USC §688)—provides that any seaman who suffers personal injuries in the course of his employment may maintain an action for damages. See *Baptiste v Superior Court* (1980) 106 CA3d 87, 164 CR 789.
- *Racketeer Influenced and Corrupt Organization Act* (RICO) (18 USC §§1961-1968)—provides that anyone injured in his or her business or property by reason of "racketeering activity" may sue to recover treble damages. 18 USC §1964; *Lou v Belzberg* (9th Cir 1987) 834 F2d 730.
- *Securities Act of 1933* (15 USC §§77a-77aa)—provides a claim against any purchaser or seller of a security who makes untrue statements of material fact or who omits to state material facts necessary in order to make other statements not misleading. See 15 USC §77v. On exclusive federal jurisdiction under the Securities Exchange Act of 1934, see §7.30.
- *Small Business Act* (15 USC §§631-650)—gives small businesses a claim against the Administrator of the Small Business Administration for failure to assist and protect, insofar as is possible, the interest of small business concerns. See 15 USC §634(b)(1).
- *Truth in Lending Act* (15 USC §§1601-1646)—establishes a civil cause of action by consumers against creditors who fail to make required financial disclosures or fail to comply with fair and accurate credit billing practices. See 15 USC §1640(e).

On the United States as a plaintiff, see 28 USC §1345. See also 14A Wright, Miller & Cooper, Federal Practice and Procedure §§3651-3653 (3d ed 1998).

NOTE: A state court must apply federal law in an action filed in state court that involves a federal question over which there is concurrent jurisdiction. *League To Save Lake Tahoe v B.J.K. Corp.* (9th Cir 1976) 547 F2d 1072, 1075 n7. See *Monessen Sw. Ry. v Morgan* (1988) 486 US 330, 100 L Ed 2d 349, 108 S Ct 1837 (proper measure of damages under Federal Employers' Liability Act inseparably connected with right of action and is therefore issue of substance that must be decided under federal law; improper for state to characterize its rule on awarding prejudgment interest as mere local rule of procedure). On federal common law, see §§7.24-7.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/7 Federal Jurisdiction/§7.30 J. Exclusive Federal Court Jurisdiction

§7.30 J. Exclusive Federal Court Jurisdiction

Some federal statutes provide for exclusive federal jurisdiction of claims arising under them. Under such statutes, a plaintiff can bring federal claims only in federal court; state courts lack subject matter jurisdiction over these matters. Some of these statutes are listed below (although counsel should check case law to determine if any exceptions apply):

- Admiralty and maritime (28 USC §1333)—creates exclusive federal jurisdiction over maritime and admiralty cases, except as provided in the "saving to suitors" clause contained in 28 USC §1331(1). For discussion of the "saving to suitors" clause, see 14 Wright, Miller & Cooper, Federal Practice and Procedure §3672 (3d ed 1998). A suit arising from the sale of a vessel, however, does not give rise to admiralty jurisdiction. *Herman Family Revocable Trust v Teddy Bear* (9th Cir 2001) 254 F3d 802, 804.
- Bankruptcy matters (28 USC §1334).
- Consuls and vice consuls of foreign states (28 USC §1351)—provides for exclusive federal district court jurisdiction for actions or proceedings against such persons.
- Certain ERISA actions (Employee Retirement Income Security Act (29 USC §§1001-1461)).
- Federal Tort Claims Act (28 USC §§2671-2680)—authorizes claims against the United States for the negligent or wrongful acts or omissions of employees of the federal government while acting within the scope of their authority. See 28 USC §1346(b).

NOTE: Claims arising in foreign countries cannot be brought under this Act. *Smith v U.S.* (1993) 507 US 197, 122 L Ed 2d 548, 113 S Ct 1178 (Antarctica held to be foreign country).

- Fine, penalty, or forfeiture, pecuniary or otherwise, incurred under Act of Congress (28 USC §1355)—provides for exclusive jurisdiction in district courts for action or proceeding to recover or enforce such fine, penalty, or forfeiture.
- Patents, copyrights, and trademarks (28 USC §1338)—provides for federal jurisdiction over actions relating to patents, trademarks, copyrights, and related matters, *e.g.,* unfair competition.
- Labor Management Relations Act (29 USC §185)—permits suits by both unions and individual union members seeking to vindicate rights (*e.g.,* wages, hours, overtime pay, wrongful discharge, fair representation) arising out of a collective bargaining agreement. See *K.V. Mart Co. v United Food & Commercial Workers Int'l Union* (9th Cir 1999) 173 F3d 1221 (29 USC §185 does not confer jurisdiction over all suits by or against covered unions, but is limited to suits for breach of contract identified in that section, such as breaches of collective bargaining agreements).
- Securities Exchange Act of 1934 (15 USC §§78a-78kk)—allows for a right of action against persons using instrumentalities of interstate commerce to engage in various manipulative or deceptive acts with respect to the purchase or sale of securities. See 15 USC §78aa.
- Seizure of property under United States law (28 USC §1356)—provides for exclusive jurisdiction in the federal district courts for any seizure under any United States law on land or on "waters not within admiralty and maritime jurisdiction."
- Sherman Antitrust Act (15 USC §§1-37a)—provides treble damages for injury caused by monopolization or contracts, combinations, or conspiracies in restraint of trade. See 15 USC §§4, 15.
- Tucker Act (28 USC §§1346(a)(2), 1491)—provides that in addition to recovery of any internal revenue tax or penalty as specified in 28 USC §1346(a)(1), the district court has original jurisdiction concurrent with the United States Claims Court, for any action or claim against the United States not exceeding $10,000, founded on the Constitution, congressional Act, or executive department regulation, or on an express or implied contract with the United States, or for liquidated or unliquidated damages in nontort cases. Under 28 USC §1346(a)(2), however, the district court does not have jurisdiction for actions or claims against the United States based on any express or implied contract with the United States or for liquidated or unliquidated damages in nontort cases that "are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978." Jurisdiction for claims exceeding

$10,000 is vested in the United States Claims Court. See 28 USC §§1346(a)(2), 1491. For further discussion of the Tucker Act, see 14 Wright, Miller & Cooper, Federal Practice and Procedure §3657 (3d ed 1998).

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Source: Civil Litigation/California Civil Procedure Before Trial/7 Federal Jurisdiction/§7.31 K. Causes of Action Under Declaratory Judgment Act

§7.31 K. Causes of Action Under Declaratory Judgment Act

The Declaratory Judgment Act (28 USC §2201) enlarges the range of remedies available in the federal courts. However, it is a procedural device only and does not enlarge federal jurisdiction. *Skelly Oil Co. v Phillips Petroleum Co.* (1950) 339 US 667, 671, 94 L Ed 1194, 1199, 70 S Ct 876; *Aetna Life Ins. Co. v Haworth* (1937) 300 US 227, 240, 81 L Ed 617, 621, 58 S Ct 454.

Use of the Declaratory Judgment Act does not confer jurisdiction by itself; there is no jurisdiction if it would not exist on the face of a well-pleaded complaint brought without the use of the Act. *Janakes v United States Postal Serv.* (9th Cir 1985) 768 F2d 1091, 1093. There must be an independent basis for jurisdiction. *Stock West, Inc. v Confederated Tribes of Colville Reservation* (9th Cir 1989) 873 F2d 1221, 1225.

Under the well-pleaded complaint rule (see §7.17), a plaintiff's declaratory judgment complaint does not present a federal question (and, thus, federal jurisdiction will be lacking) if, without the declaratory judgment procedure, the federal issue would arise only as a defense to a state-created action. *Franchise Tax Bd. v Construction Laborers Vacation Trust* (1983) 463 US 1, 16, 77 L Ed 2d 420, 435, 103 S Ct 2841. See *Janakes v United States Postal Serv., supra* (declaratory judgment that plaintiff's complaint will not assert a federal question "if, but for the declaratory judgment procedure, that question would arise only as a federal defense to a state law claim brought by the declaratory judgment defendant in state court"). On the other hand, a federal court has jurisdiction, notwithstanding the assertion of a federal defense by the declaratory judgment plaintiff, if the declaratory judgment defendant could have brought a well-pleaded coercive action arising under federal law in federal court to enforce its rights. *Franchise Tax Bd.*, 77 L Ed 2d at 437; *Janakes v United States Postal Serv., supra*. See *Mobil Oil Corp. v City of Long Beach* (9th Cir 1985) 772 F2d 534, 539 (dispositive issue is whether federal issue would appear as necessary element of well-pleaded complaint filed by any proper party in coercive action to enforce rights in dispute). The coercive action cannot "be based merely on diversity of citizenship or another, nonsubstantive jurisdictional statute," but must arise under federal law. *Janakes v United States Postal Serv., supra*.

EXAMPLE: Plaintiff mail carrier was injured while delivering mail and was paid his normal salary under the Federal Employees Compensation Act (FECA) (5 USC §§8101-8193) during the period in which he was unable to perform his duties. The United States Postal Service then notified the plaintiff that he would be required to reimburse the Service for payments received during his injury if he recovered from a third party tortfeasor. The plaintiff filed a declaratory judgment action seeking interpretation of FECA, specifically §§8131 and 8132. The plaintiff's claim was made in anticipation of the Service's action to collect its reimbursement, and thus was an assertion of a federal defense, which does not confer subject matter jurisdiction. However, the court held that 5 USC §8132 creates a right of action on which the defendant Postal Service could base a coercive suit for reimbursement in federal court under 28 USC §1331, and thus the federal court had jurisdiction over the plaintiff's declaratory judgment action. *Janakes v United States Postal Serv.* (9th Cir 1985) 768 F2d 1091, 1094.

The test is not whether all claims brought by the declaratory judgment defendant to resolve the matter in dispute necessarily arise under federal law, but rather whether the defendant has at least one claim that would arise under federal law. Thus, a declaratory judgment defendant need only have one claim arising under federal law that the defendant could have brought by a coercive suit in federal court to resolve the issue to confer federal question jurisdiction and thus enable the plaintiff to maintain the declaratory judgment action in federal court. See 768 F2d at 1095. Furthermore, the federal court has jurisdiction over the declaratory judgment action even though the declaratory judgment defendant has not actually brought the coercive action on which federal jurisdiction is based. See generally 768 F2d at 1094 (if hypothetical suit could be brought by defendant, plaintiff's declaratory judgment action supported by jurisdiction).

NOTE: A state declaratory judgment action that raises a question of federal law is not removable to federal court unless the federal court could have taken jurisdiction of the declaratory judgment complaint had it been filed with it under 28 USC §2201. *Franchise Tax Bd.*, 77 L Ed 2d at 436. On removal generally, see chap 22. On state declaratory

relief actions, see chap 35.

A district court has discretion on whether to exercise jurisdiction under the Declaratory Judgment Act. See, *e.g., Brillhart v Excess Ins. Co.* (1942) 316 US 491, 86 L Ed 1620, 62 S Ct 1173. The district court did not abuse its discretion in remanding a removed state court action and declining jurisdiction when it considered the *Brillhart* factors and determined that avoiding duplicative litigation and avoiding forum shopping favored neither party, and that state court would be the preferable forum because both the federal and state actions involved the same purely state law issue. *Huth v Hartford Ins. Co.* (9th Cir 2002) 298 F3d 800.

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§7.32 L. Jurisdiction to Proceed on Merits When Jurisdiction Attacked

A complaint that fails "to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of [subject matter] jurisdiction." *Bell v Hood* (1946) 327 US 678, 682, 90 L Ed 939, 943, 66 S Ct 773. Generally, a jurisdictional determination must be made before any determination on the merits of a claim. However, "if the attack on jurisdiction requires the court to consider the merits of the case, the court has jurisdiction to proceed to a decision on the merits." *Thornhill Publ'g Co. v General Tel. & Elec. Corp.* (9th Cir 1979) 594 F2d 730, 734.

Some statutes provide the basis for both federal court subject matter jurisdiction and the plaintiff's substantive claim. Under such a statute, the jurisdictional issue and the issue of whether a claim was stated are intertwined. In those instances, a motion to dismiss for lack of subject matter jurisdiction under Fed R Civ P 12(b)(1) rather than for failure to state a claim under Fed R Civ P 12(b)(6) is proper only if the allegations of the complaint are frivolous. *Timberlane Lumber Co. v Bank of America* (9th Cir 1976) 549 F2d 597, 602 (Rule 56 treatment rather than speaking motion under Rule 12(b)(1) appropriate). See *Thornhill Publ'g Co. v General Tel. & Elec. Corp., supra* (Rule 56 summary judgment proper; less rigorous standards apply under Rule 12(b)(1) than under Rule 56). Moreover, in certain instances when the jurisdictional question "is dependent on decision of the merits, a party is entitled to have the jurisdictional issue submitted to the jury, rather than have the court resolve factual issues." 594 F2d at 735.

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IV. SUPPLEMENTAL JURISDICTION

§7.33 A. Definitions; 28 USC §1367

The term "supplemental jurisdiction" applies to civil actions begun in federal court on or after December 1, 1990, the date that 28 USC §1367 was enacted. It is an exception to the rule that every claim against every party in a federal pleading must be asserted under a specific federal statutory grant of subject matter jurisdiction. The exercise of supplemental jurisdiction permits a federal district court to resolve in one lawsuit a claim over which federal statute gives it jurisdiction and a related claim over which it would not otherwise have subject matter jurisdiction. It permits a plaintiff who can allege a valid federal statutory cause of action against a defendant to assert, in the same federal court lawsuit, related claims that arise under state law. It permits a defendant who is sued in federal court to assert counterclaims and cross-claims that would otherwise be outside the district court's jurisdiction.

In enacting 28 USC §1367, Congress legislatively overruled the Supreme Court's holding in *Finley v U.S.* (1989) 490 US 545, 104 L Ed 2d 593, 109 S Ct 2003, which required the plaintiff to pursue a wrongful death action both in federal court (against a federal agency that could only be sued there) and in state court (against other defendants). The statute, a legislative response to a perceived tendency in the federal courts to restrict the circumstances under which they would exercise jurisdiction over related state law claims, defines supplemental jurisdiction broadly (28 USC §1367(a)) and places strict limits on the court's discretion to decline to exercise supplemental jurisdiction (28 USC §1367(c)).

Under 28 USC §1367(a), a federal district court has supplemental jurisdiction over any claim asserted in the action (including claims that involve the joinder or intervention of additional parties) that is so related to a claim over which the court has original jurisdiction (*i.e.,* a federal statutory claim) that the claims form part of the same case or controversy under US Const art III. See, *e.g., City of Chicago v International College of Surgeons* (1997) 522 US 156, 139 L Ed 2d 525, 118 S Ct 523 (if state law claims are part of same case or controversy involved in federal question, nothing in text of 28 USC §1367 indicates exception for supplemental jurisdiction on ground that resolution of state law claims requires deferential (on-the-record) review of state administrative agency's ruling). See also *Guevara v Ventura County Community College Dist.* (2008) 169 CA4th 167, 87 CR3d 50 (28 USC 1367(d) tolled plaintiff's deadline to refile administrative mandamus and federal civil rights claims in state court after federal district court dismissed claims without prejudice); *Federal Sav. & Loan Ins. Corp. v Ferrante* (9th Cir 2004) 364 F3d 1037 (district court lacked supplemental jurisdiction over attorney fee claim that was not related to litigation before court).

Supplemental jurisdiction, predicated on original federal court jurisdiction as opposed to diversity-of-citizenship jurisdiction, cannot exist without the presence of at least one federal statutory claim. Thus, if a district court determines that it had no original federal subject matter jurisdiction, it has no authority to adjudicate supplemental claims under 28 USC §1367. *Herman Family Revocable Trust v Teddy Bear* (9th Cir 2001) 254 F3d 802, 803 (suit arising from sale of vessel did not give rise to admiralty jurisdiction, and thus, district court could not adjudicate state law claims purportedly under its supplemental jurisdiction). This situation is distinguishable from one in which a district court dismisses on the merits a federal claim over which it did have jurisdiction. It then has discretion to retain jurisdiction over any state law claims. 254 F3d at 806; *Kohler v Inter-Tel Technols.* (9th Cir 2001) 244 F3d 1167.

Supplemental jurisdiction, as defined in 28 USC §1367, subsumes the concepts of "pendent" and "ancillary" jurisdiction, which were developed in decisional law. These terms remain useful because courts continue to use them to differentiate circumstances under which federal courts may exercise (or refuse to exercise) jurisdiction over state law claims.

Pendent jurisdiction allows a plaintiff who has stated at least one federal statutory claim to allege closely related nonfederal claims in the same lawsuit if:

- The federal claim has sufficient substance to confer subject matter jurisdiction on the court.
- The federal and nonfederal claims derive from a "common nucleus of operative fact."
- The claims are such that a plaintiff would "ordinarily be expected to try them all" in one judicial proceeding.

United Mine Workers of Am. v Gibbs (1966) 383 US 715, 725, 16 L Ed 2d 218, 228, 86 S Ct 1130. See §§7.37-7.42.

Ancillary jurisdiction allows a defendant to

- Assert a cross-claim against an existing party even though that claim is not itself within the court's federal statutory jurisdiction; or
- Add new parties in claims for, *e.g.,* contribution and indemnity.

The defendant must show that the new claim bears "a logical relationship to the aggregate core of operative facts which constitute the main claim over which the court has an independent basis of federal jurisdiction." *Revere Copper & Brass Inc. v Aetna Cas. & Sur. Co.* (5th Cir 1970) 426 F2d 709, 714. See also *Danner v Himmelfarb* (9th Cir 1988) 858 F2d 515, 521. See §§7.43-7.47.

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§7.34 1. Limited Supplemental Jurisdiction in Diversity Cases

Supplemental jurisdiction is also available when federal court jurisdiction is based on diversity under 28 USC §1332 (see §§7.48-7.81). Supplemental jurisdiction is not allowed, however, if joinder of another party or claim would destroy diversity. 28 USC §1367(b); *U.S. ex rel Morongo Band of Mission Indians v Rose* (9th Cir 1994) 34 F3d 901, 908 n6. See, *e.g., Wisconsin Dep't of Corrections v Schacht* (1998) 524 US 381, 389, 141 L Ed 2d 364, 372, 118 S Ct 2047 (presence of nondiverse party defeats federal jurisdiction; parties may not waive or consent to jurisdiction without diversity, and court may not ignore defect). See 28 USC §1332.

As long as there is complete diversity and at least one named plaintiff satisfies the amount-in-controversy requirement, 28 USC §1367 permits supplemental jurisdiction in diversity-of-citizenship jurisdiction cases over claims of other plaintiffs that are less than the jurisdictional amount. *Exxon Mobil Corp. v Allapattah Servs., Inc*. (2005) 545 US 546, 162 L Ed 2d 502, 125 S Ct 2611.

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Source: Civil Litigation/California Civil Procedure Before Trial/7 Federal Jurisdiction/§7.35 2. When Exercise of Supplemental Jurisdiction May Be Declined

§7.35 2. When Exercise of Supplemental Jurisdiction May Be Declined

Before December 31, 1990, federal courts had broad discretion to dismiss pendent and ancillary claims. This discretion is curtailed by 28 USC §1367(c), which states that a district court may decline to exercise supplemental jurisdiction if:

- The claim raises a novel or complex issue of state law;
- The claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
- The district court has dismissed all claims over which it has original jurisdiction; or
- In exceptional circumstances, there are other compelling reasons for declining jurisdiction.

NOTE: Because 28 USC §1367(c) permits the court to decline jurisdiction for reasons not specifically enumerated in the statute only if those reasons are compelling and only in "exceptional circumstances," it provides a basis for arguing that some reasons that were considered decisive under prior law, such as "jury confusion," are no longer grounds for refusing to exercise federal jurisdiction.

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§7.36 3. Statute of Limitations Tolling

In 28 USC §1367(d), Congress has provided that the statutory limitations period is tolled from the time a claim is asserted as being within the district court's supplemental jurisdiction until 30 days after the court dismisses it or the plaintiff voluntarily dismisses it, unless state law provides a longer tolling period. See, *e.g., Guevara v Ventura Community College Dist.* (2008) 169 CA4th 167, 170, 87 CR3d 50. Thus, if this provision is binding on state courts, a plaintiff will have time to seek a state remedy after a finding by the district court that a claim is not within its supplemental jurisdiction.

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B. Pendent Jurisdiction

§7.37 1. Defined; Discretionary Doctrine

"Pendent jurisdiction" arises when a complaint alleges, in addition to a federal claim (see §§7.15-7.32), one or more state claims, and the relationship between the claim arising under the federal Constitution, laws, or treaties and the state claim permits the conclusion that the entire action comprises one constitutional case. *United Mine Workers of Am. v Gibbs* (1966) 383 US 715, 725, 16 L Ed 2d 218, 228, 86 S Ct 1130. "The state and federal claims must derive from a common nucleus of operative facts." *United Mine Workers of Am. v Gibbs, supra*.

NOTE: Pendent jurisdiction concerns state claims joined in the same complaint with federal claims by the original plaintiffs against the original defendants. Ancillary jurisdiction (see §§7.43-7.47) concerns claims brought by a defendant or another person whose rights might be irretrievably lost if the claim is not raised in the action. *Danner v Himmelfarb* (9th Cir 1988) 858 F2d 515, 521.

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§7.38 2. Derivative Nature of Pendent Jurisdiction

The federal court must have acquired jurisdiction over the federal claim(s) for pendent jurisdiction to attach to the nonfederal claim(s), *i.e.,* federal court jurisdiction over nonfederal claim(s) is entirely derivative of its jurisdiction over the federal claim(s). *Aragon v Federated Dep't Stores* (9th Cir 1985) 750 F2d 1447, 1457; *Hunter v United Van Lines* (9th Cir 1984) 746 F2d 635, 649. Thus, *e.g.,* when the federal claim is time barred, there is no independent claim conferring subject matter jurisdiction in the federal court and therefore the federal court has no basis for asserting pendent jurisdiction over the state claim. *Aragon v Federated Dep't Stores, supra*. Similarly, pendent jurisdiction cannot be created by aggregating the amount of the plaintiff's state law claim (even if it does arise out of the same nucleus of operative facts) with his or her claim under federal law to meet a jurisdictional amount required under a federal statute to establish federal jurisdiction. The federal court must independently acquire jurisdiction over the federal cause of action before pendent jurisdiction can attach. *Hunter v United Van Lines, supra*.

NOTE: For a case in which pendent state claims were dismissed after trial when on appeal it was determined that there never existed a federal claim sufficient to invoke federal jurisdiction, see *Tully v Mott Supermarkets, Inc.* (3d Cir 1976) 540 F2d 187, 195. On a party being able to aggregate all claims over which a federal court would independently have jurisdiction to satisfy a jurisdictional amount requirement, see *Hunter,* 746 F2d at 650.

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§7.39 3. Pendent Jurisdiction Determined by Pleadings

Ordinarily, the court's jurisdiction over pendent claims is resolved on the pleadings. See *United Mine Workers of Am. v Gibbs* (1966) 383 US 715, 727, 16 L Ed 2d 218, 229, 86 S Ct 1130. Initially, federal question jurisdiction is determined by issues pleaded in the complaint. See generally *Tully v Mott Supermarkets, Inc.* (3d Cir 1976) 540 F2d 187, 196. On the well-pleaded complaint rule, see §7.17.

NOTE: Although a court's jurisdiction over pendent claims is ordinarily resolved on the pleadings, the issue of whether the court properly assumed jurisdiction remains open throughout the litigation. Pretrial procedures or even the trial may reveal factors that could not have been anticipated at the pleading stage, which may make it appropriate for the court at that time to dismiss the pendent claims. *United Mine Workers of Am. v Gibbs, supra.* On the court deciding pendent claims dispositive of the case first to avoid having to reach the federal question, see *Hagans v Lavine* (1974) 415 US 528, 546, 39 L Ed 2d 577, 593, 94 S Ct 1372.

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§7.40 4. Factors That Court Considers

The justification for pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants." *United Mine Workers of Am. v Gibbs* (1966) 383 US 715, 726, 16 L Ed 2d 218, 228, 86 S Ct 1130. Factors that the courts have considered in deciding whether to exercise pendent jurisdiction include:

- **Whether federal or state claims predominate.** If state issues substantially predominate, whether as to proof, the comprehensiveness of the remedy sought, or the scope of the issues raised, the court may decline to exercise pendent jurisdiction and dismiss the state claims without prejudice. *United Mine Workers of Am. v Gibbs, supra*.
- **Whether the state claim implicates the federal doctrine of preemption.** If it does, this factor weighs in favor of pendent jurisdiction. *United Mine Workers of Am. v Gibbs* (1966) 383 US 715, 727, 16 L Ed 2d 218, 86 S Ct 1130; *Federman v Empire Fire & Marine Ins. Co.* (2d Cir 1979) 597 F2d 798, 809.
- **Whether a jury is likely to be confused by divergent theories of relief.** If so, this factor weighs in favor of the court not exercising pendent jurisdiction. *United Mine Workers of Am. v Gibbs, supra*.
- **Whether a jury is likely to be confused by potential differences in the levels of proof.** If so, the exercise of pendent jurisdiction may be denied. See *Happy Inv. Group v Lakeworld Prop.* (ND Cal 1975) 396 F Supp 175, 189.
- **Whether there is a possibility of double liability, duplicate recovery of damages, or inconsistent judgments.** If so, the court may exercise pendent jurisdiction. See *In re Nucorp Energy Sec. Litig.* (9th Cir 1985) 772 F2d 1486, 1491 (double liability); *Sparks v Hershey* (3d Cir 1981) 661 F2d 30, 33 (duplicate damages); *Contemporary Servs. Corp. v Universal City Studios, Inc.* (CD Cal 1987) 655 F Supp 885 (inconsistent judgments).
- **Whether the plaintiff's state claim will be time barred if dismissed.** If so, the court may exercise pendent jurisdiction. See *Federman v Empire Fire & Marine Ins. Co., supra; Henson v Columbus Bank & Trust Co.* (5th Cir 1981) 651 F2d 320, 325.
- **Whether the state claim involves issues that are unsettled under state law.** If so, the court may refuse to exercise pendent jurisdiction. See *Moor v County of Alameda* (1973) 411 US 693, 716, 36 L Ed 2d 596, 613, 93 S Ct 1785; *United Mine Workers of Am. v Gibbs* (1966) 383 US 715, 726, 16 L Ed 2d 218, 228, 86 S Ct 1130.

NOTE: The foregoing factors do not necessarily apply to determinations of supplemental jurisdiction.

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§7.41 5. Effect of Dismissal of Federal Claim

Generally, dismissal of the federal claim before trial dictates dismissal of the state claims. *Schultz v Sundberg* (9th Cir 1985) 759 F2d 714, 718. See *Ellingson v Burlington N., Inc.* (9th Cir 1981) 653 F2d 1327, 1331; *Hogan v U.S.* (SD Cal 1986) 642 F Supp 813.

In certain instances, however, a federal court may in its discretion retain jurisdiction over state law claims even if the federal claim ultimately fails and is dismissed. *Tritchler v County of Lake* (9th Cir 2004) 358 F3d 1150; *Albinga Versicherungs A.G.* (9th Cir 2003) 344 F3d 931; *Aydin Corp. v Loral Corp.* (9th Cir 1983) 718 F2d 897, 904. For example, when considerable court time has been expended on the pendent state claims before dismissal of the federal claim, the district court may retain jurisdiction over the pendent claims. *Aydin Corp. v Loral Corp., supra; Meyer v California & Hawaiian Sugar Co.* (9th Cir 1981) 662 F2d 637, 640. But see *Danner v Himmelfarb* (9th Cir 1988) 858 F2d 515 (dismissal of state claims even after 3½ years of discovery not an abuse of discretion).

Similarly, a federal court may retain jurisdiction over pendent claims when a state statute of limitations would bar suit on those claims in state court. See *O'Brien v Continental Ill. Nat'l Bank & Trust Co.* (7th Cir 1979) 593 F2d 54, 63 (abuse of discretion for district court to have dismissed pendent state claims that would be time barred if pursued in state court). This situation, however, may not arise that frequently in California when the federal action containing the pendent claims is commenced before the California statute of limitations period has expired because of application in state court of the doctrine of equitable tolling of the state statute of limitations. See *Addison v State* (1978) 21 C3d 313, 146 CR 224 (plaintiffs, anticipating adverse ruling on defendant's motion to dismiss in federal court, filed state court action; federal court granted motion to dismiss eight days later; doctrine of equitable tolling of state statute of limitations held to apply; defendants' demurrer in state court based on late filing of plaintiff's complaint overruled); *Guevara v Ventura County Community College Dist.* (2008) 169 CA4th 167, 87 CR3d 50 (when plaintiff filed timely administrative mandamus and federal civil rights claims in federal court and claims were dismissed without prejudice, state doctrine of equitable tolling kept his claims alive in state court); *Nichols v Canoga Indus.* (1978) 83 CA3d 956, 148 CR 459 (federal action with pendent claims filed in federal court within California statute of limitations period; on dismissal of federal and pendent claims in federal court, state cause of action not barred in state court because of equitable tolling of state statute of limitations). On California's equitable tolling doctrine generally, see *Bacon v City of Los Angeles* (9th Cir 1988) 843 F2d 372, 374; *Donoghue v County of Orange* (9th Cir 1987) 828 F2d 1432, 1436.

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§7.42 6. Pendent Party Jurisdiction

Pendent jurisdiction has usually involved a state claim between the same parties that arose out of a common nucleus of operative facts as the federal question action. See *Ayala v U.S.* (9th Cir 1977) 550 F2d 1196, 1198. A concept known as "pendent party jurisdiction" has been held, in circuits other than the Ninth, to give jurisdiction to a federal district court when the state claim appended to the federal question action requires for its resolution the joinder of an additional party not named as a defendant in the federal question action. See, *e.g., North Dakota v Merchants Nat'l Bank & Trust Co.* (8th Cir 1980) 634 F2d 368, 370; *Bowers v Moreno* (1st Cir 1975) 520 F2d 843, 846.

The Ninth Circuit has rejected the pendent party jurisdictional theory. *Blake v Pallan* (9th Cir 1977) 554 F2d 947, 957 (joinder of claims rather than joinder of parties is object of doctrine of pendent jurisdiction); *Ayala v U.S.* (9th Cir 1977) 550 F2d 1196, 1199 (rejecting pendent party jurisdiction even though federal court had exclusive jurisdiction over plaintiff's federal claim). In the Ninth Circuit, it has been held that an independent ground of jurisdiction (*e.g.,* diversity of citizenship or a federal question) must exist over the claims against any additional parties for the claim against them to be properly joined. *Blake v Pallan, supra*; *Ayala v U.S.* (9th Cir 1977) 550 F2d 1196, 1198. See *Safeco Ins. Co. v Guyton* (9th Cir 1982) 692 F2d 551, 555 (independent jurisdictional base required to add parties; pendent party jurisdiction will not substitute for complete diversity or federal question); *Adolph Coors Co. v Sickler* (DC Cal 1985) 608 F Supp 1417, 1424 (because court lacked independent jurisdictional base for state claims asserted against defendants not named in federal claim, court could not exercise jurisdiction over claims against them).

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C. Ancillary Jurisdiction (Cases Begun Before December 1, 1990)

§7.43 1. Defined; Discretionary Doctrine; Effect

"Ancillary jurisdiction"—which has been superseded by supplemental jurisdiction with respect to cases commenced on or after December 1, 1990 (see §7.33)—has been invoked to give a federal district court jurisdiction over claims that are brought, after the original complaint has been filed, by a defendant or another person whose rights might be irretrievably lost if the claim is not raised in the action. *Danner v Himmelfarb* (9th Cir 1988) 858 F2d 515, 521. Ancillary claims are claims asserted after the original complaint is filed that arise out of the same transactions that are the subject of the federal cause of action. *U.S. v City of Twin Falls* (9th Cir 1986) 806 F2d 862, 867. The ancillary claim must bear "a logical relationship to the aggregate core of operative facts which constitutes the main claim over which the court has an independent basis of federal jurisdiction." *Revere Copper & Brass Inc. v Aetna Cas. & Sur. Co.* (5th Cir 1970) 426 F2d 709, 714. A logical relationship to the original claim exists when (1) the same aggregate of operative facts serves as the basis of both the ancillary and original claim, or (2) the aggregate core of facts on "which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant." 426 F2d at 715.

Ancillary jurisdiction, like pendent jurisdiction (see §§7.37-7.42), is a discretionary doctrine. *Danner,* 858 F2d at 523. The effect of exercising ancillary jurisdiction is to expand the scope of federal courts by permitting parties to litigate claims in a federal forum despite the absence of diversity of citizenship or of a federal question concerning the ancillary claims. See *U.S. v City of Twin Falls, supra*; *U.S. ex rel Payne v United Pac. Ins. Co.* (9th Cir 1973) 472 F2d 792, 794. The rationale for ancillary jurisdiction is that because the court already has jurisdiction over the original claim between the plaintiff and defendant, "convenience, economy, and fairness dictate that it should be able to resolve all other claims arising out of the same transaction or occurrence, or that relate to the property that is the subject matter of the principal action." *Danner*, 858 F2d at 521. See *U.S. ex rel Payne v United Pac. Ins. Co., supra*.

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§7.44 2. Claims Against Existing Parties: Counterclaims; Cross-Claims

A compulsory counterclaim under Fed R Civ P 13(a) is within the ancillary jurisdiction of the federal courts because it necessarily arises out of the same transaction or occurrence as the original claim, and no independent basis for federal jurisdiction is required. *Revere Copper & Brass Inc. v Aetna Cas. & Sur. Co.* (5th Cir 1970) 426 F2d 709, 714; *Consolidated Freightways Corp. v Coast Freightways, Inc.* (CD Cal 1986) 628 F Supp 894, 897. For the same reasons, cross-claims under Fed R Civ P 13(g) are considered ancillary, and no independent basis for federal jurisdiction is required for the federal courts to have jurisdiction over such claims. *Childress v Cook* (5th Cir 1957) 245 F2d 798, 802.

In contrast, a permissive counterclaim under Fed R Civ P 13(b) does not arise from the same transaction or occurrence as the original claim and would require an independent ground of federal jurisdiction for a federal court to have ancillary jurisdiction over the claim (*Consolidated Freightways Corp. v Coast Freightways, Inc., supra; Camper & Nicholsons, Ltd. v Yacht "Fontainebleau II"* (SD Fla 1968) 292 F Supp 734), except when a setoff is involved. *Revere Copper & Brass, Inc. v Aetna Cas. & Sur. Co., supra*.

NOTE: Joinder of additional cross-defendants under Fed R Civ P 13(h) raises the problem of pendent party jurisdiction.

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§7.45 3. Claims Involving New Parties: Impleader; Intervention

It has been held that an impleader action (*i.e.,* third party complaint) under Fed R Civ P 14(a), *e.g.,* for indemnity, is ancillary to the original claim and need not be supported by an independent ground of federal jurisdiction if the third party "claims arise out of the subject matter of the original action and involve the same persons and issues … or if they arose out of the same 'transaction or occurrence'." *U.S. ex rel Payne v United Pac. Ins. Co.* (9th Cir 1973) 472 F2d 792, 794. See *Burke v Ernest W. Hahn, Inc.* (9th Cir 1979) 592 F2d 542 (court had ancillary jurisdiction over third party complaint seeking recovery against third party defendant for liability that might result from original action).

Similarly, it appears that intervention as of right under Fed R Civ P 24(a) would be deemed ancillary to the original claim and need not be supported by an independent ground of federal jurisdiction. There is a split among the federal circuit courts on this issue, which has not been addressed by the Ninth Circuit. *Perry v Proposition 8 Official Proponents* (9th Cir 2009) 2009 US App Lexis 25430, n 2. See *Curtis v Sears, Roebuck & Co.* (8th Cir 1985) 754 F2d 781, 783 (court had jurisdiction over claim although claim did not involve statutory jurisdictional amount). But see 7C Wright, Miller & Kane, Federal Practice and Procedure §1917 (3d ed 1998) ("independent jurisdictional grounds now may be required in some cases in which intervention is of right under amended Rule 24(a)(2)"). On the effect of intervention of a nondiverse indispensable party on diversity jurisdiction, see §7.71.

NOTE: Federal Rules of Civil Procedure 13-14 and 18 provide for liberal joinder of claims, counterclaims, cross-claims and third party claims. Those rules, however, do not confer jurisdiction on the federal courts. Thus, the jurisdictional requirement (*i.e.,* federal question, supplemental (for cases begun before December 1, 1990, pendent or ancillary), or diversity jurisdiction) must be satisfied for a federal court to have jurisdiction over the claim. See Fed R Civ P 82; *U.S. ex rel Payne v United Pac. Ins. Co.* (9th Cir 1973) 472 F2d 792, 794 n5.

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§7.46 4. Effect of Dismissal of Federal Claim

When a main action has been dismissed for lack of jurisdiction, ancillary claims will also be dismissed absent independent grounds of jurisdiction. See *Ferreira v Sawayama-Kisen KK* (SD NY 1959) 171 F Supp 96. Similarly, when a district court has dismissed the main claim before trial, the court will usually dismiss the ancillary claim. See *Danner v Himmelfarb* (9th Cir 1988) 858 F2d 515, 523; *Joiner v Diamond M Drilling Co.* (5th Cir 1982) 677 F2d 1035, 1043.

However, like pendent jurisdiction (see §§7.37-7.42), ancillary jurisdiction has been called a discretionary doctrine. *Danner v Himmelfarb, supra*. Thus, dismissal of the federal claim would not necessarily require dismissal of the ancillary claims; to avoid undue prejudice, the court might as a matter of discretion proceed with the ancillary claims even though the main action had been settled or otherwise disposed of. *Joiner v Diamond M Drilling Co., supra* (rule stated but under facts of case held improper for district court to have retained and adjudicated third party action); *U.S. ex rel Payne v United Pac. Ins. Co.* (9th Cir 1973) 472 F2d 792, 794 n4 (settlement of federal claim does not terminate power of court to decide ancillary third party claims). Thus, *e.g.,* a court might retain jurisdiction of the ancillary claim if the statute of limitations would bar recovery on the claim if it were asserted in a new action. See *Southern Milling Co. v U.S.* (5th Cir 1959) 270 F2d 80 (dismissal of third party complaint when statute of limitations would bar recovery on claim if asserted in new action held to constitute an abuse of discretion). For other examples, see *Moore v New York Cotton Exch.* (1926) 270 US 593, 70 L Ed 750, 46 S Ct 367 (original action dismissed; jurisdiction over counterclaim retained); *U.S. v City of Twin Falls* (9th Cir 1986) 806 F2d 862 (retention of ancillary claims after settlement of federal claim was not abuse of discretion, given voluminous third party action). See generally *Danner v Himmelfarb* (9th Cir 1988) 858 F2d 515, 525 (cases cited upholding retention of jurisdiction over state claims after federal claim dismissed because of lengthy pretrial proceedings).

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§7.47 5. Limits on Use by Plaintiffs

In *Owen Equip. & Erection Co. v Kroger* (1978) 437 US 365, 57 L Ed 2d 274, 98 S Ct 2396, the Supreme Court expressly limited a plaintiff's use of ancillary jurisdiction. In this diversity case, the court held that in the absence of an independent basis for jurisdiction, a plaintiff against whom no counterclaim is asserted may not assert a state law claim against a third party defendant who is a citizen of the same state under the guise of ancillary jurisdiction and thereby defeat the complete diversity requirement (see §7.50) for diversity of citizenship jurisdiction. The court stated that neither the convenience of litigants nor considerations of judicial economy can suffice to justify the circumvention of the complete diversity requirement under 28 USC §1332. 437 US at 377. The court noted that the plaintiff's nonfederal claim against the third party defendant was not an ancillary claim, but was new and independent, entirely separate from the plaintiff's original claim against the defendant. 437 US at 376. Furthermore, ancillary jurisdiction typically involves claims brought by a defendant or another whose rights may be irretrievably lost if action is not taken. The plaintiff voluntarily brought the action in federal court and was thus bound by its limitations. 437 US at 376.

When defendants have asserted a counterclaim against the plaintiff, however, unlike the situation in the *Owen* case, it has been held that the plaintiff may file a third party complaint for indemnity under Fed R Civ P 14 against a new party who is a citizen of the same state as the plaintiff. *Brown & Caldwell v Institute for Energy Funding, Ltd.* (CD Cal 1985) 617 F Supp 649, 651. Such a third party complaint would be within the court's ancillary jurisdiction. 617 F Supp at 650. The third party complaint in this instance is dependent in part on resolution of the counterclaim. The plaintiff in essence is impleading a new party as part of the plaintiff's defense to the counterclaim. 617 F Supp at 651.

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V. DIVERSITY JURISDICTION

§7.48 A. Statutory Authority

The United States Constitution article III, §2 extends the federal judicial power to controversies "between Citizens of different States … and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Congress has conferred such jurisdiction on the federal district courts (see §7.2) through the diversity jurisdiction statute, 28 USC §1332. Under 28 USC §1332(a), the district courts have original jurisdiction in all civil actions with an amount in controversy exceeding $75,000 (excluding interest and costs) between:

- Citizens of different states;
- Citizens of a state and citizens or subjects of a foreign state;
- Citizens of different states in actions in which citizens or subjects of a foreign state are additional parties; and
- A foreign state (as plaintiff) and citizens of a state or states.

The courts have construed the congressional grant of diversity jurisdiction strictly. See *City of Indianapolis v Chase Nat'l Bank* (1941) 314 US 63, 76, 86 L Ed 47, 54, 62 S Ct 15 (strict construction intended to relieve federal courts of suits properly belonging in state courts and to avoid offense to state sensitiveness). See also *Kantor v Wellesley Galleries, Ltd.* (9th Cir 1983) 704 F2d 1088, 1092 (congressional grant of diversity jurisdiction to be strictly construed).

NOTE: The Ninth Circuit has held that a federal district court can take diversity jurisdiction over an appeal from a state administrative agency decision even when the review requires deferential, on-the-record review. *BNSF Ry. Co. v O'Dea* (9th Cir 2009) 572 F3d 785, applying *City of Chicago v International College of Surgeons* (1997) 522 US 156, 139 L Ed 2d 525, 118 S Ct 523 (nothing in text of 28 USC §1367 indicates exception for supplemental jurisdiction on ground that resolution of state law claims requires deferential (on-the-record) review of state administrative agency's ruling).

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§7.49 B. Purpose of Diversity Jurisdiction

The purpose of diversity jurisdiction is to prevent local prejudice by providing a neutral forum for out-of-state litigants. See *Betar v De Havilland Aircraft, Ltd.* (7th Cir 1979) 603 F2d 30, 35; *Lewis v Time, Inc.* (ED Cal 1979) 83 FRD 455, 461. See also *Asher v Pacific Power & Light Co.* (ND Cal 1965) 249 F Supp 671 (policy behind diversity jurisdiction is to provide federal forum if defendant decides that defendant cannot receive fair trial in state court due to local prejudice).

It has been argued by some that the validity of such a basis for burdening federal courts with what are really state court matters has diminished as the country has evolved into a much more urban society and therefore diversity jurisdiction should be abolished. Although Congress has rejected arguments to abolish diversity jurisdiction, Congress has placed restrictions on such jurisdiction, *e.g.,* through the amount in controversy requirement (see §§7.73-7.80).

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§7.50 C. Complete Diversity Requirement

Diversity jurisdiction does not exist unless each defendant is a citizen of a different state from each plaintiff. *Owen Equip. & Erection Co. v Kroger* (1978) 437 US 365, 373, 57 L Ed 2d 274, 282, 98 S Ct 2396 (complete diversity of citizenship required under 28 USC §1332(a)(1)). See *Johnsen v Rogers* (CD Cal 1982) 551 F Supp 281, 289 (no diversity jurisdiction under 28 USC §1332 unless complete diversity of citizenship among all adverse parties exists). For purposes of establishing complete diversity, a defendant need not negate the existence of a potential real party in interest who was not named or joined as a defendant but whose presence would, if joined, destroy diversity. *Lincoln Prop. Co. v Roche* (2005) 546 US 81, 163 L Ed 2d 415, 126 S Ct 606. The Supreme Court's decision in *Lincoln Prop. Co.* settled a division among circuit courts on this issue. Compare *Roche v Lincoln Prop. Co.* (4th Cir 2004) 373 F3d 610 (removal disallowed because an entity affiliated with defendant should have been joined as a co-defendant whose presence would have destroyed diversity) with *Simpson v Alaska State Comm'n for Human Rights* (9th Cir 1979) 608 F2d 1171, 1173 (removal upheld when Alaska plaintiff sued a Rhode Island defendant but did not join potentially liable Alaska subsidiary, and the parties did not collude to create diversity jurisdiction). On rules pertaining to citizenship, see §§7.51-7.68.

When aliens are involved, it has been held that the presence of aliens on both sides of a controversy, *i.e.,* as a plaintiff and a defendant, destroys diversity jurisdiction. See *Trans-Continental Inv. Corp. v Bank of Commonwealth* (CD Cal 1980) 500 F Supp 565, 569; *Giannakos v M/V Bravo Trader* (5th Cir 1985) 762 F2d 1295, 1298. See also *Guinto v Marcos* (SD Cal 1986) 654 F Supp 276, 278 (for diversity jurisdiction to exist under 28 USC §1332(a)(1)-(2), at least one litigant must be a citizen of a state). With passage of the Judicial Improvements and Access to Justice Act in 1988, however, an alien who is admitted to the United States for permanent residence is deemed a citizen of the state where the alien is domiciled for the purpose of 28 USC §1332. Therefore, such an alien is treated as a citizen for diversity purposes and, if another alien is a party on the other side of the controversy, it now appears that there is diversity jurisdiction unless jurisdiction in this instance is held to exceed the grant of judicial power contained in US Const art III, §2. See Siegel, Commentary on 1988 Revision, 28 USCA §1332. On jurisdiction concerning aliens, see §§7.63-7.64.

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1. Citizenship

§7.51 a. Individuals

To be a citizen of a state, a person must generally be both a citizen of the United States and domiciled (see §7.52) in a particular state. *Kantor v Wellesley Galleries, Ltd.* (9th Cir 1983) 704 F2d 1088, 1090; *Sadat v Mertes* (7th Cir 1980) 615 F2d 1176, 1180.

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§7.52 (1) Domicile

A person is "domiciled" in a state where he or she has established a fixed habitation in a particular place and intends to remain indefinitely. *Lew v Moss* (9th Cir 1986) 797 F2d 747, 749; *Prakash v American University* (DC Cir 1984) 727 F2d 1174, 1180. See *Mas v Perry* (5th Cir 1974) 489 F2d 1396 (domicile is determined by physical presence in state plus intent to remain indefinitely). A person's domicile is not lost until the person acquires a new domicile by being physically present at a new location with the intent to remain there indefinitely. *Lew v Moss* (9th Cir 1986) 797 F2d 747, 750.

For diversity purposes, domicile is synonymous with state citizenship. *Sadat v Mertes* (7th Cir 1980) 615 F2d 1176, 1180; *Jong v General Motors Corp.* (ND Cal 1973) 359 F Supp 223, 225. See *Hawes v Club Ecuestre El Commandante* (1st Cir 1979) 598 F2d 698, 701 (state citizenship is equivalent of domicile for purpose of diversity jurisdiction under 28 USC §1332(a)(1)). Thus, a United States citizen who is domiciled abroad is not a citizen of a state and hence cannot sue (or be sued) in federal court on the basis of diversity jurisdiction under 28 USC §1332(a)(1). *Sadat v Mertes, supra.* See *Berhalter v Irmisch* (WD NY 1977) 75 FRD 539, 541 (no jurisdiction under 28 USC §1332(a); United States citizen who had moved to Canada with his family, was employed there, and allegedly applied for immigrant status there, intended Canada to be domicile and thus was not citizen of any state). On "stateless person" doctrine generally, see §7.55.

Moreover, "an American citizen domiciled abroad is not by virtue of that fact alone a citizen [or subject] of a foreign state." *Sadat v Mertes* (7th Cir 1980) 615 F2d 1176, 1183. Accordingly, until such a person acquires citizenship in a foreign country, that person is neither a citizen of a state nor a citizen or subject of a foreign state and therefore cannot sue on the basis of diversity jurisdiction in federal courts under 28 USC §1332(a)(2). *Van der Schelling v U.S. News & World Report, Inc.* (ED Pa 1963) 213 F Supp 756, aff'd per curiam (3d Cir 1963) 324 F2d 956 (word "subject" equated with "citizen"). See *Haggerty v Pratt Inst.* (ED NY 1974) 372 F Supp 760 (no renunciation of U.S. citizenship and acquiring of foreign citizenship). See also *Smith v Carter* (5th Cir 1977) 545 F2d 909, 911 (citizen and subject have equivalent meaning; only difference relates to form of government under which one lives; those owing allegiance to republican government are citizens; those owing allegiance to monarch are subjects). On effect of dual citizenship, see *Sadat v Mertes* (7th Cir 1980) 615 F2d 1176, 1182. On jurisdiction concerning aliens generally, see §§7.63-7.64.

The issue in most cases in determining domicile revolves around the intent requirement. Intent is a state of mind that is "evaluated through the circumstantial evidence of a person's manifested conduct." *Berhalter v Irmisch* (WD NY 1977) 75 FRD 539, 541. In gauging intent, federal courts have looked to a number of factors, including "current residence, voting registration and voting practices, location of personal and real property, location of brokerage and bank accounts, location of spouse and family, membership in unions and other organizations, place of employment or business, driver's license and automobile registration, and payment of taxes." *Lew v Moss* (9th Cir 1986) 797 F2d 747, 750, quoting 13B Wright, Miller & Cooper, Federal Practice and Procedure §3612 (3d ed 1998). See *Bruton v Shank* (8th Cir 1965) 349 F2d 630, 631 n2 (factors include "declarations, exercise of civil and political rights, payment of taxes, obtaining of licenses, location of business or occupation, and ownership of property").

On residency not being synonymous with domicile, see §7.54.

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§7.53 (2) Domicile by Operation of Law

Certain presumptions exist to govern the domicile of particular persons. Courts generally hold that the domicile of a minor or of a person with a disability is determined by the domicile of his or her parent or guardian. See *Arredondo v Brockette* (5th Cir 1981) 648 F2d 425. See also *Dunlap v Buchanan* (8th Cir 1984) 741 F2d 165, 167 (domicile remained in Arkansas, state of parents' domicile, despite removal of incompetent minor to special care home in Texas).

Similarly, students attending school out of state are usually presumed to lack intention necessary to establish a new domicile. See *Shishko v State Farm Ins. Co.* (ED Pa 1982) 553 F Supp 308, 310. See also *Scoggins v Pollock* (11th Cir 1984) 727 F2d 1025 (former domicile maintained until new domicile acquired; plaintiff moved to South Carolina as student with no intent to return to former domicile but was undecided about future plans); *Holmes v Sopuch* (8th Cir 1981) 639 F2d 431, 434 (no new domicile established; plaintiff intended to remain in new state for as long as studies required rather than for indefinite period). Prisoners incarcerated in a state other than their domicile will also generally continue to retain their preincarceration domicile, and may not claim a change of domicile by virtue of their incarceration. *Jones v Hadican* (8th Cir 1977) 552 F2d 249, 250; *Wright v Redding* (ED Pa 1975) 408 F Supp 1180, 1182.

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§7.54 (3) Residence Distinguished

Although domicile and citizenship are synonymous for diversity purposes (see §7.50), residency is not synonymous with either. See *Jeffcott v Donovan* (9th Cir 1943) 135 F2d 213 (resident of state might be citizen of that state or another state). An individual may have several residences, but can be domiciled in only one state at any one time. *Janzen v Goos* (8th Cir 1962) 302 F2d 421, 425; *Pitts v Black* (SD NY 1984) 608 F Supp 696, 710. Thus, mere residence in a state is not sufficient to show domicile. *Mantin v Broadcast Music, Inc.* (9th Cir 1957) 244 F2d 204; *Jong v General Motors Corp.* (ND Cal 1973) 359 F Supp 223, 225. But see *Slaughter v Toye Bros. Yellow Cab Co.* (5th Cir 1966) 359 F2d 954, 956 (in absence of other evidence, a party's residence is presumed to be party's domicile).

NOTE: A complaint may be dismissed when the plaintiff alleges residency rather than citizenship in pleading diversity jurisdiction. See generally *Strain v Harrelson Rubber Co.* (5th Cir 1984) 742 F2d 888, 889 (dismissal not necessarily required; under 28 USC §1653, defective jurisdictional allegations may be amended on terms in trial or appellate court).

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§7.55 (4) Stateless Persons

Under the "stateless person" doctrine, a person who is a citizen of the United States, but not a state citizen (*i.e.,* not domiciled within a state; see §7.52), cannot sue or be sued in federal district court based on diversity of citizenship jurisdiction under 28 USC §1332(a)(1). See *Willis v Westin Hotel Co.* (SD NY 1986) 651 F Supp 598, 602. Similarly, a United States citizen who is domiciled abroad is neither a citizen of a state nor a citizen or subject of a foreign state and therefore cannot sue on the basis of diversity jurisdiction in federal courts under 28 USC §1332(a)(2) unless that person has acquired citizenship in the foreign country. See *Van der Schelling v U.S. News & World Report, Inc.* (ED Pa 1963) 213 F Supp 756, aff'd per curiam (3d Cir 1963) 324 F2d 956 (word "subject" equated with "citizen"). See also §7.52. On jurisdiction concerning aliens, see §§7.63-7.64.

Usually the cases that have applied the "stateless person" doctrine to preclude diversity jurisdiction have been cases involving a United States citizen domiciled abroad. See *Willis v Westin Hotel Co., supra*. Generally, courts have refused to apply the "stateless person" doctrine to a person who is both a citizen and a resident of the United States. Accordingly, a person living in hotels in various states has been held to retain the citizenship of the state she was domiciled in before the adoption of such transient living. *Willis v Westin Hotel Co., supra*. Moreover, it has been held that a person born to migratory parents is presumed a citizen of the state of birth, despite the fact that parents were not domiciled there at the time of birth. *Gregg v Louisiana Power & Light Co.* (5th Cir 1980) 626 F2d 1315.

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§7.56 b. Governmental Bodies

The United States is not deemed to be a "citizen of a state" for the purpose of diversity jurisdiction under 28 USC §1332. *Darling v U.S.* (ED Cal 1972) 352 F Supp 565, 567 (also immunity of United States from suit not waived by 28 USC §§1331, 1340; no jurisdiction over United States unless Congress has consented by statute); *TM Sys. v U.S.* (D Conn 1979) 473 F Supp 481 (United States not citizen of any state; diversity destroyed unless United States not indispensable party to suit). Moreover, federal officers sued in their official capacity are not considered "citizens of a state" and cannot be sued on the basis of diversity of citizenship under 28 USC §1332. *Ajay Nutrition Foods, Inc. v FDA* (D NJ 1974) 378 F Supp 210 (court, however, had jurisdiction over individual defendants under 28 USC §1331 to grant equitable relief, *i.e.,* an injunction).

Similarly, a state is not a "citizen of a state" within the meaning of 28 USC §1332 (*Ronwin v Shapiro* (9th Cir 1981) 657 F2d 1071, 1073), and thus can neither sue nor be sued in federal courts on the basis of diversity jurisdiction. See *State Highway Comm'n v Utah Constr. Co.* (1929) 278 US 194, 73 L Ed 262, 49 S Ct 104 (court has no jurisdiction unless suit arises out of Constitution, laws, or treaties of United States; on federal question jurisdiction, see §§7.15-7.32); *Rieser v District of Columbia* (DC Cir 1977) 563 F2d 462, 470 n43 (state and state agencies are not citizens, but municipal corporations are).

Because actions against state officials in their official capacity are treated as suits against the state, such actions cannot be maintained on the basis of diversity jurisdiction. See *DeLong Corp. v Oregon State Highway Comm'n* (D Or 1964) 233 F Supp 7, 10, aff'd (9th Cir 1965) 343 F2d 911 (diversity jurisdiction determined by looking at real party in interest rather than named parties in pleading; if state, although unnamed, is real party in interest, no diversity jurisdiction exists). Moreover, individual state officers or agencies cannot be named in lieu of the state in order to establish diversity jurisdiction. *Ronwin,* 657 F2d at 1073.

NOTE: The Eleventh Amendment to the United States Constitution prohibits suits in federal court by a private citizen, or a subject of a foreign country, against a state. The issue of diversity jurisdiction under 28 USC §1332 is separate and distinct from the issue of immunity under the Eleventh Amendment. See *Ronwin v Shapiro, supra*; *DeLong Corp. v Oregon State Highway Comm'n, supra.* Furthermore, there are numerous instances when "state officials cannot invoke state sovereign immunity under the Eleventh Amendment simply because they committed a tort in the course of their employment." *Ronwin,* 657 F2d at 1074.

WARNING: By choosing to invoke federal jurisdiction, the removing party waives immunity to which it might otherwise be entitled under the Eleventh Amendment. *Lapides v Board of Regents of Univ. Sys. of Ga.* (2002) 535 US 613, 152 L Ed 2d 806, 122 S Ct 1640; *Embury v King* (9th Cir 2004) 361 F3d 562.

Counsel who desire to proceed in federal court with a claim against the United States, a state, a federal or state agency, or a federal or state officer in his or her official capacity, must ascertain whether there is any statutory basis other than diversity jurisdiction under 28 USC §1332 that will enable counsel to proceed with the suit in federal court and whether any sovereign immunity exists.

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c. Corporations

§7.57 (1) General Rule

Under 28 USC §1332(c)(1), a corporation is "deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *Tosco Corp. v Communities for a Better Env't* (9th Cir 2001) 236 F3d 495, 499. The overriding purpose of this "dual citizenship" requirement is to restrict the availability of diversity jurisdiction in cases involving corporations. *J.A. Olson Co. v City of Winona* (5th Cir 1987) 818 F2d 401, 406; *Burton v United States Olympic Comm.* (CD Cal 1983) 574 F Supp 517, 519.

As a result of corporate dual citizenship, a diversity action cannot be maintained if an opposing party is a citizen of either the state of incorporation or principal place of business. See *Tosco Corp. v Communities for a Better Env't, supra*; *Bank of Cal. v Twin Harbors Lumber Co.* (9th Cir 1972) 465 F2d 489; *Leuhrs v Utah Home Fire Ins. Co.* (9th Cir 1971) 450 F2d 452, 454 n2. See also *Cook v Avi Casino Enters., Inc.* (9th Cir 2008) 548 F3d 718, 723 (corporation organized under Indian tribal law in California was not created by state and did not create diversity).

Moreover, if a plaintiff fails to allege both the state of incorporation and the principal place of business for each corporate party, plaintiff risks dismissal of plaintiff's complaint. *Naartex Consulting Corp. v Watt* (DC Cir 1983) 722 F2d 779. See *Casio, Inc. v SM&R Co.* (7th Cir 1985) 755 F2d 528.

An incorporated entity is a corporation for purposes of diversity citizenship even when the corporation acts as an unincorporated association or other "unconventional corporation." *Kuntz v Lamar Corp.* (9th Cir 2004) 385 F3d 1177, 1183 (cooperative to be treated as corporation simply because it is incorporated under Idaho law regardless of cooperative's individual structure, purpose, operations, or name).

On citizenship of an alien corporation, see *Windert Watch Co. v Remex Elecs., Ltd.* (SD NY 1979) 468 F Supp 1242. On jurisdiction concerning aliens generally, see §§7.63-7.64.

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§7.58 (2) Principal Place of Business

For diversity jurisdiction purposes, "every corporation has one and only one principal place of business." *J.A. Olson Co. v City of Winona* (5th Cir 1987) 818 F2d 401, 406. When a corporation is engaged in multistate operations, several factors determine its principal place of business.

Federal courts generally use one of two tests to determine a corporation's principal place of business. First, the "place of operations test" locates a corporation's principal place of business in the state which "contains a substantial predominance of corporate operations." *Tosco Corp. v Communities for a Better Env't* (9th Cir 2001) 236 F3d 495, 500; *Industrial Techtonics, Inc. v Aero Alloy* (9th Cir 1990) 912 F2d 1090, 1092. Second, the "nerve center test" locates a corporation's principal place of business in the state where the majority of its executive and administrative functions are performed. *Tosco Corp. v Communities for a Better Env't, supra*; *Co-Efficient Energy Sys. v CSL Indus.* (9th Cir 1987) 812 F2d 556, 558 (under nerve center test, corporation's principal place of business is where its executive and administrative functions are performed).

The Ninth Circuit Court of Appeals has directed when each test should apply: if a majority of a corporation's business activity takes place in one state, then that state is the corporation's principal place of business, even if the corporate headquarters are located in a different state. The "nerve center" test should be used only when no state substantially predominates the corporation's business activities. Thus, the Ninth Circuit applies the place of operations test unless the plaintiff shows that its activities do not substantially predominate in any one state. *Tosco Corp. v Communities for a Better Env't, supra*.

The determination of substantial predominance does not require the majority of a corporation's total business activity to be located in the state; only the amount of the corporation's business activity in one state must be significantly larger than any other state in which the corporation conducts business. *Tosco Corp. v Communities for a Better Env't, supra*. Because the corporation's employees, refineries, lubricant facilities, convenience stores, income, sales, and inventories were all in California, the Ninth Circuit applied the place of operations test and held that its principal place of business was in California. 236 F3d at 502.

For discussion of removing actions to federal court, see chap 22.

NOTE: For venue purposes, a corporate defendant is considered a resident of every state in which it is doing business, not merely of the state in which it has its principal place of business. 28 USC §1391(c).

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§7.59 (3) Federal Corporations

In contrast to corporations organized under state laws (see §7.57), federally chartered corporations organized to do business throughout the states are viewed as having national citizenship only. Diversity jurisdiction over such federally chartered corporations is thus precluded, unless Congress enacts a specific statutory provision that provides for citizenship of such a corporation in a particular state (*Bankers Trust Co. v Texas & Pac. Ry.* (1916) 241 US 295, 309, 60 L Ed 1010, 1016, 36 S Ct 569), "or the federal statute incorporating the entity characterized it as a 'body corporate' of a particular state." *Burton v United States Olympic Comm.* (CD Cal 1983) 574 F Supp 517, 519 (diversity jurisdiction precluded because terms of federal charter and, as a result of multi-state activities, United States Olympic Committee cannot be considered "localized" in particular state); *Hancock Fin. Corp. v FSLIC* (9th Cir 1974) 492 F2d 1325, 1329 (diversity precluded because Federal Savings and Loan Insurance Corporation is not a citizen of any particular state).

For diversity purposes, national banks or other national banking associations are citizens of the states in which they are respectively "located." 28 USC 1348. Under 28 USC §1348, "located" means the state where the national bank's main office is located, as set forth in its articles of association. *Wachovia Bank, Nat'l Ass'n v Schmidt* (2006) 546 US 303, 163 L Ed 2d 797, 126 S Ct 941.

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§7.60 d. Unincorporated Associations

The citizenship of an unincorporated association for diversity purposes is determined by the citizenship of each and every member of that association. See *Navarro Sav. Ass'n v Lee* (1980) 446 US 458, 461, 64 L Ed 2d 425, 429, 100 S Ct 1779. See also *United Steelworkers of Am. v Bouligny* (1965) 382 US 145, 15 L Ed 2d 217, 86 S Ct 272 (unincorporated labor organization). In order to invoke diversity jurisdiction, all members of an unincorporated association must be diverse from the opposing party. *Rockwell Int'l Credit Corp. v United States Aircraft Ins. Group* (9th Cir 1987) 823 F2d 302, overruled on other grounds in *Partington v Gedan* (9th Cir 1991) 923 F2d 686, 688; *Baer v United Servs. Auto. Ass'n* (2d Cir 1974) 503 F2d 393, 395.

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§7.61 e. Partnerships

For diversity purposes, a partnership is deemed a citizen of each state of which a general partner is a citizen. *Lewis v Odell* (2d Cir 1974) 503 F2d 445. See *Cote v Wadel* (7th Cir 1986) 796 F2d 981; *Village Fair Shopping Ctr. v Sam Broadhead Trust* (5th Cir 1979) 588 F2d 431, 433 n1. However, in the case of a partnership consisting of both general and limited partners, circuits are in conflict as to whether a limited partner's citizenship should be counted in determining whether diversity jurisdiction exists. Compare, *e.g., Mesa Operating Ltd. Partnership v Louisiana Interstate Gas* (5th Cir 1986) 797 F2d 238 (only citizenship of general partners relevant to determination of diversity jurisdiction) and *Colonial Realty Corp. v Bache & Co.* (2d Cir 1966) 358 F2d 178 (citizenship of limited partner not to be considered and does not destroy diversity) with *New York State Teachers Retirement Sys. v Kalkus* (4th Cir 1985) 764 F2d 1015 (for purpose of diversity jurisdiction, citizenship of limited partnership determined by considering citizenship of both general and limited partners), *Elston Inv. Ltd. v David Altman Leasing Corp.* (7th Cir 1984) 731 F2d 436 (citizenship of both general and limited partners considered), and *Carlsberg Resources Corp. v Cambria Sav. & Loan Ass'n* (3d Cir 1977) 554 F2d 1254 (citizenship of both general and limited partners considered).

The Ninth Circuit Court of Appeals has not dealt with this exact issue, although district courts in California, Hawaii, and Arizona have considered the issue and held that a limited partner's citizenship is relevant for diversity purposes and is to be considered along with a general partner's citizenship in establishing diversity jurisdiction. See *Finalco Equip. Invs. X, LP v Welch* (ND Cal 1989) 718 F Supp 1446; *Sage Investors v Group W Cable, Inc.* (D Ariz 1986) 666 F Supp 186, 188; *Windward City Ctr. v Trans-America Occidental Life Ins. Co.* (D Haw 1985) 613 F Supp 1216, 1219.

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§7.62 f. Assignees

When there has been a bona fide assignment of a claim, the assignee's citizenship is determinative for diversity purposes. See, *e.g., R.C. Hedreen Co. v Crow Tribal Hous. Auth.* (D Mont 1981) 521 F Supp 599, 607. Under 28 USC §1359, however, a federal district court does not acquire diversity jurisdiction if an assignment, or other device, is collusively or improperly made to create or manufacture federal diversity jurisdiction. See *Kramer v Caribbean Mills, Inc.* (1969) 394 US 823, 826, 23 L Ed 2d 9, 13, 89 S Ct 1487. See also *Amar v Garnier Enters.* (CD Cal 1966) 41 FRD 211 (shareholder derivative action).

"[A]ssignments of causes of action between [parent companies] and subsidiaries are presumptively ineffective to create diversity jurisdiction." *Simpson v Providence Wash. Ins. Group* (9th Cir 1979) 608 F2d 1171, 1174. See also *Prudential Oil Corp. v Phillips Petroleum Co.* (2d Cir 1976) 546 F2d 469, 475 (no diversity when subsidiary's sole purpose for existence was to prosecute assigned claim). But see *Drexel, Burnham Lambert Group, Inc. v Galadari* (2d Cir 1985) 777 F2d 877, 881 (assignment not collusive when facially valid business purpose existed).

For further discussion of assignments, see 14 Wright, Miller & Cooper, Federal Practice and Procedure §3639 (3d ed 1998). On disregarding nominal or formal parties and looking to the real party in interest in determining diversity jurisdiction, see §7.66.

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Source: Civil Litigation/California Civil Procedure Before Trial/7 Federal Jurisdiction/ g. Aliens/§7.63 (1) Jurisdiction Generally

g. Aliens

§7.63 (1) Jurisdiction Generally

For there to be diversity jurisdiction under 28 USC §1332(a)(1), the controversy must involve citizens of different states. See §7.50. Except for aliens admitted to the United States for permanent residence, aliens are not deemed citizens of a state and no diversity jurisdiction attaches by virtue of 28 USC §1332(a)(1). On state citizenship being equivalent to domicile, see §7.52.

However, under 28 USC §1332(a)(2), diversity jurisdiction (sometimes called alienage jurisdiction, see *Sadat v Mertes* (7th Cir 1980) 615 F2d 1176, 1182) exists when the controversy is between state citizens "and citizens or subjects of a foreign state" and the requisite jurisdictional amount (see §§7.73-7.80) is involved. The word "subject" is equated with the word "citizen" of a foreign state within the meaning of 28 USC §1332(a)(2). *Van der Schelling v U.S. News & World Report, Inc.* (ED Pa 1963) 213 F Supp 756, aff'd per curiam (3d Cir 1963) 324 F2d 956.

Thus, alienage jurisdiction will not lie if the suit is between a citizen of a state and an alien with no nationality, *i.e.,* a "stateless" alien. See *Sadat v Mertes* (7th Cir 1980) 615 F2d 1176, 1183. On stateless persons generally, see §7.55. Moreover, an American citizen does not become a citizen of a foreign state solely by virtue of being domiciled abroad. See *Sadat v Mertes, supra*. Until such a person acquires citizenship in a foreign country, that person is neither a citizen of a state nor a citizen or subject of a foreign state and therefore cannot sue on the basis of diversity jurisdiction in federal court under 28 USC §1332(a)(2). *Smith v Carter* (5th Cir 1977) 545 F2d 909, 911 (American citizen who was permanent resident of Canada was not citizen of Canada and therefore could not invoke diversity jurisdiction under 28 USC §1332(a)(2)); *Haggerty v Pratt Inst.* (ED NY 1974) 372 F Supp 760 (no renunciation of U.S. citizenship and acquiring of foreign citizenship). A citizen of the United States who is domiciled abroad (*i.e.,* is not a state citizen; see §7.52) also cannot maintain a suit under 28 USC §1332(a)(1) because the controversy under that subsection must be between state citizens. *Sadat v Mertes* (7th Cir 1980) 615 F2d 1176, 1180. On effect of dual citizenship on alienage jurisdiction under 28 USC §1332(a)(2), see 615 F2d at 1182.

A foreign state within the meaning of 28 USC §1332(a)(2) has generally been held to be "a political entity that is recognized by the United States as a free and independent sovereign." *Windert Watch Co. v Remex Elecs., Ltd.* (SD NY 1979) 468 F Supp 1242, 1244 (no jurisdiction under 28 USC §1332(a)(2) over action by California corporation against two Hong Kong corporations; Hong Kong was, at time of case, crown colony of United Kingdom, and not recognized by United States as independent state, de facto or otherwise). See 13B Wright, Miller & Cooper, Federal Practice and Procedure §3604 (3d ed 1998) (generally held "that a foreign state is one formally recognized by the executive branch of the United States government"). But see *Bank of Hawaii v Balos* (D Haw 1988) 701 F Supp 744 (Republic of Marshall Islands deemed de facto a foreign state; substance over form governed); *Tetra Fin. (HK) Ltd. v Shaheen* (SD NY 1984) 584 F Supp 847 (*Windert* decision rejected in other jurisdictions; hypertechnical to preclude Hong Kong corporation from federal court because not recognized by United States as foreign sovereign in its own right; commercial and cultural realities dictate that diversity jurisdiction "be granted to certain governmental entities that have not been formally recognized"). See also *Iran Handicraft & Carpet Export Ctr. v Marjan Int'l Corp.* (SD NY 1987) 655 F Supp 1275, 1281, aff'd (2d Cir 1988) 868 F2d 1267 (Iran recognized as foreign state although current government not recognized; 28 USC §1332(a)(2) requires court "only to determine whether the foreign state, of which the party claims citizenship, is recognized by the United States as an international juridical person"; once entity recognized by United States as sovereign state, later withdrawal of recognition of its government does not effect change in underlying recognition of state as "international juridical entity").

The presence of alien parties on both sides of a controversy has been held to destroy diversity jurisdiction under 28 USC §1332(a)(2). See, *e.g., Giannakos v M/V Bravo Trader* (5th Cir 1985) 762 F2d 1295, 1298; *Trans-Continental Inv. Corp. v Bank of Commonwealth* (CD Cal 1980) 500 F Supp 565, 569. See also *Guinto v Marcos* (SD Cal 1986) 654 F Supp 276, 278 (for diversity jurisdiction to exist under 28 USC §1332(a)(1) or (2), at least one of litigants must be citizen of state). *Planning & Investing Co. S. A. v Hemlock* (SD NY 1970) 50 FRD 48 (court dismissed alien's action

against two alien corporations who were not indispensable parties but retained action against non-alien individual defendants). Since 1989, however, aliens admitted to the United States for permanent residence under 28 USC §1332(a) are now deemed citizens of the state in which they are domiciled for the purpose of 28 USC §§1332, 1335, and 1441 (on removal to federal court, see chap 22) and the presence of such an alien on one side of the controversy, depending on the circumstances, may not defeat diversity jurisdiction under 28 USC §1332(a)(2).

An alien corporation is considered "a citizen of the entity under the laws of which it is incorporated." *Windert Watch Co. v Remex Elecs., Ltd.* (SD NY 1979) 468 F Supp 1242, 1244. There appears to be a split of authority as to whether the dual citizenship provision of 28 USC §1332(c) applies to alien corporations, *i.e.,* whether an alien corporation may also be deemed a citizen of a state where it has its principal place of business for purposes of 28 USC §1332(c). Compare, *e.g., Salomon Englander Y Cia, Ltd. v Israel Discount Bank, Ltd.* (SD NY 1980) 494 F Supp 914 (§1332(c) does not apply to alien corporations; if §1332(c) were applied to alien corporations, it might create jurisdiction as often as it destroys it) with *Richmond Constr. Corp. v Hilb* (MD Fla 1980) 482 F Supp 1201 (§1332(c) applies to alien corporations; defendant alien corporations had principal place of business in Florida and were considered citizens of Florida for diversity purposes, thereby defeating diversity jurisdiction).

Under 28 USC §1332(a)(3), a district court has jurisdiction when the matter in controversy is between citizens of different states and "citizens or subjects of a foreign state are additional parties." Thus, when there is a legitimate controversy between completely diverse citizens and an alien is added as an additional party, diversity jurisdiction is not defeated. See *Transure, Inc. v Marsh & McLennan, Inc.* (9th Cir 1985) 766 F2d 1297. Similarly, when a controversy is between completely diverse citizens and aliens are added on both sides of the controversy, diversity jurisdiction is not defeated. 28 USC §1332(a)(3); *Transure, Inc. v Marsh & McLennan, Inc., supra* (alien corporations on both sides of controversy).

NOTE: When a client has a claim against an alien defendant and there is no basis for jurisdiction under 28 USC §1332 or any federal statute or treaty, the plaintiff will have to proceed in state court with the claim against the alien defendant (assuming that in personam jurisdiction exists over the alien defendant in the particular state court).

For further discussion of jurisdiction concerning aliens generally and alien corporations, see 13B Wright, Miller & Cooper, Federal Practice and Procedure §§3604, 3628 (3d ed 1998); 14 Wright, Miller & Cooper §§3661-3662 (3d ed 1998). On foreign states' being subject to federal diversity jurisdiction as the plaintiff or defendant, see §7.65.

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§7.64 (2) Aliens Admitted for Permanent Residence

Under the Judicial Improvements and Access to Justice Act, for the purposes of 28 USC §§1332, 1335, and 1441 (on removal to federal court, see chap 22), an alien admitted to the United States for permanent residence is deemed a citizen of the state in which he or she is domiciled. 28 USC §1332(a). Thus, *e.g.,* it appears that if an alien admitted to the United States for permanent residence who is domiciled in California sues or is sued by a citizen of another state, diversity jurisdiction exists under 28 USC §1332(a)(1) unless such grant of jurisdiction is held to violate US Const art III, §2 (see §7.2). See generally Siegel, Commentary on 1988 Revision, 28 USCA §1332. Similarly, if such an alien sues or is sued by a citizen of a foreign state who does not have permanent residence in the United States, it appears that there is federal diversity jurisdiction under 28 USC §1332(a)(2) unless such grant of jurisdiction is also held to violate US Const art III, §2. See Siegel, Commentary on 1988 Revision, 28 USCA §1332.

Conversely, if an alien admitted to the United States for permanent residence who is domiciled in California sues or is sued by a California citizen, diversity jurisdiction appears to be lacking under 28 USC §1332(a).

On effect of dual citizenship on alienage jurisdiction under 28 USC §1332(a)(2), see *Sadat v Mertes* (7th Cir 1980) 615 F2d 1176, 1182.

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§7.65 h. Foreign States

A district court has jurisdiction when the matter in controversy is between a foreign state, as defined in 28 USC §1603(a), "as plaintiff and citizens of a State or of different States" and the jurisdictional amount (see §§7.73-7.80) is satisfied. 28 USC §1332(a)(4). For a case in which formal recognition of a foreign country was not required for the foreign country to gain access to federal court, see *National Petrochemical Co. v M/T Stolt Sheaf* (2d Cir 1988) 860 F2d 551 (plaintiff was foreign corporation wholly owned by Iran). But see *Iran Handicraft & Carpet Export Ctr. v Marjan Int'l Corp.* (SD NY 1987) 655 F Supp 1275, 1277, aff'd (2d Cir 1988) 868 F2d 1267 (cites cases, including Second Circuit cases, denying unrecognized government access to federal courts).

Furthermore, a district court has jurisdiction of any nonjury civil action, without regard to any amount in controversy, against a foreign state as defined in 28 USC §1603(a) concerning "any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under [28 USC §§1605-1607] or under any applicable international agreement." 28 USC §1330(a).

Except as used in 28 USC §1608, a foreign state is defined in 28 USC §1603(a) to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in" 28 USC §1603(b). An agency or instrumentality of a foreign state is defined in §1603(b) to mean an entity that is:

- A separate legal person, corporate or otherwise;
- An organ of a foreign state or political subdivision of such a foreign state "or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and
- "[N]either a citizen of a state of the United States as defined in [28 USC §1332(c), (e)] nor created under the laws of any third country."

See, *e.g.*, *Bolkiah v Superior Court* (1999) 74 CA4th 984, 88 CR2d 540 (family members of Sultan of Brunei were not "foreign states" or "agents or instrumentalities of foreign states" within meaning of 28 USC §1603(a)-(b) when they failed to show they held government positions or governmental power by birthright).

The Foreign Sovereign Immunities Act of 1976 is the exclusive means of exercising jurisdiction over foreign sovereigns. 74 CA4th at 992. On the Foreign Sovereign Immunities Act of 1976 generally, see 28 USC §§1330, 1602-1611. On foreign states being immune from jurisdiction of federal or state courts except as provided in 28 USC §§1605-1607, or by existing international agreements to which the United States is a party at the time of enactment of the Foreign Sovereign Immunities Act of 1976, see 28 USC §1604.

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§7.66 i. Legal Representative

Under the Judicial Improvements and Access to Justice Act, the legal representative of a decedent's estate is deemed a citizen only of the same state as the decedent. 28 USC §1332(c)(2). Similarly, the legal representative of an infant or of a person with a disability is deemed a citizen only of the same state as the infant or person with a disability. 28 USC §1332(c)(2). Thus, the citizenship of only the decedent, infant, or person with a disability, rather than that of the legal representative, is looked at for diversity purposes and earlier cases to the contrary no longer control. See generally Siegel, Commentary on 1988 Revision, 28 USCA §1332.

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§7.67 j. Class Action

In a class action suit, diversity is determined only by the citizenship of the named representatives. See *Supreme Tribe of Ben Hur v Cauble* (1921) 255 US 356, 65 L Ed 673, 41 S Ct 338; *Friedman v Meyers* (2d Cir 1973) 482 F2d 435, 436 n1; *Calagaz v Calhoon* (5th Cir 1962) 309 F2d 248, 253.

When jurisdictional elements are otherwise satisfied and the claim of at least one named class member meets the jurisdictional amount requirement in a diversity case, 28 USC §1367 permits supplemental jurisdiction over other class members whose claims are less than the jurisdictional minimum. *See Exxon Mobil Corp. v Allapattah Servs., Inc.* (2005) 545 US 546, 162 L Ed 2d 502, 125 S Ct 2611. The United States Supreme Court in *Exxon Mobil*, in a 5-4 decision, concluded that Congress' enactment of 28 USC §1367 overruled its holding in *Zahn v International Paper Co.* (1973) 414 US 291, 300, 38 L Ed 2d 511, 518, 94 S Ct 505, that unnamed class members could not aggregate their separate and distinct claims for jurisdictional purposes.

In *Exxon Mobil,* numerous fuel dealers brought a class action alleging that Exxon Mobil had intentionally overcharged them for fuel they had purchased. The Supreme Court held that when a court has "original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of §1367(a)," and the presence of other claims in the complaint over which the court may lack original jurisdiction "is of no moment." *Exxon Mobil Corp. v Allapattah Servs., Inc., supra*. *Exxon Mobil* settled a split among the circuit courts over the interpretation of 28 USC §1367 and the viability of *Zahn*. Compare *Stromberg Metal Works, Inc. v Press Mechanical, Inc*. (7th Cir 1996) 77 F3d 928, 930 (§1367 overrides supreme court cases that required each joined plaintiff to meet independently the amount-in-controversy requirement), with *Leonhardt v Western Sugar Co*. (10th Cir 1998) 160 F3d 631, 641 (28 USC §1367 does not alter the historical rules disallowing the aggregation of claims in diversity class actions).

Congress' enactment of the Class Action Fairness Act of 2005 (CAFA) (Pub L 109-2, 119 Stat 4) amended 28 USC §1332 and eased the diversity jurisdiction requirements for certain class action suits. See *Richina v Maytag Corp.* (ED Cal, Oct. 26, 2005, No. 05-1281) 2005 US Dist Lexis 25294. CAFA confers diversity jurisdiction over class actions when the aggregate amount in controversy exceeds $5 million and at least one plaintiff is a citizen of a state or foreign state different from that of any defendant. 28 USC §1332(d)(2)(A)-(C). CAFA also abrogates, similar to 28 USC §1367, the rule against aggregation of claims. CAFA applies only to class actions commencing after February 17, 2005, that otherwise meet its requirements (*Richina v Maytag Corp., supra*; Pub L 109-2, §9, 119 Stat 4) and has no impact on the interpretation of 28 USC §1367. *Exxon Mobil Corp. v Allapattah Servs., Inc., supra*; see also *Berry v American Express Publ'g Corp*. (CD Cal 2005) 381 F Supp 2d 1118 (remand granted when plaintiff's class action for injunctive relief did not meet $5 million minimum requirement under CAFA).

CAFA also extended federal removal jurisdiction to "mass actions," which are any civil actions in which 100 or more people propose to be treated jointly and the other jurisdictional requirements are met, *e.g.*, the aggregate amount in controversy exceeds $5 million and at least one plaintiff is a citizen of a state or foreign country different from any defendant. 27 USC 1332(d)(11); *Tanoh v Dow Chem. Co.* (9th Cir 2009) 561 F3d 945. See §22.29A.

On aggregation of claims generally, see §7.80.

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§7.68 k. Special Rule for Direct Actions Against Insurer

For the purposes of 28 USC §§1332 and 1441 (on removal to federal court, see chap 22) in any direct action against an "insurer of a policy or contract of liability insurance … to which action the insured is not joined as a party-defendant," such insurer is deemed a citizen of

- The state in which the insured is a citizen;
- Any state by which an insurer has been incorporated; or
- The state where it has its principal place of business.

28 USC §1332(c).

The purpose of this provision of §1332(c) is to eliminate the availability of diversity jurisdiction for "tort claims in which both the injured party and the tortfeasor are local residents, but which, under state 'direct action' statutes, are brought against the tortfeasor's foreign insurance carrier without joining the tortfeasor as a defendant." *Beckham v Safeco Ins. Co. of Am.* (9th Cir 1982) 691 F2d 898, 901; *Blake By & Through Blake v National Cas. Co.* (CD Cal 1984) 607 F Supp 189, 190.

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§7.69 2. Time of Filing of Complaint Controls

Diversity of citizenship is determined by the citizenship of the parties at the time the complaint is filed, not by their citizenship either at the time the cause of action arose or after commencement of the action. *Grupo Dataflux v Atlas Global Group, LP* (2004) 541 US 567, 158 L Ed 2d 866, 874, 124 S Ct 1920 (post-filing change in citizenship of one party does not cure defect in diversity); *Co-Efficient Energy Sys. v CSL Indus.* (9th Cir 1987) 812 F2d 556, 557 (diversity of citizenship determined as of filing of complaint); *Mann v City of Tucson Dep't of Police* (9th Cir 1986) 782 F2d 790, 794 (diversity determined at time complaint filed, not time events giving rise to complaint occurred). For example, a district court properly analyzed diversity of the parties as of the time a case was filed in state court and then removed. Because the defendant corporation carried its burden of establishing that diversity of citizenship existed at that time, the fact that the corporation's predecessor, an unincorporated association, was named as a defendant was irrelevant because that association ceased to exist before the suit was filed. *Strotek Corp. v Air Transp. Ass'n* (9th Cir 2002) 300 F3d 1129.

Subsequent events cannot destroy jurisdiction if the jurisdictional requirements have been met at the time the action is filed. *Hill v Rolleri* (9th Cir 1980) 615 F2d 886, 889 (federal jurisdiction over ancillary third party claim survived settlement of main action on which diversity jurisdiction depended); *Alaska Airlines v U.S.* (ND Cal 1975) 399 F Supp 906, 912 (multidistrict litigation; settlement of all but three cases did not affect court's jurisdiction over third party claims). See *In re Agent Orange Prod. Liab. Litig.* (ED NY 1985) 611 F Supp 1290, aff'd (2d Cir 1987) 818 F2d 210 (diversity jurisdiction not later divested by change in domicile).

On removal based on subsequent events that create diversity jurisdiction, see chap 22.

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§7.70 3. Court's Duty to Realign Parties

The court is responsible for aligning (or realigning) parties according to their interests in the litigation, irrespective of how they may be named in the complaint (*City of Indianapolis v Chase Nat'l Bank* (1941) 314 US 63, 69, 86 L Ed 47, 50, 62 S Ct 15). In aligning the parties, the court disregards nominal or formal parties and rests jurisdiction only on the citizenship of real parties to the controversy. *Navarro Sav. Ass'n v Lee* (1980) 446 US 458, 461, 64 L Ed 2d 425, 429, 100 S Ct 1779. The parties must be realigned for jurisdictional purposes even if this destroys diversity jurisdiction. *Dolch v United Cal. Bank* (9th Cir 1983) 702 F2d 178, 182.

Thus, just as nominal parties cannot destroy diversity jurisdiction in the removal context, they also cannot destroy (or create) such jurisdiction in original diversity actions. For further discussion, see chap 22.

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§7.71 4. Effect of Intervenors

Intervention of a nondiverse party who is not an indispensable party when the complaint is filed does not destroy diversity jurisdiction. *American Nat'l Bank & Trust Co. v Bailey* (7th Cir 1984) 750 F2d 577, 582 (distinction between intervention as of right under Fed R Civ P 24(a) and permissive intervention under Fed R Civ P 24(b) not discussed); *Harris v Illinois-California Express, Inc.* (10th Cir 1982) 687 F2d 1361, 1366 (permissive intervention under Fed R Civ P 24(b)); *CRI, Inc. v Watson* (8th Cir 1979) 608 F2d 1137, 1140 (intervention as of right under Fed R Civ P 24(a)(2)). It appears, however that if the intervenor was an indispensable party when the complaint was filed, diversity jurisdiction is destroyed. See *American Nat'l Bank & Trust Co. v Bailey, supra*; *Travelers Indem. Co. v Dingwell* (D Me 1988) 691 F Supp 503, 508, aff'd (1st Cir 1989) 884 F2d 629. See also 7C Wright, Miller & Kane, Federal Practice and Procedure §1917 (3d ed 1998). But see *Omni Devs. v Porter* (D Fla 1978) 459 F Supp 930, 932 (claim brought under Fed R Civ P 24(a)(2) is appropriate for exercise of ancillary jurisdiction). On ancillary jurisdiction as relating to intervention, see §7.45.

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§7.72 5. Exception for Statutory Interpleader

An exception to the complete diversity requirement (see §7.50) is found in the interpleader statute, 28 USC §1335. That statute allows a person holding property (whose value exceeds $500) that is claimed by two or more claimants to bring an interpleader action depositing the property with the court. The statute applies when there are "two or more adverse claimants, of diverse citizenship." 28 USC §1335(a)(1). This subsection has been construed to require only "minimal diversity," *i.e.,* diversity of citizenship between any two claimants is sufficient to invoke federal jurisdiction notwithstanding that other rival claimants may be co-citizens. *State Farm Fire & Cas. Co. v Tashire* (1967) 386 US 523, 530, 18 L Ed 2d 270, 275, 87 S Ct 1199. See *Aetna Cas. & Sur. Co. v Schmitt* (ND Cal 1977) 441 F Supp 440, 443 (§1335 requires that there be at least two claimants with adverse citizenship; total diversity not necessary).

In contrast, interpleader actions authorized under Fed R Civ P 22 require complete diversity of citizenship, *i.e.,* diversity of citizenship between the plaintiff (stakeholder) and all of the defendants (claimants) notwithstanding that "among themselves the claimants are not citizens of different states." *Travelers Ins. Co. v First Nat'l Bank of Shreveport* (5th Cir 1982) 675 F2d 633, 637 n9; *Aetna Cas. & Sur. Co. v Ahrens* (SD Tex 1976) 414 F Supp 1235, 1253. Furthermore, it appears that the amount-in-controversy requirement of 28 USC §1332 must also be satisfied. See *Travelers Ins. Co. v Harville* (SD Ala 1985) 622 F Supp 68 (decided when jurisdictional amount was $10,000). See also 7 Wright, Miller & Kane, Federal Practice and Procedure §1703 (3d ed 1998).

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§7.73 D. Jurisdictional Amount in Controversy Requirement

In addition to satisfying the diversity of citizenship requirements (see §§7.48-7.72), a party must also satisfy the jurisdictional amount in controversy requirement. The matter in controversy must exceed "the sum or value of $75,000, exclusive of interest and costs." 28 USC §1332(a).

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§7.74 1. Determined by Pleadings

The amount in controversy for federal diversity jurisdiction "is normally determined from the face of the pleadings." *Pachinger v MGM Grand Hotel—Las Vegas, Inc.* (9th Cir 1986) 802 F2d 362, 363. See *St. Paul Mercury Indem. Co. v Red Cab Co.* (1938) 303 US 283, 288, 82 L Ed 845, 848, 58 S Ct 586.

The amount claimed in good faith by the plaintiff controls, unless it appears to a legal certainty that the claim is really for less than the jurisdictional amount. *St. Paul Mercury Indem. Co. v Red Cab Co., supra*. See *Morris v Hotel Riviera, Inc.* (9th Cir 1983) 704 F2d 1113 (state statute limiting hotel's liability to $750 established with legal certainty that plaintiff could not meet jurisdictional amount requirement); *Diefenthal v CAB* (5th Cir 1982) 681 F2d 1039 (to a legal certainty, suit claiming damages for humiliation and distress caused by alleged brusque treatment by stewardess was trivial and did not meet jurisdictional amount requirement). See also *Hatcher v Emergency Med. Specialty Servs.* (D NJ 1986) 643 F Supp 1124 (state law limiting nonprofit hospital's liability to $10,000 precluded diversity jurisdiction). But see *Zacharia v Harbor Island Spa, Inc.* (2d Cir 1982) 684 F2d 199, 202 (even if defendant's liability limited to $1000 by state law, existence of valid defense does not deprive federal court of jurisdiction).

It has been stated that "when the issue of the jurisdictional amount is intertwined with the merits of the case, courts should be careful not to decide the merits, under the guise of determining jurisdiction." *Continental Cas. Co. v Department of Highways* (5th Cir 1967) 379 F2d 673, 675. See *Etheridge v Piper Aircraft Corp.* (8th Cir 1977) 559 F2d 1027 (improbability of recovery is not basis for denial of jurisdiction). See also *St. Paul Mercury Indem. Co. v Red Cab Co., supra* (plaintiff's inability to recover amount adequate to give court jurisdiction does not show bad faith or oust court's jurisdiction). Nevertheless, the court may examine the claim to determine if to a legal certainty the claim is for less than the jurisdictional amount causing the court to lack subject matter jurisdiction. See, *e.g., Morris v Hotel Riviera, Inc., supra*. See also *Christensen v N.W. Airlines, Inc.* (9th Cir 1980) 633 F2d 529 (claimed damages not made in good faith, but solely for purpose of obtaining federal court jurisdiction; to legal certainty, plaintiff's unliquidated tort claim could not reach jurisdictional amount); *Nelson v Keefer* (3d Cir 1971) 451 F2d 289 (to find claim lacking in good faith, must find to legal certainty that plaintiff cannot recover above jurisdictional amount).

For discussion of the amount in controversy requirement concerning tort claims for unliquidated damages, see 14B Wright, Miller & Cooper, Federal Practice and Procedure §3707 (3d ed 1998).

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§7.75 2. Determined as of Time Action Commenced

The amount in controversy is determined as of the time of commencement of the action. *Sellers v O'Connell* (6th Cir 1983) 701 F2d 575, 578. As a result, once a bona fide allegation of damages in excess of the jurisdictional minimum is made, "the court's power is not conditional on a later award of at least that amount." *Adolph Coors Co. v Movement Against Racism & Klan* (11th Cir 1985) 777 F2d 1538, 1544. See *St. Paul Mercury Indem. Co. v Red Cab Co.* (1938) 303 US 283, 289, 82 L Ed 845, 848, 58 S Ct 586 (plaintiff's inability to recover amount adequate to give court jurisdiction does not show bad faith or oust court's jurisdiction). See also *Griffin v Red Run Lodge, Inc.* (4th Cir 1979) 610 F2d 1198 (no single claim over jurisdictional amount but aggregate amount of claims over jurisdictional amount; plaintiff entitled to damages though less than jurisdictional amount). The federal courts, however, are authorized by 28 USC §1332(b) to impose costs on plaintiffs who are ultimately awarded less than the jurisdictional amount.

Federal courts may be divested of subject matter jurisdiction when plaintiff amends the initial complaint to reduce the amount in controversy to less than the jurisdictional minimum. See 28 USC §1447(c) ("if at any time before final judgment… the district court lacks subject matter jurisdiction, the case shall be remanded"); *Villano v Kohl's Dep't Stores, Inc.* (SD NY 2005) 362 F Supp 2d 418. In *Villano,* plaintiff's initial complaint in state court alleged damages of $500,000 arising from an infant's cut to her finger in defendant's store. After defendant removed the case to federal court in New York, plaintiff amended his complaint to reduce the amount in controversy to $74,000. The court, relying on Congress' amendment of 28 USC §1447(c) in 1988, granted plaintiff's motion for remand because plaintiff no longer met the amount in controversy requirement. 362 F Supp 2d at 421.

On aggregation of claims, see §7.80.

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§7.76 3. Punitive Damages

In determining the jurisdictional amount for purposes of diversity jurisdiction, federal courts must consider claims for punitive as well as actual damages unless it is apparent to a legal certainty that punitive damages are not recoverable. *Holley Equip. Co. v Credit Alliance Corp.* (11th Cir 1987) 821 F2d 1531, 1535; *Kahal v J.W. Wilson & Assocs.* (DC Cir 1982) 673 F2d 547. See *Sellers v O'Connell* (6th Cir 1983) 701 F2d 575, 579 (punitive damages must be included unless barred under state law).

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§7.77 4. Attorney Fees

Attorney fees may also be included in determining the amount in controversy if a statute authorizes them to a successful litigant. *Goldberg v CPC Int'l, Inc.* (9th Cir 1982) 678 F2d 1365, 1367. See *Rosack v Volvo of Am. Corp.* (ND Cal 1976) 421 F Supp 933, 937 (attorney fees that may be awarded to the prevailing party may be considered in determining jurisdictional amount). See also *Clark v National Travelers Life Ins. Co.* (6th Cir 1975) 518 F2d 1167, 1168 (statutory penalty and statutory attorney fees may be considered in determining jurisdictional amount).

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§7.78 5. Exclusion of Interest and Costs

Under 28 USC §1332(a), costs and interest are excluded from consideration in determining the amount in controversy. For example, interest on cash death benefits of life insurance policies (*i.e.,* accrued interest) from the date of an insured's death until the date of payment had to be excluded in determining the jurisdictional amount. *Principal Mut. Life Ins. Co. v Juntunen* (7th Cir 1988) 838 F2d 942 (jurisdiction held lacking). But see *Bailey Employment Sys. v Hahn* (2d Cir 1981) 655 F2d 473 (interest that accrued on note before maturity considered). See also *Sarnoff v American Home Prods. Corp.* (7th Cir 1986) 798 F2d 1075, 1078 ("prejudgment interest may sometimes count toward the jurisdictional minimum").

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§7.79 6. Relief Other Than Monetary Damages

When a plaintiff seeks specific relief other than money damages, the value of the "matter in controversy" must still exceed the jurisdictional amount requirement (see §7.73) specified in 28 USC §1332(a). Thus, *e.g.,* in an action for specific performance to convey real property, "the value of the property involved … determines the jurisdictional amount." *Porter v Hollander* (D Del 1980) 494 F Supp 151, 152 n1.

Similarly, the minimum jurisdictional "amount must be present in actions seeking only injunctive and declaratory relief, regardless of the difficulty of valuation." *United States Jaycees v Superior Court* (DC DC 1980) 491 F Supp 579, 581. In such cases, in the Ninth Circuit, it appears that the amount in controversy is "the value of the right to be protected or the extent of the injury to be prevented." *Jackson v American Bar Ass'n* (9th Cir 1976) 538 F2d 829, 831 (federal question case under 28 USC §1331; case decided before 1976 and 1980 amendments to §1331 striking out minimum amount in controversy requirement). See *Hunt v Washington State Apple Advertising Comm'n* (1977) 432 US 333, 347, 53 L Ed 2d 383, 396, 97 S Ct 2434 (decided under former amount-in-controversy requirement of 28 USC §1331; for injunctive or declaratory relief, amount in controversy measured by value of the object of the litigation); *United States Jaycees v Superior Court, supra* ("assessment must be made of the value of the right plaintiff seeks to protect, or of the cost to defendant of correcting the alleged wrong"). See also *Burns v Massachusetts Mut. Life Ins. Co.* (8th Cir 1987) 820 F2d 246, 248 (diversity case; for injunction, amount in controversy is the value to plaintiff of the right to be enforced); *Oklahoma Retail Grocers Ass'n v Walmart Stores, Inc.* (10th Cir 1979) 605 F2d 1155, 1160 (diversity case; impact on defendant, including the cost of the injunction, proper to consider in determining amount in controversy). Diversity jurisdiction will not lie, however, when the right sought to be enforced is entirely speculative and lacks the capability of being translated into monetary value. *Jackson v American Bar Ass'n, supra*.

Moreover, a monetary value can be accorded to intangible rights to determine the amount in controversy requirement. *Handsome v Rutgers Univ.* (D NJ 1978) 445 F Supp 1362, 1364 (decided under former amount-in-controversy requirement of 28 USC §1331; value of right to college education held to exceed former jurisdictional amount of $10,000); *CCCO-Western Region v Fellows* (ND Cal 1972) 359 F Supp 644, 647 (decided under former amount-in-controversy requirement of 28 USC §1331; fundamental constitutional rights, including freedom of speech, worth more than former jurisdictional amount of $10,000).

For further discussion, see 14B Wright, Miller & Cooper, Federal Practice and Procedure §§3702, 3708 (3d ed 1998).

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§7.80 7. Aggregation of Claims

When a plaintiff has multiple claims against a single defendant that are properly joined, the aggregate amount of those claims is deemed the amount in controversy for diversity jurisdiction purposes. *Stone v Stone* (4th Cir 1968) 405 F2d 94, 96; *Alberty v Western Sur. Co.* (10th Cir 1957) 249 F2d 537. See *Diefenthal v CAB* (5th Cir 1982) 681 F2d 1039, 1053 n15 (tort and contract claims may be aggregated to satisfy amount-in-controversy requirement). Similarly, when a plaintiff has properly joined multiple claims against two or more defendants jointly liable, the aggregate amount of those claims is deemed the amount in controversy for diversity jurisdiction purposes. *Alberty,* 249 F2d at 538; *Aetna Cas. & Sur. Co. v Graves* (WD La 1974) 381 F Supp 1159, 1163.

On the other hand, when a single plaintiff has multiple claims against two or more defendants and the claims are separate and distinct as to each defendant (*i.e.,* their liability is several), the general rule is that aggregation is not permitted. "'[T]he test of jurisdiction is the amount of each claim, not their aggregate.'" *Jewell v Grain Dealers Mut. Ins. Co.* (5th Cir 1961) 290 F2d 11, 13, quoting *Cornell v Mabe* (5th Cir 1953) 206 F2d 514, 516.

When there are multiple plaintiffs (such as in a class action) and the claim of at least one plaintiff meets the jurisdictional amount-in-controversy requirement, the court has supplemental jurisdiction over other plaintiffs whose claims arose from the same case or controversy even if they do not meet the jurisdictional minimum. *Exxon Mobil Corp. v Allapattah Servs., Inc.* (2005) 545 US 546, 162 L Ed 2d 502, 125 S Ct 2611. In *Exxon Mobil,* the Supreme Court held that Congress's enactment of 28 USC §1367 overruled the holding in *Zahn v International Paper Co.* (1973) 414 US 291, 300, 38 L Ed 2d 511, 518, 94 S Ct 505, that unnamed class members could not aggregate their separate and distinct claims for jurisdictional purposes. "If a court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of §1367(a)," and the presence of other claims in the complaint over which the court may lack jurisdiction is of no moment. *Exxon Mobil Corp.,* 545 US at 549. *Exxon Mobil* settled a split among the circuit courts over the interpretation of 28 USC §1367 and the viability of *Zahn.*

When two or more plaintiffs "unite to enforce a single title or right, in which they have a common and undivided interest," however, they may aggregate their claims to satisfy the jurisdictional amount requirement. *Troy Bank v Whitehead & Co.* (1911) 222 US 39, 40, 56 L Ed 81, 82, 32 S Ct 9. See *Snyder v Harris* (1969) 394 US 332, 338, 22 L Ed 2d 319, 89 S Ct 1053. See *Eagle v American Tel. & Tel. Co.* (9th Cir 1985) 769 F2d 541, 545 (class action on behalf of minority shareholders; claims common and undivided; individual minority shareholders' claims aggregated).

NOTE: To properly plead diversity jurisdiction under 28 USC §1332, the plaintiff must allege the amount in controversy "against each defendant unless the plaintiff's claims against the defendants are common and undivided so that the defendants' liability is joint and not several." *Welker v Metropolitan Life Ins. Co.* (CD Cal 1980) 502 F Supp 268, 271.

For further discussion, see 14B Wright, Miller & Cooper §§3704-3705 (3d ed 1998).

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§7.81 E. Exceptions for Domestic Relations and Probate

Exceptions to diversity of citizenship subject matter jurisdiction exist in the areas of domestic relations (see *Csibi v Fustos* (9th Cir 1982) 670 F2d 134, 136) and probate (see *Giardina v Fontana* (2d Cir 1984) 733 F2d 1047, 1050). If one of these exceptions applies, the federal court lacks subject matter jurisdiction notwithstanding that the diversity of citizenship (see §§7.48-7.72) and amount in controversy requirements (see §§7.73-7.80) have been satisfied. *Giardina v Fontana, supra*; *Csibi v Fustos, supra*. The rationale behind the domestic relations exception is that state courts have a greater interest and expertise in this area, which involves uniquely nonfederal issues. *Csibi v Fustos, supra*. The rationale behind the probate exception appears to be judicial economy, a desire to promote legal certainty concerning transfer of property at death and state expertise. See *Dragan v Miller* (7th Cir 1982) 679 F2d 712.

The Ninth Circuit has narrowly construed the domestic relations exception and applies a primary issue test to determine if it applies. *Csibi v Fustos* (9th Cir 1982) 670 F2d 134, 137. Under this test, if "the primary issue concerns the status of parent and child or husband and wife," the court lacks subject matter jurisdiction. *Csibi v Fustos, supra*. Thus, a federal court lacks subject matter jurisdiction to "grant a divorce or annulment, determine support payments, or award custody of a child." *Csibi v Fustos, supra*. See *Bennett v Bennett* (DC Cir 1982) 682 F2d 1039, 1042 (no federal jurisdiction to issue injunction to enjoin defendants from interfering with plaintiff's custody rights).

Under the probate exception, a federal court lacks subject matter jurisdiction to probate a will or administer an estate. *Markham v Allen* (1946) 326 US 490, 494, 90 L Ed 256, 259, 66 S Ct 296. See *Dragan v Miller, supra*. Moreover, under this exception it has been held that a federal court lacks subject matter jurisdiction over a will contest to set aside a will "when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect." *O'Callaghan v O'Brien* (1905) 199 US 89, 110, 50 L Ed 101, 111, 25 S Ct 727.

The Supreme Court addressed the scope of the probate exception in *Marshall v Marshall* (2006) 547 US 293, 164 L Ed 2d 480, 126 S Ct 1735. In *Marshall,* the Court held that the probate or annulment of a will, the administration of a decedent's estate, and disposing of property that is in the custody of a state probate court are matters reserved solely for state probate courts; federal courts are not precluded from adjudicating matters outside those confines, however, such as the present widow's counterclaim against decedent's son in her federal bankruptcy proceedings.

Federal courts may adjudicate certain independent claims that arise out of probate matters. For example, an action to determine whether a custody decree has been violated, and, if so, the appropriate damages, does not fall within the domestic relations exception to diversity jurisdiction. *McIntyre v McIntyre* (9th Cir 1985) 771 F2d 1316 (exception inapplicable to action for tortious interference with custody rights). See *Giardina v Fontana, supra* (fraud claim involving interest in estate does not fall under probate exception). But see *Jagiella v Jagiella* (5th Cir 1981) 647 F2d 561, 564 (domestic relations exception extended to damage action for alienation of children's affection and resultant infliction of mental anguish status); *Dragan v Miller, supra* (cannot circumvent probate exception by calling a will contest a tort; probate exception applied).

On when the abstention doctrine may be applicable to cases not within the domestic relations or probate exceptions, but on the verge, see *McIntyre,* 771 F2d at 1319 (domestic relations exception; under facts abstention improper); *Giardina,* 733 F2d at 1051 (probate exception; under facts abstention improper). On abstention doctrine generally, see §7.12.

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8

Venue

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I. INTRODUCTION

§8.1 A. Scope of Chapter

This chapter discusses venue of civil actions. Specifically, it discusses preliminary matters (see §§8.4-8.9), venue in transitory actions (see §§8.10-8.30), venue in local actions (see §§8.31-8.47), venue in mixed actions (see §§8.48-8.54), special rules for corporations, associations, and partnerships (see §§8.55-8.64), and special rules for governmental entities (see §§8.65-8.78).

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§8.2 B. Governing Law

The statutes governing proper venue of civil actions generally are found in CCP §§392-395.5, 401. In a few situations, proper venue is dictated by statutes outside the Code of Civil Procedure. See, *e.g.,* the jurisdictional venue statutes cited in §8.3. The statute empowering courts to transfer venue at their discretion is CCP §397(c). On venue in federal cases, see 28 USC §§1391-1407. On change of venue, see chap 20.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.3 C. Statutory List: Venue Statutes

§8.3 C. Statutory List: Venue Statutes

Unless particular rules require trial in another county, under the general rule of venue set forth in CCP §395(a) venue is proper in the county of residence of any defendant. There are a wide variety of statutory exceptions to this rule, based either on the type of action or the type of party. The following is a list of some of the most commonly invoked specific statutory venue provisions with citations to sections in the text where that statute is discussed.

Type of Action	Statute	Discussion
Real property	CCP §392(a)	§8.32
Unlawful detainer	CCP §392(b)	§8.37
Contract	CCP §§395(a)-(b), 1812.10, 2984.4	§8.18
1. If defendant is corporation or association	CCP §395.5	§8.56
2. If defendant is state	Govt C §955	§8.65
Injury to person or wrongful death	CCP §395(a)	§8.29
1. If defendant is corporation or association	CCP §395.5	§8.56
2. If defendant is state	Govt C §955.2	§8.67
3. If defendant is city, county, or local agency	CCP §394	§8.68
Injury to personal property	CCP §395(a)	§8.30
Marital dissolution	CCP §395(a)	§8.41
Determination of parental relation or to enforce support	CCP §395(a)	§8.42
Adoption	Fam C §§8714, 8802	§8.43
Partition	CCP §872.110	§8.38
Eminent domain	CCP §1250.020	§8.39
If plaintiff is city, county, or local agency	CCP §394	§8.76
Inverse condemnation	CCP §392(a)(1)	§8.35
	Govt C §955	§8.66
Involuntary dissolution of corporation	Corp C §§177, 1800	§8.47
Recovery of statutory penalty or forfeiture	CCP §393(a)	§8.45
Public officer	CCP §393(b)	§8.44
Executor, administrator, guardian, conservator, or trustee	CCP §395.1	§8.46
Corporation or association	CCP §395.5	§8.56
Unincorporated association	CCP §395.2	§8.55

State	Govt C §§955, 955.2-955.3; CCP §401	§8.65
City, county, or local agency	CCP §394 (removal statute)	§8.72

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II. PRELIMINARY MATTERS

§8.4 A. Venue Defined

Venue is defined as the proper county for trial of a civil action. *Milliken v Gray* (1969) 276 CA2d 595, 600, 81 CR 525. The purpose of the basic venue rule is to give the defendant the right to have actions tried in the county of his or her residence. *Kaluzok v Brisson* (1946) 27 C2d 760, 167 P2d 481; *Vickerson v Wehr* (1941) 42 CA2d 678, 109 P2d 743.

With a few exceptions in which venue is considered "jurisdictional," jurisdiction relates to a court's power to act whereas venue does not. A court having jurisdiction may render a binding judgment with res judicata effect even though venue is improper, *i.e.,* when the case was not brought in the proper county for trial. *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 119, 101 CR 745; *Newman v County of Sonoma* (1961) 56 C2d 625, 15 CR 914.

When venue is jurisdictional, *i.e.,* when a statute specifies a particular place for trial as part of a grant of subject matter jurisdiction, a judgment rendered in an action tried in an improper county is void and subject to collateral attack. *Barquis v Merchants Collection Ass'n, supra*. See, *e.g., Van Zanten v Superior Court* (1963) 214 CA2d 510, 29 CR 625, in which the court held that venue is jurisdictional in a proceeding under former Pen C §6502 to commit a person as a narcotics addict. See also Comment to CCP §1250.020 (venue in eminent domain proceedings), discussed in §8.39.

Venue should be distinguished from subject matter jurisdiction issues, *e.g.,* whether the case is a limited or unlimited civil case. Actions in law in which the amount in controversy exceeds $25,000 are "unlimited civil cases." See CCP §88. See also CCP §§85-85.1 (defining "limited civil cases" as all actions or special proceedings in which the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000); *Stern v Superior Court* (2003) 105 CA4th 223, 130, 129 CR2d 275. In addition, there are a number of actions that by statute that are considered unlimited civil cases regardless of the amount in controversy or the nature of the relief sought. See, *e.g.*, Prob C §§2200, 7050 (guardianship, conservatorship, probate proceedings); Fam C §§200, 8500-9206 (adoption proceedings); Welf & I C §245 (juvenile court proceedings). For discussion of limited and unlimited civil cases after trial court unification, see chap 6.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.5 B. Nature of Action: Transitory, Local, or Mixed

§8.5 B. Nature of Action: Transitory, Local, or Mixed

Venue is based on:

- Classifications of actions as transitory (see §§8.10-8.30), local (see §§8.31-8.47), or mixed (see §§8.48-8.54); and
- Classifications of the parties involved (see §§8.55-8.64 (special rules for corporations, associations, and partnerships), §§8.65-8.78 (special rules for government entities)).

PRACTICE TIP: Although proper venue is easy to determine in many cases, the classifications are crucial if many different causes of action or types of relief are sought or if a party involved in the action belongs to a group governed by special venue statutes. In such situations, it is often unclear how actions will be classified or what rules will be applied.

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§8.6 C. Importance of Complaint

The attorney should carefully draft the complaint allegations and the demand to support the choice of venue. Venue determinations are generally based on the plaintiff's theory of the action set forth in the complaint on file when the motion to change venue is made. *Brown v Superior Court* (1984) 37 C3d 477, 482, 208 CR 724. This is true even if the complaint is subsequently amended to dismiss the cause of action initially providing the basis for venue. *Armstrong Petroleum Corp. v Superior Court* (1981) 114 CA3d 732, 170 CR 767.

Proper venue is determined by the allegations in the complaint, and no party can challenge venue later based on allegation in a cross-complaint. *K.R.L. Partnership v Superior Court* (2004) 120 CA4th 490, 498, 15 CR3d 517 (cross-defendant is not entitled to seek change of venue under CCP §396b based on compulsory cross-complaint).

Careful drafting of the complaint is also important because public policy favors trial in the county where the defendant resides, and the complaint will be construed strictly against a plaintiff who seeks venue in another county. *Neet v Holmes* (1942) 19 C2d 605, 612, 122 P2d 557; *Haurat v Superior Court* (1966) 241 CA2d 330, 334, 50 CR 520; *Bybee v Fairchild* (1946) 75 CA2d 35, 170 P2d 54.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.7 D. Importance of Trial Court Delay Reduction Act in Choosing Venue

§8.7 D. Importance of Trial Court Delay Reduction Act in Choosing Venue

The programs developed under the Trial Court Delay Reduction Act (Govt C §§68600-68620) dramatically alter the pace of litigation. Counsel should consider the effects of these programs in choosing venue, because although all counties have adopted the Act, local practice in its implementation may vary from county to county. Thus, careful consideration of local rules and practices may be particularly important in choosing between venue in different counties, and counsel is advised to consult local rules before making a decision.

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§8.8 E. Effect of Contractual Venue Agreements

A contractual provision specifying the county where an action on that contract will be brought is void. *General Acceptance Corp. v Robinson* (1929) 207 C 285, 277 P 1039. In this case, the court relied on a series of out-of-state decisions holding that the rules determining where actions may be brought are based on general convenience and expediency and that agreements of the parties should not be allowed to interfere with these considerations. See also *Alexander v Superior Court* (2003) 114 CA4th 723, 730, 8 CR3d 111 (following *General Acceptance Corp*. to hold contractual venue selection clause is invalid to extent it is inconsistent with statutory venue scheme).

Although venue selection provisions are void, a contractual provision specifying the state in which an action must be brought is enforceable in the absence of a showing that enforcement would be unreasonable. *Smith, Valentino & Smith, Inc. v Superior Court* (1976) 17 C3d 491, 131 CR 374 (court declined to follow *General Acceptance Corp.*). Similarly, a contractual provision mandating arbitration to settle contract-related disputes that specifies the state in which the arbitration must be held is also enforceable if it is consistent with the parties' reasonable expectations and not unduly oppressive or unconscionable. *Bos Material Handling, Inc. v Crown Controls Corp.* (1982) 137 CA3d 99, 186 CR 740.

In some circumstances, the prohibition against venue selection provisions may be avoided by, *e.g.,* specifying in writing where performance of a contract will take place. See §8.23. But see §8.28 for discussion of the invalidity of provisions in consumer installment sales contracts purporting to waive the venue provisions of the governing statutes.

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§8.9 F. Effect on Venue of Coordination Statutes

Conventional venue principles may be overridden when civil actions sharing common questions of fact or law are pending in different courts or in different divisions of the superior court of the same county. CCP §§403-404. Such multicourt litigation may be ordered coordinated under the procedures specified in CCP §§403-404.9 and Cal Rules of Ct 3.500-3.550, which are based in part on procedures developed by federal district courts for handling complex and multidistrict litigation under 28 USC §1407. Once a case has come under the coordination procedure, the place of trial must be determined by the coordination judge unfettered by the narrow perspective of the venue statutes. *Keenan v Superior Court* (1980) 111 CA3d 336, 342, 168 CR 561.

When coordination has been ordered, the trial judge may hear and determine the coordinated actions in the site or sites he or she finds appropriate (CCP §404.3) and may order any coordinated action or severable claim in that action transferred from the court where it is pending to another court for a specified purpose or for all purposes (Cal Rules of Ct 3.543(a)). For further discussion, see 4 Witkin, California Procedure, *Pleading* §§352-374 (5th ed 2008).

For full discussion of coordination, see chap 43.

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III. VENUE IN TRANSITORY ACTIONS

§8.10 A. General Rule: County of Defendant's Residence

In a transitory action, the events giving rise to the action might have taken place anywhere, and the general rule of venue in CCP §395(a) is that venue is proper in the superior court in the county where any defendant resides at the commencement of the action except as otherwise provided by law and subject to the court's power to transfer actions or proceedings. CCP §395(a).

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§8.11 1. Residence Defined

Under Govt C §244(a), a residence is the place where a person remains and to which he or she returns in "seasons of repose." It is similar to a domicile (see *Burt v Scarborough* (1961) 56 C2d 817, 17 CR 146), *i.e.,* the place where a person normally resides and intends to remain permanently (*Enter v Crutcher* (1958) 159 CA2d Supp 841, 323 P2d 586). On meaning of "domicile," see §6.67. On corporate residence, see §8.57. For venue purposes, a person can have only one place of residence. *Burt v Scarborough, supra*.

Although a stated intent to remain at the location is an important factor in determining residence (*Johnston v Benton* (1925) 73 CA 565, 239 P 60), a court may disregard this statement of intent when a person's acts indicate a contrary intention (*Briggs v Superior Court* (1947) 81 CA2d 240, 183 P2d 758). For further discussion, see 3 Witkin, California Procedure, *Actions* §§818-820 (5th ed 2008).

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2. Effect of Multiple Defendants

§8.12 a. Residence of Any Defendant

If there are several properly joined defendants to a civil action and the complaint is filed in the county of residence of one of them, venue is proper and the plaintiff is entitled to have the action brought where it was filed. CCP §395(a). See, *e.g., Monogram Co. v Kingsley* (1951) 38 C2d 28, 237 P2d 265 (venue proper in county of one defendant, even though he was joined with numerous nonresident defendants against whom most causes of action were alleged and even though he consented to transfer). The same rule applies when venue is proper with respect to one of several cross-defendants; the cross-complainant is entitled to its venue choice even if all cross-defendants were to join in seeking a change to the county in which another of them resides. See *Tutor-Saliba-Perini Joint Venture v Superior Court* (1991) 233 CA3d 736, 742, 285 CR 1 (cross-defendant public entity that was sued for breach of contract, indemnity, and contribution sought change of venue to county where it was located). If a defendant is dismissed from the action at a later time, the remaining defendants have no right to compel a change of venue. *Ferguson v Koerber* (1924) 69 CA 47, 230 P 476.

Even when none of the named defendants reside in the county where the action was commenced, venue is proper in that county if, at any time before hearing on a motion for change of venue, the plaintiff amends the complaint in good faith to include the true name of a fictitiously named defendant who resides there. *Gutierrez v Superior Court* (1966) 243 CA2d 710, 52 CR 592. See also *Bachman v Cathry* (1896) 113 C 498, 45 P 814.

For discussion of venue when at least one of multiple defendants is a business entity, see §8.63. When one of multiple defendants is a government entity, see §8.77.

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b. Improper Joinder of Defendants

§8.13 (1) Statutory Authority: CCP §395(a)

Code of Civil Procedure §395(a) states:

> If any person is improperly joined as a defendant or has been made a defendant solely for the purpose of having the action tried in the superior court in the county where he or she resides, his or her residence shall not be considered in determining the proper place for the trial of the action.

Under the language of §395(a), when a plaintiff has a cause of action against a defendant who is a necessary party under the rules governing joinder of parties (see chap 14), that defendant is not considered a party joined "solely for the purpose" of obtaining venue. *Freeman v Dowling* (1933) 219 C 213, 25 P2d 980; *Hellman v Logan* (1905) 148 C 58, 82 P 848. When the issue is raised whether a defendant has been properly joined or joined solely for the purpose of establishing venue, the California Supreme Court has stated the question as "whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that plaintiff had a cause of action against the resident defendant." *Peiser v Mettler* (1958) 50 C2d 594, 603, 328 P2d 953.

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§8.14 (2) Case Examples

Courts have found that a defendant was improperly joined or joined solely for the purpose of obtaining venue in the following situations:

- No cause of action exists against the resident defendant. See, *e.g., Minyard v Superior Court* (1967) 248 CA2d 633, 56 CR 801; *South v Wishard* (1954) 123 CA2d 642, 267 P2d 827.
- Allegations of the complaint do not sufficiently connect the defendant with the action. *Norins Realty Co. v Consolidated Abstract & Title Guar. Co.* (1947) 80 CA2d 879, 182 P2d 593.
- An unwilling plaintiff is named as a nominal defendant under CCP §382 even if this is not done solely to establish venue. The main factor is whether the defendant is actually a plaintiff rather than a defendant. See *Donohoe v Wooster* (1912) 163 C 114, 124 P 730.
- A defendant is named who is simply a stakeholder with no personal interest in the controversy. *Hays v Cowles* (1943) 60 CA2d 514, 519, 141 P2d 26. If, however, a defendant who is primarily a stakeholder asserts a claim for fees or compensation out of the fund in question, venue is proper in that defendant's county of residence because the court will consider that defendant to be a necessary party. See *Independent Iron Works v American President Lines* (1950) 35 C2d 858, 221 P2d 939.
- The alleged county of residence of a fictitiously named defendant may not be used to lay venue in that county. *Kallen v Serretto* (1932) 126 CA 548, 14 P2d 917.

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B. Special Residence Problems

§8.15 1. Residence Outside State or Unknown

Although generally venue in transitory actions is proper in the county of residence of any defendant, the action may be tried in the superior court in any county the plaintiff designates in the complaint when:

- No defendant resides in the state; or
- Defendants reside in the state but, after a diligent search (*Thurber v Thurber* (1896) 113 C 607, 45 P 852), the county of residence is unknown to the plaintiff.

CCP §395(a).

The plaintiff's reasons for choosing a particular county are immaterial. *Hamilton v Superior Court* (1974) 37 CA3d 418, 112 CR 450. Under the nonresidence clause of §395(a), all defendants must reside outside the state. If any reside in the state, they are entitled to change venue to the county where one defendant resides. *Banta v Wink* (1897) 119 C 78, 51 P 17.

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§8.16 2. Imminent Departure From State

Another exception to the general rule in transitory actions is that, when a defendant is about to depart from the state, a transitory action may be tried "in the superior court in any county where either of the parties reside or service is made." CCP §395(a). To "depart" within the meaning of §395(a) means to leave without intending to return or with no reasonable likelihood of an early return. *Polk v Bradbury* (1932) 127 CA 383, 15 P2d 865.

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§8.17 C. Particular Transitory Actions With Greater Venue Choice

In many types of transitory actions (*e.g.,* those discussed below involving contracts (see §§8.18-8.28), personal injury or wrongful death (see §8.29), and injuries to personal property (see §8.30)), venue is proper either in the county of a defendant's residence or in other specified counties.

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1. Contract Actions

§8.18 a. Statutory Provisions

Contract actions are governed by a number of different venue provisions, depending on the nature of the contract. The overall statutory framework is as follows:

- CCP §395(a) (general provision in contract cases);
- CCP §395(b) (consumer obligations generally);
- CC §1812.10 (retail installment sales contracts generally); and
- CC §2984.4 (retail motor vehicle installment sales contracts).

Code of Civil Procedure §395(a) provides that, except for actions founded on consumer obligations (see §§8.25-8.28), an action against an individual defendant founded on a contract to perform an obligation in a particular county may be tried in the superior court in the county where:

- The obligation will be performed;
- The contract in fact was entered into; or
- The defendant resides at the commencement of the action.

See §8.57 for the rule when defendant is corporation or association. On determining the county where the contract was entered into, see §§8.23-8.24. For discussion of individual defendant's county of residence, see §8.11.

The county in which the obligation is incurred is considered to be the county where it is to be performed unless there is a "special contract in writing to the contrary." CCP §395(a). For discussion, see §§8.23-8.24.

Actions based on consumer obligations are generally governed by the venue provisions of CCP §395(b). Venue provisions in actions on retail installment sales contracts generally are governed by the Unruh Retail Installment Sales Act (CC §§1801-1812.20). CC §1812.10. Those regarding motor vehicles are governed by the Rees-Levering Motor Vehicle Sales and Finance Act (CC §§2981-2984.6). CC §2984.6. For discussion, see §§8.25-8.28.

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b. Contract Actions Governed by CCP §395(a)

§8.19 (1) Types of Actions

In addition to express contracts, the venue options provided by CCP §395(a) in actions founded on breach of contract apply to the following:

- Actions on implied in fact contracts (see *International Inv. Co. v Chagnon* (1959) 170 CA2d 441, 339 P2d 147);
- Actions on implied in law contracts (*Fitzhugh v University Realty Co.* (1920) 46 CA 198, 188 P 1023);
- Actions to recover statutory penalties declared by the legislature to be collectible in the same manner as contract obligations (*People v Zegras* (1946) 29 C2d 67, 172 P2d 883);
- Actions for partnership dissolutions (see *Rudnick v Delfino* (1956) 140 CA2d 260, 294 P2d 983); and
- Actions for rescission and restitution (*Fitzhugh v University Realty Co., supra*).

Although there are no California authorities directly on point, it is arguable that an action on a judgment, other than one to establish and enforce a foreign judgment or court order for child support, is an action on a contract within the scope of CCP §395(a). For discussion of venue in child support enforcement action governed by CCP §395(a), see §8.41.

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(2) Determining Where Contract Is Entered Into

§8.20 (a) Last Act Necessary: Acceptance

The county in which the contract in fact is entered into is the county where the last act necessary to make the contract binding takes place. *Bank of Yolo v Sperry Flour Co.* (1903) 141 C 314, 74 P 855; *Mitchell v Superior Court* (1986) 186 CA3d 1040, 231 CR 176. Usually, the last act is the act of acceptance. *Mitchell v Superior Court, supra*.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.21 (b) Illustrative Cases

§8.21 (b) Illustrative Cases

Courts have determined where the contract was entered into in the following typical situations:

- When acceptance is by telephone, the contract is made at the place where the acceptance is spoken. *Wilson v Scannavino* (1958) 159 CA2d 369, 324 P2d 350. See *Bank of Yolo v Sperry Flour Co.* (1903) 141 C 314, 74 P 855 (dictum).
- When acceptance is by mail, the contract is made at the place where the letter is mailed. *Bank of Yolo v Sperry Flour Co., supra.* Similarly, a contract that is within the statute of frauds is made at the place of oral acceptance, even if a memorandum sufficient to satisfy the statute is subsequently executed elsewhere. *Taylor v J.B. Hill Co.* (1945) 67 CA2d 581, 154 P2d 926.
- When the contract is not binding until occurrence of a condition precedent, the contract is made at the place where the condition is satisfied. *Di Giorgio Fruit Corp. v Zachary* (1943) 60 CA2d 560, 141 P2d 8; *Limited Mut. Compensation Ins. Co. v Curtis* (1941) 45 CA2d 507, 114 P2d 404.
- When minor errors such as typographical errors are corrected, the contract is made in the county where the agreement was originally made, not where the corrections were made. *Standard Mach. Co. v Coleman* (1956) 140 CA2d 748, 296 P2d 89.
- When substantive contract provisions are modified in another county, the place where the contract was originally made determines venue unless the litigation arises from the modification. *Joe Lowe Corp. v Rasmusson* (1942) 53 CA2d 490, 127 P2d 1002.
- When an oral agreement is subsequently integrated into a written contract, the writing supersedes the oral agreement and venue is proper in the county where the writing is executed. *Hale v Bohannon* (1952) 38 C2d 458, 241 P2d 4.

For further discussion, see 3 Witkin, California Procedure, *Actions* §§837-840 (5th ed 2008).

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.22 (c) Effect of Contract Provisions

§8.22 (c) Effect of Contract Provisions

Under CCP §395(a), venue in a contract action is proper in the superior court in the county where the contract was "in fact" made. Thus, when an attestation clause recites that the contract was executed in a particular county, parol evidence is permitted to prove that execution in fact occurred elsewhere. *Taylor v Lundblade* (1941) 43 CA2d 638, 111 P2d 344. For the same reason, parties to a contract executed in one county may not stipulate that it was made in another county to support venue in the other county. See generally *Taylor v Lundblade, supra.*

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(3) Determining Place of Performance

§8.23 (a) Statutory Definitions

Venue in an action on a contract is proper in the superior court in the county where the contractual obligation is to be performed only if the agreement specifies in writing the place of performance. CCP §395(a); *Mitchell v Superior Court* (1986) 186 CA3d 1040, 231 CR 176. Otherwise, under §395(a) the county where the obligation is incurred is considered to be the county of performance. This provision substantially limits the plaintiff's option to lay venue in the county of performance.

If the defendant in a contract action is a corporation, venue is governed by CCP §395.5, which provides that venue is proper in the place of performance of the contract and contains no requirement that the writing specify the place. For discussion, see §8.58.

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§8.24 (b) Illustrative Cases

Although the "special contract in writing" required by CCP §395(a) need not be separate and distinct, the place of performance cannot be implied from the contract (see *Caffrey v Tilton* (1952) 38 C2d 371, 240 P2d 273) or shown by parol evidence (*Mitchell v Superior Court* (1986) 186 CA3d 1040, 231 CR 176). But see *Inglewood Thrift & Loan v Colby* (1961) 188 CA2d Supp 857, 10 CR 814 (fact that parol evidence was necessary to identify place of payments made no difference). The contract must specifically state the place of performance. *Mitchell v Superior Court, supra*; *Armstrong v Smith* (1942) 49 CA2d 528, 122 P2d 115.

In the following situations, courts have found contractual provisions for place of performance sufficiently specific for venue purposes:

- When the contract specified performance at the promisee's office in a city or county, even though it did not set forth the office address, venue may be laid there. *Stute v Burinda* (1981) 123 CA3d Supp 11, 177 CR 102; *Morthrift Plan v Fischer* (1961) 196 CA2d Supp 865, 17 CR 607. But see *Fidelity Thrift & Loan Ass'n v Hall* (1960) 186 CA2d Supp 895, 9 CR 596 (when office address not stated, venue improper at place of performance).
- When a promissory note recited that it was payable "at Santa Rosa, California," venue was held to be proper in Santa Rosa even though the note was executed in San Francisco and the defendants resided there. *Causley v Superior Court* (1968) 267 CA2d 757, 73 CR 585.
- Venue was held to be proper in Santa Clara County when the contract, written on the plaintiff's letterhead, simply specified performance at the plaintiff's business, but the letterhead showed an office address in Santa Clara County. *Wathen v Superior Court* (1963) 212 CA2d 125, 27 CR 840.

For further examples and discussion, see 3 Witkin, California Procedure, *Actions* §§841-844 (5th ed 2008).

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/ c. Consumer Obligations and Installment Sales/ §8.25 (1) Consumer Obligations (CCP §395(b))

c. Consumer Obligations and Installment Sales

§8.25 (1) Consumer Obligations (CCP §395(b))

In actions based on the sale of goods or services or for loans or extensions of credit intended primarily for personal, family, or household uses, venue is proper (subject to the court's power to transfer) in the superior court of the county where the buyer:

- In fact signed the contract;
- Resided when the contract was signed; or
- Resides when the action is commenced.

CCP §395(b). See *Leonard v Slade* (1975) 55 CA3d Supp 1, 127 CR 309 (action for medical services rendered is founded on obligation of defendant for services intended primarily for personal use within meaning of §395(b)).

The proper court location for trial of a case is the location where the court tries that type of case that is nearest or most accessible to where the buyer or lessee resides, where the buyer or lessee in fact signed the contract, where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action. Otherwise, any location of the superior court designated as the proper court under CCP §395(b) is a proper court location for the trial. The court may specify by local rule the nearest or most accessible court location where the court tries that type of case. CCP §395(b). As long as the case arises from a consumer transaction specified in the statute, CCP 395(b) governs venue regardless whether the consumer is a plaintiff or a defendant or whether one of the defendants is an individual. *Fontaine v Superior Court* (2009) 175 CA4th 830, 96 CR3d 607.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.26 (2) Installment Sales Contracts (CC §§1812.10, 2984)

§8.26 (2) Installment Sales Contracts (CC §§1812.10, 2984)

Actions on installment sales contracts are specifically excluded from the venue provisions of CCP §395(b) and, except for motor vehicle installment sales purchases governed by CC §2984.4, are governed by the Unruh Retail Installment Sales Act (CC §§1801-1812.20). Under CC §1812.10(a)-(b), venue in such actions is proper in the superior court nearest or most accessible to where:

- The buyer in fact signed the contract;
- The buyer resided when the contract was made;
- The buyer resides when the action is commenced; or
- The goods purchased have become affixed to and part of real property.

The court may specify by local rule the nearest or most accessible court location where the court tries that type of case. CC §1812.10(b).

Venue in motor vehicle installment sales purchases, which is specifically excluded from CCP §395(b), is governed by the Rees-Levering Motor Vehicle Sales and Finance Act (CC §§2981-2984.6). Under CC §2984.4(a)-(b), venue in these actions is proper in the superior court in the county where:

- The buyer in fact signed the contract or purchase order;
- The buyer resided when the contract or purchase order was entered into;
- The buyer resides when the action is commenced; or
- The vehicle is permanently garaged.

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§8.27 (3) Pleading Requirements

In actions brought under CC §§1812.10 and 2984.4, the plaintiff must file with the complaint an affidavit stating facts showing that venue is proper, or may state such facts in the verified complaint, but not on information and belief. Failure to include these facts may result in dismissal without prejudice, although the court may permit the subsequent filing of the affidavit "on such terms as may be just." CC §§1812.10(c), 2984.4(c).

In addition to the pleading requirements in CC §§1812.10 and 2984.4, similar requirements may be found in CCP §396a. Under §396a, in cases relating to consumer contracts for personal, family, or household use that are subject to CCP §395(b) or CC §1812.10 or §2984.4, or in unlawful detainer proceedings as defined in CCP §1161, the complaining party must state facts in a verified complaint or affidavit verified under oath by either the plaintiff or the plaintiff's attorney, showing that the action is in superior court, which is a proper court for trial, and that the action is subject to one of the foregoing provisions. Failure to file the verified complaint or affidavit requires dismissal of the action without prejudice, although the court may permit the subsequent filing of the affidavit "on such terms as may be just." CCP §396a(a).

Furthermore, in contrast to the rules governing unlimited civil cases, if it appears from the plaintiff's pleadings that the court in which the action is filed does not have venue, the case must be transferred to a proper court unless the defendant consents to keep the action in the court where the action was commenced. CCP §396a(b). For discussion of requirements for valid consent, see §8.28.

The intentional and mass filing of such complaints in the wrong county is both an abuse of process and an unlawful business practice, which may be enjoined under CC §3369. *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 101 CR 745. See *Yu v Signet Bank* (1999) 69 CA4th 1377, 82 CR2d 304 (mass filing of complaints against debtors in wrong jurisdiction is "distant forum abuse" and even more egregious than practice in *Barquis*).

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§8.28 (4) Consent to Improper Venue

A provision of an obligation for consumer goods covered by CCP §395(b) waiving the venue provisions of those subdivisions is void and unenforceable. CCP §395(c). In addition, both the Unruh Retail Installment Sales Act (CC §1804.1) and the Rees-Levering Motor Vehicle Sales and Finance Act (CC §2983.7) provide that the parties may not by contract agree to venue in a county other than as specified above.

If any of the above actions is brought as a limited civil case (see chap 6), however, the defendant may consent in writing or in open court to keep the action in a court without proper venue, but only if he or she is represented by counsel at the time the consent is given. CCP §396a(b).

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§8.29 2. Personal Injury and Wrongful Death Actions

Except as otherwise provided by law and subject to the court's power to transfer, actions for injury to a person or for wrongful death arising from negligence are triable either in the superior court in the county where any defendant resides or in the county where the injury or injury causing death occurs. CCP §395(a).

The term "injury to person," as used in §395(a), is narrowly construed to mean actual bodily physical injuries. *Cubic Corp. v Superior Court* (1986) 186 CA3d 622, 231 CR 18. Not included in the definition of this term are actions for:

- Intentional infliction of emotional distress (*Cubic Corp. v Superior Court, supra*; *Carruth v Superior Court* (1978) 80 CA3d 215, 145 CR 344);
- Injury to reputation (*Carruth v Superior Court, supra*);
- False imprisonment (*Monk v Ehret* (1923) 192 C 186, 219 P 452);
- Libel (*Graham v Mixon* (1917) 177 C 88, 169 P 1003); and
- Malicious prosecution and false arrest (*Plum v Forgay Lumber Co.* (1931) 118 CA 76, 4 P2d 804).

The actions listed above may be considered actions for personal injury for pleading purposes, but they are not personal injury actions for purposes of venue. See *Carruth v Superior Court, supra*.

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§8.30 3. Actions for Injury to Personal Property

Except as otherwise provided by law and subject to the court's power to transfer, actions for injury to personal property arising from negligence are triable in the superior court in the county where any defendant resides or the injury occurred. CCP §395(a).

The phrase "injury to … personal property" is narrowly construed to mean physical injury. Nonphysical injuries to property are triable only in the county of a defendant's residence. Actions for conversion of personal property, for example, are not considered actions for injury to personal property within the meaning of §395(a). *Spangenberg v Spangenberg* (1932) 123 CA 387, 11 P2d 408; *Mason v Buck* (1929) 99 CA 219, 278 P 461.

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IV. VENUE IN LOCAL ACTIONS

§8.31 A. Local Action Defined

The traditional definition of a local action is one in which the events giving rise to the action must have taken place in a particular locality. *Ophir Silver Mining Co. v Superior Court* (1905) 147 C 467, 473, 82 P 70. A local action must be tried in the particular locality regardless of the defendant's county of residence. The most common example of a local action is one directly and exclusively affecting real property, and it is triable only in the county where the property is located. See §§8.32-8.37.

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B. Local Actions Involving Real Property

1. Real Property Actions (CCP §392)

§8.32 a. Types of Actions

In the following types of real property actions (subject to the court's power to transfer), venue under CCP §392 is proper in the superior court in the county where the real property or part of it is situated:

- Recovery of real property or of estate or interest in real property (CCP §392(a)(1); see §8.33);
- Determination in any form of right or interest in real property (CCP §392(a)(1); see §8.34);
- Injury to real property (CCP §392(a)(1); see §8.35);
- Foreclosure of liens or mortgages on real property (CCP §392(b); see §8.36); and
- Unlawful detainer proceedings (CCP §392(b); see §8.37).

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/ b. Examples/§8.33 (1) Recovery of Real Property or Estate or Interest in Real Property

b. Examples

§8.33 (1) Recovery of Real Property or Estate or Interest in Real Property

Actions to recover real property or an estate or interest in real property include (CCP §392(a)(1)):

- Action for ejectment or unlawful detainer. See *Childs v Eltinge* (1973) 29 CA3d 843, 105 CR 864.
- Action to set aside land sale. See *Etter v Vollmer* (1956) 139 CA2d 718, 294 P2d 55 (see also §8.34).

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.34 (2) Determination of Right or Interest in Real Property

§8.34 (2) Determination of Right or Interest in Real Property

Actions to determine a right or interest in real property include:

- Action to quiet title. See *Eckstrand v Wilshusen* (1933) 217 C 380, 18 P2d 931; *Kejr v Construction Eng'rs* (1952) 111 CA2d 817, 245 P2d 21.
- Action to cancel or set aside deed or other instrument affecting title to land. See *Stanley v Barney* (1932) 123 CA 139, 10 P2d 1022; *Lefurgey v Prentice* (1918) 36 CA 338, 171 P 1080; *Robinson v Williams* (1910) 12 CA 515, 107 P 705.
- Action to reform deed, contract, or other instrument that affects title to land. See *Franklin v Dutton* (1889) 79 C 605, 21 P 964; *Massae v Superior Court* (1981) 118 CA3d 527, 173 CR 527; *Cohen v Hellman Commercial Trust & Sav. Bank* (1933) 133 CA 758, 24 P2d 960.
- Action for specific performance of contract to sell land. See *Santa Barbara Lodge No. 605 v Penzner* (1951) 104 CA2d 494, 231 P2d 595; *Kopke v Carlson* (1929) 98 CA 155, 276 P 606.
- Action to establish express or constructive trust in land. See *Donohoe v Rogers* (1914) 168 C 700, 144 P 958; *Franco W. Oil Co. v Cameron* (1962) 200 CA2d 37, 19 CR 304; *Hannah v Canty* (1905) 1 CA 225, 81 P 1035.
- Action to enjoin or set aside land sale. See *Sloss v De Toro* (1888) 77 C 129, 19 P 233; *Rice v Schubert* (1951) 101 CA2d 638, 226 P2d 50.
- Action to determine right to use real property and facilities for religious purposes. See *Rosicrucian Fellowship v Rosicrucian Fellowship Non-Sectarian Church* (1945) 72 CA2d 171, 164 P2d 282.
- Action to set aside judgment of heirship in probate proceeding involving real property. See *Roach v Whalen* (1913) 22 CA 508, 135 P 57.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.35 (3) Injury to Real Property

§8.35 (3) Injury to Real Property

Actions for injury to real property include (CCP §392(a)(1)):

- Action to recover damages for physical injuries. See *Stauffer Chem. Co. v Superior Court* (1968) 265 CA2d 1, 71 CR 202 (damage to soil and growing crops); *Wolfe v Wallace* (1957) 154 CA2d 523, 316 P2d 697 (damages for value of trees cut down and for diminution in value of land).
- Action to recover damages for nonphysical or consequential injuries. See *Coley v Hecker* (1928) 206 C 22, 272 P 1045 (slander of title); *Wick v Mattison* (1962) 207 CA2d 608, 24 CR 677 (malicious prosecution resulting in injury to real property); *Strosnider v Pomin* (1939) 32 CA2d 103, 89 P2d 179 (fraudulent inducement to dismiss quiet title action resulting in interference with easement).
- Declaratory relief action that involves determination of liability for damage to real property. See *Standard Brands v Bryce* (1934) 1 C2d 718, 37 P2d 446.
- Inverse condemnation action brought by landowner when there is no agreement or consent to entry, even if damages are sought by landowner. See *Williams v Merced Irrig. Dist.* (1935) 4 C2d 238, 48 P2d 664. This rule may not apply if the landowner expressly consents to the entry and taking with the understanding that compensation will be negotiated later. In such a case, the action may be viewed as an action on a contract and, therefore, transitory. See *Gallup v Sacramento & San Joaquin Drainage Dist.* (1915) 171 C 71, 151 P 1142. Inverse condemnation actions against the state by a landowner for taking or damaging private property for public use are also governed by Govt C §955, which provides that such actions are triable in the county where the property is located. See §8.66. For further discussion, see 3 Witkin, California Procedure, *Actions* §§800, 803, 879 (5th ed 2008).

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§8.36 (4) Foreclosure of Liens and Mortgages on Real Property

An action to foreclose on a mechanics' lien is a local action governed by CCP §392(b). See *Case v Kirkwood* (1931) 119 CA 207, 6 P2d 110. Even if a plaintiff seeks a money judgment on the original obligation in a mechanics' lien action, venue is proper in the county where the property or some part of it is located. It is immaterial whether the lien is created by contract or by statute. *Case v Kirkwood, supra*.

Under CC §3144, a mechanics' lien will not bind property for longer than 90 days after the lien claim is recorded unless within that time an action to foreclose the lien is filed in a proper court. In *Douglas v Donner Pines, Inc.* (1977) 73 CA3d 268, 140 CR 839, the court held that an action to foreclose a mechanics' lien must be filed in or transferred to the county where the property is situated within 90 days after the lien claim is recorded. Transfer to the proper county after 90 days is insufficient to permit the plaintiff to maintain the action. *Douglas v Donner Pines, Inc., supra*.

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§8.37 (5) Unlawful Detainer Proceedings

In unlawful detainer actions as defined in CCP §1161, venue is proper in the superior court in the location where the court tries that type of proceeding that is nearest or most accessible to where the real property that is the subject of the action, or some part of it, is situated. Otherwise, any location of the superior court designated as the proper court in CCP §372(a) (see §8.32) is a proper court location for the trial. The court may specify by local rule the nearest or most accessible court location where the court tries that type of case. CCP §372(b).

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§8.38 2. Partition (CCP §872.110)

Subject to the court's power to transfer, venue in actions for partition of real property is proper in the county where the property or some part of it is situated. CCP §872.110. See *Hecker v Ross* (1960) 183 CA2d 30, 6 CR 438.

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§8.39 3. Eminent Domain Proceedings (CCP §1250.020)

Under CCP §1250.020, eminent domain proceedings for the taking of private property for public use must be brought in the county where the property to be taken is located. If the property is located in more than one county, any of those counties may be selected. CCP §1250.020(b). These provisions are jurisdictional (see §8.4) and a judgment in any proceeding not brought in compliance with CCP §1250.020 is void. See Comment to CCP §1250.020.

The general change of venue provisions of the Code of Civil Procedure apply to eminent domain proceedings. For discussion of the applicability of CCP §394 to eminent domain proceedings, see §8.76. See also Condemnation Practice in California §8.23 (3d ed Cal CEB 2005) for discussion of venue in condemnation (*i.e.,* eminent domain) proceedings.

For discussion of venue in inverse condemnation actions brought by a landowner for injury to real property under CCP §392(a)(1), see §8.35. For further discussion, see 3 Witkin, California Procedure, *Actions* §§800, 803, 879 (5th ed 2008). Counsel should keep in mind that, if the state is the defendant in an action for taking or damaging private property for public use, Govt C §955 provides that venue is proper in the county where the property is located. See §8.66.

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§8.40 4. Property Situated in More Than One County

In actions governed by CCP §§392 and 872.110, venue is proper in the county where the land or some part of it is situated. If the property is situated in more than one county, the action may be brought in any of those counties. *PG&E v Scott* (1938) 10 C2d 581, 75 P2d 1054. If the action affects several parcels of property in different counties, venue is proper in any county where part of the property or any parcel is situated. *Appel v Hubbard* (1957) 155 CA2d 639, 318 P2d 164.

Like CCP §§392 and 872.110, CCP §1250.020(b) provides that, when property sought to be taken in an eminent domain proceeding is situated in more than one county, the action may be brought in any one of those counties.

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C. Local Actions Not Involving Real Property

§8.41 1. Marital Dissolution Proceedings

Code of Civil Procedure §395(a) provides that marital dissolution proceedings must be tried in the superior court in the county in which either the petitioner or the respondent resided for three months immediately before commencement of the proceeding. See Fam C §2320. Annulment or legal separation proceedings may be brought in the county in which either the petitioner or the respondent resides at the commencement of the proceeding. CCP §395(a).

If the respondent is a resident of another county in the state when the proceedings commence, the court on motion may change the place of trial to the county of the respondent's residence if it promotes the ends of justice. CCP §397(e). See *Henson v Superior Court* (1963) 218 CA2d 327, 32 CR 404.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.42 2. Determination of Parental Relationship or to Enforce Support

§8.42 2. Determination of Parental Relationship or to Enforce Support

In proceedings to enforce obligations of child support under Fam C §3900, the superior court in the county in which the child resides is the proper court for trial. CCP §395(a).

In actions to determine the existence or nonexistence of a parental relationship under Fam C §§7630-7634, the proper county for trial is the county where the child resides or is found; if the child is the subject of a pending or proposed adoption, either any county where an adoption agency to which the child has been or will be relinquished is located, or the county in which an office of the department or agency investigating the petition is located; or, if the father is deceased, where proceedings for probate of his estate have been or could be commenced. Fam C §7620(b); CCP §395(a).

Section 395(a) also provides that the county in which the child resides is the proper county for the trial of a proceeding to establish and enforce a foreign judgment or court order for the support of a minor child.

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§8.43 3. Adoption

In proceedings for the adoption of a minor child, venue is proper in the county where the adopting parent resides or in the county in which the child was freed for adoption. Fam C §8714.

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§8.44 4. Actions Against Public Officers

Subject to the court's power to transfer, actions against a "public officer or person especially appointed to execute the duties of a public officer, for an act done by the officer of person in virtue of the office; or against a person who, by the officer's command or in the officer's aid, does anything touching the duties of the officer," must be tried in the county where the cause, or some part of it, arose (*i.e.,* where the act is enforced and has impact on the plaintiff). CCP §393(b). See *Tharp v Superior Court* (1982) 32 C3d 496, 186 CR 335; *Cecil v Superior Court* (1943) 59 CA2d 793, 140 P2d 125 (cause arose where business located when agency action affected right to carry on business). See also *Stoneham v Rushen* (1982) 137 CA3d 729, 188 CR 130 (cause arose in county where prison located because director's actions have effect there).

Section 393(b) applies only to affirmative acts that directly interfere with a plaintiff's personal or property rights, including writ proceedings against state officials and agencies (*Tharp v Superior Court, supra*). It does not apply to omissions or neglect of official duty (*State Comm'n in Lunacy v Welch* (1908) 154 C 775, 99 P 181; Comment to CCP §393) or to actions to prevent contemplated future acts (*Bonestell, Richardson & Co. v Curry* (1908) 153 C 418, 95 P 887; *Harris v Alcoholic Beverage Control Appeals Bd.* (1961) 197 CA2d 759, 18 CR 151). See *Tharp v Superior Court, supra*; *Regents of Univ. of Cal. v Superior Court* (1970) 3 C3d 529, 91 CR 57. Section 393(b) also applies to actions that seek to vindicate public rights. *California State Parks Found. v Superior Court* (2007) 150 CA4th 826, 833, 58 CR3d 715.

In an action against a state agency, department, institution, or other public entity for an official action, the entity itself is a "public officer" within the meaning of CCP §393(b) unless an administrative or enforcement officer is designated by statute. *Tharp v Superior Court, supra*; *Regents of Univ. of Cal. v Superior Court, supra*. See *Sutter Union High Sch. Dist. v Superior Court* (1983) 140 CA3d 795, 190 CR 182. For discussion of actions by or against state or local entities, see §§8.65-8.78.

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§8.45 5. Actions for Recovery of Penalty or Forfeiture

Subject to the court's power to transfer, actions to recover a penalty or forfeiture imposed by statute must be tried in the county where the cause, or some part of it, arose. CCP §393(a). If the penalty is based on an offense committed on a lake, river, or other stream of water situated in two or more counties, the action also may be tried in a county bordering the body or stream of water "and opposite to the place where the offense was committed." CCP §393(a). This provision apparently precludes venue in a county significantly upstream or downstream from the place where the infraction occurred.

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§8.46 6. Actions Against Executor, Administrator, Guardian, Conservator, or Trustee

Except as provided in Prob C §17005 (on trusts), when a defendant is sued in an official capacity as executor, administrator, guardian, conservator, or trustee on a claim for payment of money or recovery of personal property, the proper county for trial is the county with jurisdiction over the estate. CCP §395.1. Other actions against such persons are governed by normal venue rules. See *Ramos v Cypher* (1955) 137 CA2d 648, 290 P2d 585.

Actions involving living trusts must be brought in the county where the principal place of administration is located. Prob C §17005(a)(1). If the living trust has no trustee, the proper venue for bringing an action to appoint a trustee is the county where the trust property or some portion of it is located. Prob C §17005(b). The proper venue for actions involving testamentary trusts is the county where the decedent's estate is being administered or the county where the principal place of administration of the trust is located. Prob C §17005(a)(2). In cases not covered by Prob C §17005(a)-(b), the general rules governing venue apply. Prob C §17005(c).

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§8.47 7. Actions for Involuntary Dissolution of Corporation

Actions seeking involuntary dissolution of a corporation must be brought in the superior court in the county where the corporation has its principal executive office. *Capp Care, Inc. v Superior Court* (1987) 195 CA3d 504, 241 CR 741. If the corporation has no such office in the state, the action must be brought in Sacramento. Corp C §§177, 1800.

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V. VENUE IN MIXED ACTIONS

§8.48 A. When Situation Arises

Venue problems in civil actions frequently arise in the following situations:

- The complaint states a single cause of action but demands different types of relief, one regarded as local and the other as transitory, *e.g.,* an action seeking damages and cancellation of a real property deed on the ground that it was procured by fraud.
- The complaint demands only one type of relief but the action contains both local and transitory elements, *e.g.,* an action for damages for removal of fixtures from real property.

For discussion of these problems, see §§8.49-8.54.

The issue of venue can also be complicated when transitory and local causes of action are joined in one complaint (see §8.52), when public policy considerations determine venue (see §8.54), or when conflicting venue provisions apply to different causes of action in one complaint (see §8.53).

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§8.49 B. Main Relief Rule

In a mixed action involving a single cause of action seeking different types or elements of relief, or in a case involving a demand for one type of relief containing both local and transitory elements, the court determines whether for venue purposes the action is local or transitory by examining the main relief sought or the "principal object" of the action.

Determining the main relief sought in a mixed action may be the most difficult analytical problem in the law of venue. Appellate decisions are not always consistent on the rules to follow or their application. Compare, *e.g., Peiser v Mettler* (1958) 50 C2d 594, 328 P2d 953 (action for damages for wrongful removal of fixtures from real property held transitory because severance of fixtures changed character of property from real to personal), with *Wolfe v Wallace* (1957) 154 CA2d 523, 316 P2d 697 (action for damages for destruction of scenic trees on plaintiff's land held local). Therefore, the attorney preparing a complaint in a mixed action and to whom venue is important should draft the complaint as carefully as possible to support the choice of venue.

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§8.50 1. Main Relief Affects Rights in Ownership or Use of Real Property: Local

When the main relief sought by the complaint affects rights in ownership or use of real property, which is local in character (see §§8.31-8.40), the action is considered local even though the complaint also seeks incidental personal relief, *i.e.,* damages. The following are examples of mixed actions in which courts have found that the main relief sought was local:

- Declaratory relief action regarding liability for injury to real property. See *Standard Brands v Bryce* (1934) 1 C2d 718, 37 P2d 446.
- Action to recover possession of land and for rents and profits. See *State v Royal Consol. Mining Co.* (1921) 187 C 343, 202 P 133.
- Action for negligence, breach of contract, and breach of warranty regarding sale of weed killer causing physical injury to land. See *Stauffer Chem. Co. v Superior Court* (1968) 265 CA2d 1, 71 CR 202.
- Action for damages and to quiet title to easement to roadway, all based on defendant's fraudulent misrepresentations that plaintiff would be permitted to use it. See *Strosnider v Pomin* (1939) 32 CA2d 103, 89 P2d 179.
- Complaint for declaratory judgment, incidentally seeking damages, for reformation of deed of trust. See *Massae v Superior Court* (1981) 118 CA3d 527, 173 CR 527.

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§8.51 2. Main Relief Affects Personal Rights: Transitory

When the main relief sought affects personal (*i.e.,* transitory) rights (see §§8.10-8.30), the action is transitory even though title or possession of real property is incidentally involved. An action involving real property will not automatically be considered local for venue purposes under the main relief rule. The following are examples of mixed actions in which courts have found that the main relief was transitory even though real property was involved:

- Allegedly fraudulent land sale in which plaintiff/buyer elected to affirm contract, retain land, and sue for damages even when buyer sought to have damages set off against purchase price of property. See *Kaluzok v Brisson* (1946) 27 C2d 760, 167 P2d 481.
- Action for money judgment for labor and materials furnished on construction site and to foreclose mechanics' lien. See *Central Bank v Superior Court* (1973) 30 CA3d 913, 106 CR 696.
- Action to set aside real property conveyances as having been made to defraud creditors. See *Los Angeles City Sch. Dist. v Redwood Empire Title Co.* (1962) 206 CA2d 398, 23 CR 662.
- Action by vendor for specific performance of land sale contract. See *Work v Associated Almond Growers* (1926) 76 CA 708, 245 P 790. But see *Santa Barbara Lodge No. 605 v Penzner* (1951) 104 CA2d 494, 231 P2d 595 (action is local if brought by vendee).
- Action for money due under contract of sale or under lease of real property (not considered local because interest in real property not at issue). See *Hammon v American Exploration & Mining Co.* (1962) 203 CA2d 306, 21 CR 409; *Marcacci v Continental Baking Co.* (1962) 202 CA2d 224, 20 CR 567.
- Action with primary purpose to cancel note and deed of trust on ground of fraud. See *Nelson v Crocker Nat'l Bank* (1975) 51 CA3d 536, 124 CR 229.
- Action on four counts, each seeking damages for removal of fixtures in violation of lease. See *Peiser v Mettler* (1958) 50 C2d 594, 328 P2d 953.
- Action by judgment creditor to set aside fraudulent transfer of real property (held not local under "main relief rule" because gist of action was fraud and setting aside conveyance was only incidental to establishing fraud). See *Los Angeles City Sch. Dist. v Redwood Empire Title Co., supra.*

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C. Joinder of Causes of Action

§8.52 1. Transitory and Local

As a general rule in mixed actions, when two or more inconsistent venue provisions appear to apply to the same case, a motion for change of venue must be granted on the entire complaint if the defendant is entitled to a change of venue on any one cause of action. *Capp Care, Inc. v Superior Court* (1987) 195 CA3d 504, 241 CR 741. This general rule has been applied to allow a defendant to have the entire action transferred to his or her own county of residence when a local cause of action is joined with a transitory one. *Peiser v Mettler* (1958) 50 C2d 594, 328 P2d 953; *Campbell v Nichols* (1959) 167 CA2d 329, 334 P2d 618; *Keithly v Lacey* (1946) 77 CA2d 339, 175 P2d 235. The result in these cases is consistent with the historical purpose of the basic venue rules giving the defendant the right to have an action tried in the county of his or her residence. See §8.4.

The general rule has also been applied to permit transfer of the entire action when transitory causes of action were joined with a local cause of action for dissolution of a corporation governed by a specific venue provision. *Capp Care, Inc. v Superior Court, supra*. The court in *Capp Care* concluded that the local action was an exception to the general rule of preference for the county of a defendant's residence and allowed the defendant corporation to force a change of venue from the county of another defendant's residence to the county where venue was proper for dissolution of a corporation.

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§8.53 2. Two Transitory Causes of Action

When the plaintiff unites in one complaint two transitory causes of action, one giving the defendant a right to trial in his or her county of residence while the other does not:

- A change of venue motion must be granted on the entire action if the defendant is entitled to a change of venue on any one cause of action.
- The defendant is entitled to have venue changed to his or her county of residence.

International Inv. Co. v Chagnon (1959) 170 CA2d 441, 339 P2d 147; *Crofts & Anderson v Johnson* (1950) 101 CA2d 418, 225 P2d 594. For further discussion, see 3 Witkin, California Procedure, *Actions* §§882-888 (5th ed 2008). Even if there is only one cause of action but two counts stated, one giving the defendant the right to have the case tried in his or her county of residence, the court need not analyze the case under the "mixed action, main relief" rules, but as a case involving one transitory and one local cause of action. See, *e.g., Johnson v Superior Court* (1965) 232 CA2d 212, 42 CR 645.

When tort and contract causes of action are joined in one complaint, counsel must be aware of several possible venue problems. For example, if a defendant, either individual or corporate, has a right to a change of venue on the contract causes of action, the entire action can be transferred. *Jhirmack Enters. v Superior Court* (1979) 96 CA3d 715, 158 CR 192. Courts have not been consistent in characterizing actions as arising from tort or contract for venue purposes. Compare *Williamson v Pacific Greyhound Lines* (1944) 67 CA2d 250, 153 P2d 990 (tort action), with *Justis v Atchison, T. & S.F. Ry.* (1910) 12 CA 639, 108 P 328 (contract action). In *Williamson,* the court indicated that the test for venue is whether the gravamen of the action as determined by the complaint arises from the tort or from the contract. *Williamson v Pacific Greyhound Lines* (1944) 67 CA2d 250, 252, 153 P2d 990. Venue in such cases may be controllable through careful drafting of the complaint. See *L.B. Labs. v Mitchell* (1952) 39 C2d 56, 244 P2d 385. For further discussion, see §8.6.

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§8.54 D. Public Policy Considerations

Public policy considerations relating to a special venue statute may override the general mixed action rules (providing for venue preference in the county of the defendant's residence and for transfer of the entire action if the defendant is entitled to transfer of any one cause of action) and require that a mixed action containing causes of action governed by conflicting venue provisions be maintained at the venue provided in the special statute. For example, in a mixed action alleging (1) claims under the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) and (2) claims for wrongful discharge and intentional infliction of emotional distress (governed by the general venue statute providing for venue in the county of the defendant's residence), the supreme court held that venue was controlled by the special FEHA venue provision of Govt C §12965(b). *Brown v Superior Court* (1984) 37 C3d 477, 208 CR 724. For discussion of *Brown,* see 3 Witkin, California Procedure, *Actions* §886 (5th ed 2008).

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VI. SPECIAL RULES FOR CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS (CCP §395.5)

§8.55 A. Purpose of Statute

The purpose of the corporation venue statute is to give a plaintiff a wider choice of venue in suits against corporations than is permitted in suits against individuals. *Smith v Stanford Research Inst.* (1963) 212 CA2d 750, 28 CR 481 (discussing former Cal Const art XII, §16).

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§8.56 B. Entities Governed by CCP §395.5

The provisions of CCP §395.5 apply to:

- Domestic corporations;
- Foreign corporations that have complied with the filing requirements of Corp C §2105 for corporations doing business in the state (*Easton v Superior Court* (1970) 12 CA3d 243, 90 CR 642); and
- Partnerships and unincorporated associations that have filed a statement with the Secretary of State listing their principal office in the state under Corp C §18200 (unincorporated associations) or Corp C §15800 (partnerships) (CCP §395.2; see *Carruth v Superior Court* (1978) 80 CA3d 215, 145 CR 344).

An association or a partnership may file a statement with the Secretary of State designating its principal place of business in California after the action is filed but before or simultaneously with filing a motion for change of venue and still come within the protection of CCP §395.5. *San Francisco Found. v Superior Court* (1984) 37 C3d 285, 208 CR 31 (referring to CCP §395.2).

The purpose of CCP §395.2 is to provide unincorporated associations with the same protection from forum shopping provided to corporations by limiting the plaintiff's venue choices. See Comment to CCP §395.2. CCP §395.2; 37 C3d at 297. If an unincorporated association or partnership fails to comply with CCP §395.2 and Corp C §18200 (unincorporated associations) or Corp C §15800 (partnerships), the plaintiff may forum shop and bring suit against the unincorporated association or partnership in any county in which any member of the association resides. See Comment to CCP §395.2.

The Corporate Filing Division, Corporate Status Section of the Secretary of State's office in Sacramento will state on the telephone whether a foreign corporation, partnership, or unincorporated association has filed a statement designating its principal office in the state.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.57 C. Entities and Actions Not Governed by CCP §395.5

§8.57 C. Entities and Actions Not Governed by CCP §395.5

A foreign corporation that has not filed a statement designating its principal office within the state as required by Corp C §2105 is not governed by CCP §395.5, and it may be sued in any county. *Easton v Superior Court* (1970) 12 CA3d 243, 90 CR 642.

An unincorporated association or partnership that has not filed a statement under Corp C §18200 (unincorporated associations) or Corp C §15800 (partnerships) is not governed by CCP §395.5, and it may be sued in the county of residence of any member of the association. *Carruth v Superior Court* (1978) 80 CA3d 215, 145 CR 344 (discussing former Corp C §24003, now Corp C §18200).

In both types of cases, the business entity may avoid the possibility of venue shopping by the plaintiff by filing a statement with the Secretary of State and thus coming under CCP §395.5. Note that although the filing requirements of Corp C §2105 (foreign corporations) and Corp C §15800 (partnerships) are mandatory, those of Corp C §18200 (unincorporated associations) are permissive.

An action seeking involuntary dissolution of a corporation is a local action governed by the specific venue statutes in Corp C §§177 and 1800, not by the general venue rules of CCP §395.5. Such an action must be brought in the county in which the corporation has its principal executive office. *Capp Care, Inc. v Superior Court* (1987) 195 CA3d 504, 241 CR 741.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.58 D. Where Plaintiff May Bring Action

§8.58 D. Where Plaintiff May Bring Action

Under CCP §395.5, corporations and associations may be sued in any of the following counties, subject to the court's power to change the place of trial:

- Where the contract is made or to be performed (see §8.59);
- Where the obligation or liability arises (see §8.61); or
- Where the principal place of business of the corporation or association is situated.

The principal place of business of a corporation is considered to be its residence for venue purposes. *Hale v Bohannon* (1952) 38 C2d 458, 472, 241 P2d 4; *Hardin v San Jose City Lines* (1951) 103 CA2d 688, 230 P2d 31.

See also Corp C §105 (corporations and associations may be sued as provided in the Code of Civil Procedure).

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1. Contract Actions

§8.59 a. Where Contract Is Made

In actions against a corporation or an association based on a contract, the language of CCP §395.5 that permits venue "in the county where the contract is made" has the same effect as the language in CCP §395(a) that permits a contract action against an individual to be brought in the superior court in the county where the contract was entered into (see §§8.20-8.22). See 3 Witkin, California Procedure, *Actions* §854 (5th ed 2008).

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§8.60 b. Where Contract Is to Be Performed

Unlike contract actions against individuals (see §§8.23-8.24), when venue in a contract action against a corporation or association is laid "in the county where the contract is to be performed," it is not necessary that the contract specify the place of performance. *Anaheim Extrusion Co. v Superior Court* (1985) 170 CA3d 1201, 216 CR 815. In *Anaheim,* an action for failure to pay for goods sold and delivered, the contract did not specify place of performance. The court held that payment was due at the place of performance. Extrinsic evidence of the intended place of performance will support a choice of venue in that place. *Hale v Bohannon* (1952) 38 C2d 458, 241 P2d 4. See *Gallo v Boyle Mfg. Co.* (1939) 35 CA2d 168, 94 P2d 1010 (action on contract calling for delivery "f.o.b. Modesto" held triable in Stanislaus County). For further discussion, see 3 Witkin, California Procedure, *Actions* §§855-880 (5th ed 2008).

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§8.61 2. Tort Actions

Under CCP §395.5, tort actions may be brought in the county where the "obligation or liability arises," meaning the place where the wrongful act or breach of duty takes place. *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 184 CR 296. This venue rule is broader than that covering tort actions against individuals, which covers only tort actions for physical injury to persons or property, and death. See §8.29. Venue rules covering tort actions against corporations, on the other hand, extend also to actions for nonphysical injury. See, *e.g., Sea World, Inc. v Superior Court* (1970) 13 CA3d 100, 91 CR 336 (false imprisonment); *Buck v James McClatchy Publ'g Co.* (1930) 105 CA 248, 287 P 364 (libel).

When an action against a corporation or an association for personal injury or wrongful death is pleaded on an implied warranty theory, the courts consider the action to be a contract action for venue purposes. Thus, the plaintiff may have a broader choice of venue when the complaint is so framed than when it is framed as a tort action. Compare *Pacific Air Lines, Inc. v Superior Court* (1965) 231 CA2d 587, 42 CR 68 (tort theory), with *Smith v Stanford Research Inst.* (1963) 212 CA2d 750, 28 CR 481 (contract theory), both concerning wrongful death actions arising from airplane crashes.

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§8.62 E. When and Where Defendant May Transfer Action

Under the venue options provided to a plaintiff by CCP §395.5, the plaintiff's choice is presumptively correct and the defendant corporation, association, or partnership has the burden of showing that it is improper on any ground. *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 184 CR 296; *Shida v Japan Food Corp.* (1960) 185 CA2d 443, 8 CR 271. If, for example, the complaint fails to allege that the suit is on a contract made or to be performed in another county or that the obligation or liability arose or the breach occurred in another county, a defendant governed by CCP §395.5 is entitled to have an action against it transferred. *Lake v Wyatt Earp Enters.* (1962) 210 CA2d 366, 26 CR 683; *Clary v Basalt Rock Co.* (1950) 99 CA2d 458, 222 P2d 24.

The defendant is limited, however, to having venue transferred only to its county of residence and not to another county where it could have been sued under CCP §395.5. *Beutke v American Sec. Co.* (1955) 132 CA2d 354, 282 P2d 201. The court in *Beutke* noted that former Cal Const art XII, §16, now CCP §395.5, is "for the benefit of the plaintiff and does not give the defendant corporation the same rights." 132 CA2d at 361.

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§8.63 F. Multiple Defendants

When an individual and a corporation, association, or partnership governed by CCP §395.5 are joined as defendants and the plaintiff sues in a county where neither defendant resides but that is one of the places in which a corporation or association may be sued under §395.5, the individual defendant may obtain a change of venue to the county where he or she resides. *Carruth v Superior Court* (1978) 80 CA3d 215, 145 CR 344 (partnership). If an individual defendant and a business entity are joined as defendants and the action is brought in the county where an individual defendant resides, venue is proper and none of the defendants is entitled to a change of venue. See *Buran Equip. Co. v Superior Court* (1987) 190 CA3d 1662, 236 CR 171.

If, however, the suit is brought in the county of residence of the defendant entity governed by CCP §395.5, the preference for venue at the defendant's place of residence is met and an individual defendant cannot change venue to the county of his or her residence. See *Mosby v Superior Court* (1974) 43 CA3d 219, 226, 117 CR 588 (dictum). Furthermore, a §395.5 defendant does not have standing to assert the right of a codefendant individual to change venue to the county of the individual defendant's residence. *Easton v Superior Court* (1970) 12 CA3d 243, 90 CR 642.

For general discussion of transitory actions triable in county of any defendant's residence when there are multiple defendants, see §8.12. For discussion of venue when business entity and governmental entity are joined as defendants, see §8.77.

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§8.64 G. Multiple Causes of Action: Mixed Action Rule Applies

Just as in actions against individual defendants (see §8.63), if venue is not proper as to all causes of action, a CCP §395.5 defendant may have the action transferred. *Jhirmack Enters. v Superior Court* (1979) 96 CA3d 715, 158 CR 192 (Shasta County corporation, sued in Santa Barbara County in complaint containing contract and tort causes of action, entitled to have entire action transferred to Shasta, where contract was made, to be performed, and breached, even though tort occurred in Santa Barbara).

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VII. SPECIAL RULES FOR GOVERNMENT ENTITIES (CCP §394, Govt C §955)

A. State as Defendant

§8.65 1. Venue in Sacramento County

With certain statutory exceptions (discussed in §§8.66-8.70), when the state is a defendant it has a right to have the action brought in or transferred to Sacramento County. Govt C §955. If the action is not brought in Sacramento County, the Attorney General may, by written demand made on or before answering, force the action to be transferred to Sacramento County. Govt C §955. The types of actions governed by Govt C §955 include actions on contracts or for torts other than those for injury to person or property that are governed by Govt C §955.2.

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2. Exceptions to Applicability of Govt C §955

§8.66 a. Inverse Condemnation

In actions against the state for taking or damaging private property for public use, the proper county for trial is the county where the property is situated. Govt C §955. See §8.35 on venue of actions for inverse condemnation for injury to real property under CCP §392(a)(1).

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§8.67 b. Personal Injury or Death; Injury to Property

The proper county for trial of actions against the state for injury or death to any person or personal property is the county where the injury occurred or the injury causing death occurred. Govt C §955.2. If the action is filed in a different county, the court must grant the state's motion to change venue to the county where the injury or injury causing death occurred. This is true even if there are multiple defendants and only one of them is the state or a state agency. *State v Superior Court (Fuller)* (1967) 252 CA2d 637, 60 CR 653; *State v Superior Court (Vincent)* (1965) 238 CA2d 691, 48 CR 156. If, however, the action is brought initially in the county where the injury occurred, the court in that county has discretion to transfer the action only "under the same circumstances as the place of trial may be changed where an action is between private parties." Govt C §955.2. See *State v Superior Court (Clark)* (1987) 193 CA3d 328, 238 CR 315.

In addition to the discretionary change of venue when the action is brought in the county where the injury occurred under Govt C §955.2, special venue provisions in other statutes may control over §955.2. See, *e.g., Hatcher v California State Univ.* (1983) 146 CA3d Supp 1, 194 CR 756 (venue provision (CC §1798.49) in Information Practices Act of 1977 (CC §§1798-1798.78), which permits action in county in which complainant resides, controls over Govt C §955.2, which is limited to "certain" tort actions (see Comment to Govt C §955.2)).

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.68 c. Action by City, County, or Local Agency Against State

§8.68 c. Action by City, County, or Local Agency Against State

When a city, county, or local agency is the plaintiff in an action against the state, the action may be tried in any city or county where the local entity is situated. Govt C §955.3. Before answering, however, the Attorney General may move to change venue to Sacramento County under CCP §397. Govt C §955.3. For discussion of CCP §397, see chap 20.

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§8.69 d. State Agency Considered Public Officer

In some instances, a state agency is considered a "public officer" within the meaning of CCP §393(b), and actions against it are therefore triable where the cause of action or some part of it arose. *Regents of Univ. of Cal. v Superior Court* (1970) 3 C3d 529, 91 CR 57. See *Tharp v Superior Court* (1982) 32 C3d 496, 186 CR 335. For discussion of venue in actions against public officers, see §8.44.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.70 e. Actions Against State or State Agency

§8.70 e. Actions Against State or State Agency

To alleviate the hardship that can result from Govt C §955 and other statutes providing that actions against the state or a state agency may or must be brought in Sacramento County, CCP §401(1) provides that such actions against the state or a state agency may be brought in any county or city and county in which the Attorney General has an office, *i.e.,* Sacramento, San Francisco, Los Angeles, and San Diego. The courts have broadly construed the language of CCP §401(1) that the proceeding may or must be brought in Sacramento "[w]henever it is provided by any law of this State" to mean that the proceeding may be brought where the Attorney General has an office. See, *e.g.,* discussion in *Harris v Alcoholic Beverage Control Appeals Bd.* (1961) 197 CA2d 759, 18 CR 151.

The effect of CCP §401 is that in actions against the state or a state agency other than for inverse condemnation or personal and property injury and wrongful death, the question is whether the state may "by any law" (CCP §401(1)) remove the action to Sacramento. If it can, §401(1) provides that venue is proper wherever the Attorney General maintains an office, *i.e.,* Sacramento, San Francisco, Los Angeles, and San Diego. If it cannot, venue is governed by the statutory provisions governing other parties.

Unlike CCP §401(1), Govt C §955 applies only to actions against the state and not to those against state agencies. Therefore, unless some other provision of law permits or requires trial in Sacramento (see, *e.g.,* Rev & T C §9173 relating to actions against State Board of Equalization to recover use fuel tax refunds), venue options granted to the plaintiff by CCP §401(1) do not apply to actions against state agencies. Venue in such cases is governed by ordinary venue rules. *Regents of Univ. of Cal. v Superior Court* (1970) 3 C3d 529, 91 CR 57. The residence of a state agency is the county in which the agency's principal office is situated. *Gallup v Sacramento & San Joaquin Drainage Dist.* (1915) 171 C 71, 151 P 1142. A state agency that is considered a public officer for venue purposes is governed by CCP §393(b). See §8.44.

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§8.71 B. State or State Agency as Plaintiff

Whenever the state or a state agency may bring an action in Sacramento County, under any applicable venue statute, the court must, on the motion of any defendant, transfer the action to the county where the Attorney General has an office nearest to the county in which the defendants or some of them reside or have their principal office in the state. CCP §401(2).

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/ C. City, County, or Local Agency/§8.72 1. The Removal Statute (CCP §394)

C. City, County, or Local Agency

§8.72 1. The Removal Statute (CCP §394)

Actions by or against a city, county, or local agency are governed by CCP §394, which is not a venue statute but a removal statute designed mainly to avoid local prejudice by permitting the transfer of those actions to a neutral county for trial. *Garrett v Superior Court* (1974) 11 C3d 245, 113 CR 152. See *Colusa Air Pollution Control Dist. v Superior Court* (1991) 226 CA3d 880, 889, 277 CR 110, which notes that §394 cannot be used to obtain removal to the county in which a defendant local agency "resides" and that CCP §395(a) does not authorize a nonresident defendant to obtain a change of venue even if a resident defendant joins in the motion. On the definition of "local agency," see *Golden Gate Bridge Highway & Transp. Dist. v Superior Court* (2004) 125 CA4th 177, 22 CR3d 558 (Golden Gate Bridge District is local agency under CCP §394); *Westinghouse Elec. Corp. v Superior Court* (1976) 17 C3d 259, 131 CR 231 (Bay Area Rapid Transit District is "local agency" under §394); *Garrett v Superior Court, supra* (county flood control and water conservation district is "local agency" under §394). See also *Marin Community College Dist. v Superior Court* (1977) 72 CA3d 719, 140 CR 310 (community college district is local agency within county for purposes of determining venue under §394).

When an action or a proceeding is one in which there is no right to a jury, or when the right to a jury is waived, in lieu of transferring the matter, the court may ask the chair of the Judicial Council to assign a disinterested judge from a neutral county to hear the case. CCP §394(a). In *Brennan v Superior Court* (1994) 30 CA4th 454, 35 CR2d 693, the court ruled that assigning a neutral judge satisfies CCP §394 even if a plaintiff other than the governmental entity has a right to a jury trial. Other plaintiffs are subject to the general rule setting venue in the defendant's county of residence, and their right to a jury trial is irrelevant under CCP §324. *Brennan v Superior Court, supra*.

The provisions of CCP §394 are not jurisdictional and may be waived by failure to move for a change of venue in a reasonable time. *Ventura Unified Sch. Dist. v Superior Court* (2001) 92 CA4th 811, 814, 112 CR2d 260 (defendant did not waive right to change venue by filing change of venue motion within 30 days after second public entity defendant, which was in different county, settled out of the case). However, a party's right to request removal under CCP §394 cannot be waived by contract. *Arntz Builders v Superior Court* (2004) 122 CA4th 1195, 19 CR3d 346 (clause containing express waiver of rights under CCP §394 not enforceable). If the county is a sole defendant and moves timely, transfer is mandatory. *Delgado v Superior Court* (1977) 74 CA3d 560, 141 CR 528.

The removal statute operates only after an action is filed in a proper county under ordinary venue rules. A plaintiff suing a city, county, or local agency may not initially elect to file the complaint in a neutral county. *County of Riverside v Superior Court* (1968) 69 C2d 828, 73 CR 386; *County of San Bernardino v Superior Court* (1994) 30 CA4th 378, 35 CR2d 760; *Sutter Union High Sch. Dist. v Superior Court* (1983) 140 CA3d 795, 797, 190 CR 182.

Although the courts are split on whether CCP §394 applies to cross-complainants and cross-defendants, the majority favor a more liberal interpretation of CCP §394. In *City of Chico v Superior Court* (1979) 89 CA3d 187, 152 CR 380, the First District Court of Appeal held that §394 does not apply when a city is named only as a cross-defendant in a cross-complaint seeking indemnity and contribution, because the statute only uses the words "plaintiff" and "defendant," not "cross-complainant" and "cross-defendant." The Third District Court of Appeal concluded that *City of Chico* was incorrectly decided and held that §394 should be liberally construed to promote its policy of guarding against local prejudices, and that the terms "plaintiff" and "defendant" include "cross-complainant" and "cross-defendant." *Ohio Cas. Ins. Group v Superior Court* (1994) 30 CA4th 444, 35 CR2d 771.

In *Kennedy/Jenks Consultants, Inc. v Superior Court* (2000) 80 CA4th 948, 954, 95 CR2d 817, the First District Court of Appeal also declined to follow *City of Chico* (decided by another division of the first district), concluding that *Ohio Cas. Ins. Group* was more consistent with the court's view that §394 "should receive a liberal construction that will promote rather than frustrate the policy behind the law." Finally, in *Metropolitan Transit Sys. v Superior Court* (2007) 153 CA4th 293, 296, 62 CR3d 517, the Fourth District Court of Appeal followed both *Ohio Cas. Ins. Group* and *Kennedy/Jenks Consultants, Inc.,* and held that a cross-defendant may bring a motion under CCP §394 after a local

agency has brought a compulsory cross-complaint against plaintiff.

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§8.73 a. Exception: Injury to Person or Property

An action by a private plaintiff against a city, county, or local agency for negligent injury to person or property occurring in the city or county where the agency is located must be tried in that city or county. CCP §394. See *County of Orange v Superior Court* (1999) 73 CA4th 1189, 86 CR2d 923 (defendant entitled to change of venue to county where actual injuries occurred when plaintiff, mistakenly arrested on bench warrant and imprisoned in one county, sued second county, which had only issued the bench warrant).

A plaintiff may defeat this rule, however, by joining with the governmental defendant an individual defendant who resides in another county and by bringing suit in that county. *Channell v Superior Court* (1964) 226 CA2d 246, 38 CR 13. In *Delgado v Superior Court* (1977) 74 CA3d 560, 141 CR 528, however, in which a local entity was one of many defendants, including a business entity defendant, the court concluded that transfer under CCP §394 was mandatory and that the general venue provisions of CCP §395, as amended after the decision in *Channell,* applied only if no other venue statute applied. *Delgado* was followed in *Central Contra Costa Sanitary Dist. v Superior Court* (1978) 84 CA3d 702, 148 CR 801. Both *Delgado* and *Central Contra Costa* questioned the *Channell* decision. Code of Civil Procedure §394 does not require removal to the county of the public entity's location of a cross-claim against the entity for breach of contract, indemnity, or contribution. *Tutor-Saliba-Perini Joint Venture v Superior Court* (1991) 233 CA3d 736, 743, 285 CR 1.

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b. Effect of Removal Provisions of CCP §394: Specific Situations

§8.74 (1) Action Commenced Where Plaintiff Resides or Does Business

When a nonnegligence action against a city, county, or local agency is commenced in the county where a plaintiff resides or is doing business, CCP §394 requires a transfer to a neutral county on motion by a defendant. See *Finance & Constr. Co. v City of Sacramento* (1928) 204 C 491, 269 P 167. The transferee county may be stipulated to by the parties. CCP §394(a).

In contrast, if the action is improperly commenced in a neutral county, the defendant local entity may have the case removed to the defendant's county of residence or to another county proper under the general venue statutes. *Skidmore v County of Solano* (1954) 128 CA2d 391, 275 P2d 613. The result is anomalous: A plaintiff who wants a trial in a neutral county should commence the action in the plaintiff's own county and not in a neutral county or in a county proper under the general venue statutes.

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§8.75 (2) Entity Sues Individual Nonresidents or Corporation Not Doing Business Within County

Although a city, county, or local agency may sue its residents in the city or county (*County of Nevada v Phillips* (1952) 111 CA2d 428, 244 P2d 495), under CCP §394 an action against a nonresident defendant must be transferred to a neutral county on motion of either party. *McCarthy v Superior Court* (1987) 191 CA3d 1023, 236 CR 833; *City of Oakland v Darbee* (1951) 102 CA2d 493, 227 P2d 909 (each nonresident defendant has right to transfer, even if action must be severed). This is true even if suit is filed in the proper county under a specific venue statute.

Corporate defendants who are not "doing business" in the county where suit is filed may obtain a transfer to a neutral county under CCP §394. *Westinghouse Elec. Corp. v Superior Court* (1976) 17 C3d 259, 131 CR 231. A corporation is "doing business" within the meaning of §394 only if its activities "are substantial enough that the corporation can reasonably be viewed as being intimately identified with the affairs or closely associated with the people of the community." 17 C3d at 271.

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Source: Civil Litigation/California Civil Procedure Before Trial/8 Venue/§8.76 (3) Condemnation Proceedings

§8.76 (3) Condemnation Proceedings

Code of Civil Procedure §394 modifies ordinary venue rules in condemnation proceedings. The following are examples of situations in which §394 applies:

- The defendant's land is located in the county of the private defendant's residence; the plaintiff county or city may remove the case to a neutral county. *City of Stockton v Ellingwood* (1926) 78 CA 117, 121, 248 P 272.
- A city sues to condemn land in its own county; the private defendant may remove the case to a neutral county. *City of Long Beach v Lakewood Park* (1953) 118 CA2d 596, 258 P2d 538.

For further discussion, see 3 Witkin, California Procedure, *Actions* §879 (5th ed 2008).

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§8.77 2. Multiple Defendants

There is some uncertainty about the applicability of CCP §394 when multiple defendants are sued and only one is a local entity. The court in *Channell v Superior Court* (1964) 226 CA2d 246, 38 CR 13, (1) applied the general rule under CCP §395 that, when there are multiple defendants, venue is proper in the county of any defendant's residence, and (2) held that this rule is not altered by §394. In *Delgado v Superior Court* (1977) 74 CA3d 560, 141 CR 528, however, in which a local entity was one of many defendants, including a business entity defendant, the court concluded that transfer under CCP §394 was mandatory and that the general venue provisions of CCP §395, as amended after the decision in *Channell,* applied only if no other venue statute applied. *Delgado* was followed in *Central Contra Costa Sanitary Dist. v Superior Court* (1978) 84 CA3d 702, 148 CR 801. Both *Delgado* and *Contra Costa* questioned the *Channell* decision.

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§8.78 3. Multiple Causes of Action

A defendant who has a right to change venue to a neutral county under CCP §394 as to one cause of action but not to other causes of action may have the entire action removed to a neutral county. *Morrison v Superior Court* (1980) 100 CA3d 852, 161 CR 169. The court in *Morrison* relied on the settled rule that a motion for change of venue must be granted on all causes of action if the defendant is entitled to a change of venue on any one.

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9

Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem

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I. INTRODUCTION

§9.1 A. Scope of Chapter

This chapter discusses prelitigation claims, notices, and petitions. Specifically, it discusses the following:

- Claims that must be presented to public entities before governmental agencies or their employees may be sued. See §§9.3-9.30.
- Notices, certificates, and applications that are required before bringing a lawsuit against a professional. See §§9.31-9.37.
- Claims against decedents' estates that may be a prerequisite to suit. See §§9.38-9.51.
- The need for, and procedures to appoint, guardians ad litem. See §§9.52-9.75.
- Forms for use under these procedures. See §§9.76-9.95.

On notice of suit that must be given by an employee to the employer and by an employer to an employee when either sues a third party whose fault caused the employee to be injured on the job, see California Workers' Damages Practice §§3.30-3.31 (2d ed Cal CEB 2001).

Creditor's claims and suits on claims are discussed in greater detail in 1 California Decedent Estate Practice, chap 12 (Cal CEB 1986).

For appointment of guardians ad litem proceedings under the Probate Code, see California Trust Administration §§15.16-15.18 (2d ed Cal CEB 2001).

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§9.2 B. Governing Law

Claims for monetary damages against public entities are governed by the Government Claims Act (formerly known as the Tort Claims Act) (Govt C §§810-998.3). *City of Stockton v Superior Court* (2007) 42 C4th 730, 741, 68 CR3d 295. Statutes governing suing certain professionals are the following:

- Notice to health care provider before filing a medical malpractice suit. CCP §364.
- Certificates of merit in professional negligence suit against architect, engineer, or land surveyor. CCP §411.35.
- Leave to sue unpaid officer or director of nonprofit corporation. CCP §425.15.

Claims against estates are governed by CCP §§377.20 and 377.40-377.43. Guardians ad litem are governed by CCP §372.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/ II. CLAIMS AGAINST PUBLIC ENTITIES/ A. Presenting Claim as Prerequisite to Suit/§9.3 1. Requirements; Definition of Public Entity

II. CLAIMS AGAINST PUBLIC ENTITIES

A. Presenting Claim as Prerequisite to Suit

§9.3 1. Requirements; Definition of Public Entity

A California public entity may sue or be sued. Govt C §945. With limited exceptions, no suit for money or damages may be brought against a public entity unless a timely claim has been presented to the entity and has either been acted on by the entity's governing board or rejected by operation of law. Govt C §945.4. The claims presentation requirement applies to both contracts and torts. *City of Stockton v Superior Court* (2007) 42 C4th 730, 740, 68 CR3d 295. See Govt C §905.2(a)(3).

The purpose of the claims statute is to allow public entities to investigate claims while the facts are fresh and to decide whether to settle them or incur the cost of litigation. *Jenkins v County of Contra Costa* (1985) 167 CA3d 152, 213 CR 126.

The term "public entity" includes the state of California, the Regents of the University of California, a county, city district, public authority, public agency, and any other political subdivision or public corporation of California. Govt C §811.2.

Detailed discussion of liability, immunities, defenses, and procedures can be found in California Government Tort Liability Practice (4th ed Cal CEB 1999) and California Tort Guide, chap 8 (3d ed Cal CEB 1996).

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§9.4 2. Exceptions

Certain claims are exempted by Govt C §§905-905.6 (*e.g.,* claims by public employees for wages). A claim exempted by Govt C §905 that is not expressly governed by any other statutes or regulations is governed by procedures prescribed in charters, ordinances, or regulations adopted by the local public entity. Govt C §935.

A state agency or local public entity can create its own claims procedures in any written agreement to which it is a party. Contractual claims procedures are limited to claims "arising out of or related to the agreement" (Govt C §§930, 930.2); they supersede the claims procedures of the Government Claims Act and provide the exclusive claims procedures for applicable claims (Govt C §930.4). See *Antz Builders v City of Berkeley* (2008) 166 CA4th 276, 82 CR3d 605.

Certain statutory causes of actions that have their own unique exhaustion requirements, such as those under the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) may also be exempt from the filing requirements of the Government Claims Act (formerly known as the Tort Claims Act). *Snipes v City of Bakersfield* (1983) 145 CA3d 861, 193 CR 760.

The Government Claims Act does not apply to causes of action arising under federal law, and compliance with the claims statutes is not required. *Williams v Horvath* (1976) 16 C3d 834, 842, 129 CR 453. Although a plaintiff seeking relief under 42 USC §1983 is not required to comply with the state claims procedures as a condition of asserting the federal claims, when state and federal causes of action are pendently joined, the state claims procedures must be followed to avoid dismissal of the state claims.

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§9.5 3. Effect of Failure to Comply

The claims statutes are in effect statutes of limitation. A civil action filed against a public entity without compliance with applicable claims requirements is subject to dismissal or to a motion for summary judgment. See *Lewis v City & County of San Francisco* (1971) 21 CA3d 339, 98 CR 407 (action dismissed after failure to amend complaint following sustained demurrer); *Petersen v City of Vallejo* (1968) 259 CA2d 757, 66 CR 776 (motion for summary judgment granted); *Ruffino v City of Los Angeles* (1964) 226 CA2d 67, 37 CR 765 (motion for summary judgment granted).

Compliance with the claims statutes must be alleged in the complaint as well as proved at trial. A complaint against a public entity that fails to affirmatively allege compliance with claim presentation requirements does not state a cause of action and is demurrable. *State v Superior Court (Bodde)* (2004) 32 C4th 1234, 1243, 13 CR3d 534 ("plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirements. Otherwise, his complaint is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action.").

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.6 4. Claims Against Public Employees

§9.6 4. Claims Against Public Employees

Simply being a public officer or employee, whether elected, appointed, or hired, does not insulate a person from suit. Govt C §820. On public employees' liability generally, see Govt C §§820-822.2.

NOTE: Restrictions on the civil liability of public employees do not apply to persons who were acting as independent contractors. Govt C §810.2. See Govt C §815.4.

A cause of action against a public employee for injury resulting from an act or omission in the scope of employment is barred if an action against the employing public entity would have been barred because of the plaintiff's failure to present a written claim or failure to commence the action within the time specified in Govt C §945.6. Govt C §950.2. A cause of action against a public employee is not barred, however, if the plaintiff pleads and proves that he or she did not know or have reason to know the identity of the employee within the period for the presentation of a claim. Govt C §950.4.

A person wishing to maintain an action against a public officer or employee must:

- Present a timely claim against the public entity even though the entity may be immune from liability and plead the claim's presentation and rejection (Govt C §950.2);
- Plead and prove that he or she did not know or have reason to know that the injury was caused by an act or omission of a public entity or employee (Govt C §950.4); or
- Be prepared to show that the act causing the injury was not within the scope of the defendant's public employment (*Hopper v Allen* (1968) 266 CA2d 797, 72 CR 435 (defamation action dismissed for failure to show that defendant police chief was acting beyond scope of authority); *Miller v Hoagland* (1966) 247 CA2d 57, 55 CR 311 (demurrer sustained in action for fraudulent misrepresentations because complaint on its face showed that defendant city attorney was acting within scope of employment).

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§9.7 5. Claims Against Judicial Branch Entities or Judges

The Judicial Council may act on the claim against a judicial branch entity or a judge of one of those entities, as defined (Govt C §900.3), in accordance with the procedures that it will provide by rule of court (Govt C §912.7). As such, the Judicial Council may adjust and pay any claim arising from the activities of a judicial branch entity or judge. Govt C §935.8. A "judicial branch entity" is a public entity and means any superior court, court of appeal, the California Supreme Court, the Judicial Council, or the Administrative Office of the Courts. Govt C §900.3. There are specified means of presentation and service of a claim. See Govt C §915(c)-(d).

In addition to its power in acting on claims, the Judicial Council is authorized to settle, adjust, or compromise any pending *action* arising from the activities of a judicial branch entity or judge. Govt C §948.1; see Govt C §§965(c), 965.6(c). Special provisions govern service. See Govt C §955.9. The Controller is authorized to draw a warrant for payment of any final judgment or settlement based on claims arising from the activities of a judicial branch entity. Govt C §965.2(b). The Administrative Officer of the Courts must report to the Judicial Council any action that the Administrative Office of the Courts takes or proposes to take to prevent future occurrences similar to those on which the claim was based. Govt C §965.65(b).

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§9.8 B. Identifying Public Entity

A plaintiff's attorney must determine whether any potential defendant is a public entity (see §9.3 for definition) or was acting as a public entity employee. Under Govt C §53051, a public agency, any public entity other than the state, a city, a county, or a city and county (Govt C §53050) is required, within 70 days after its establishment, to file its name and address and the names and addresses of its governing board members with the Secretary of State and the county clerk of each county in which the agency maintains an office. Changes must be filed within 10 days. The Secretary of State must maintain this information as a public record. Govt C §53051(c). If the public agency does not file this information, a claimant's noncompliance with the claims requirement is not a bar or defense to a suit against that public entity. See §9.5.

WARNING: Counsel must be wary of the potential defendant that is a subdivision of a public entity. In *Hovd v Hayward Unified Sch. Dist.* (1977) 74 CA3d 470, 141 CR 527, the court held that a vocational skills center was not a public agency within the meaning of Govt C §§53050-53051 but rather was a subdivision of a public entity. Thus, the center was not required to comply with §53051; the plaintiff's action was barred for failure to file a timely claim with the entity.

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C. Drafting the Claim

§9.9 1. Contents

A written claim may be prepared by filling in a printed form, if one is provided by the public entity, or by drafting a paper that contains all the elements required by Govt C §910 (see attorney-drafted form in §9.76):

- The claimant's name and post office address;
- The post office address to which the person presenting the claim desires notices to be sent;
- The date, place, and circumstances giving rise to the claim;
- A general description of the indebtedness, obligation, injury, damage, or loss claimed as of the date of the claim;
- The name(s) of the public employee(s) responsible for the loss;
- If the claim is under $10,000, the amount claimed for current and prospective damages and the method of computation; and
- If the claim exceeds $10,000, no dollar amount need be stated; however, the claim must indicate whether it would be a limited civil case (on limited civil cases, see chap 6).

WARNING: A complaint against a public entity may be demurrable if the facts alleged in the complaint do not substantially correspond to those stated in the "date, place, and circumstances" portion of the claim form. See *Loehr v Ventura County Community College Dist.* (1983) 147 CA3d 1071, 195 CR 576. Similarly, failure to adequately describe the nature of the injury or loss claimed can preclude recovery for the specific loss. For example, a claim for diminution in property value was held to be insufficient to support a claim for physical injury or emotional distress in *State ex rel Dep't of Transp. v Superior Court* (1984) 159 CA3d 331, 205 CR 518. But see *Connelly v County of Fresno* (2006) 146 CA4th 29, 40, 52 CR3d 720 (claim that alleged "Unspecified Medical, Lost Income, future Medical" substantially complied with claim presentation requirement).

The document submitted as a claim should be identifiable as a claim on its face.

WARNING: Submitting a letter requesting damages and threatening suit does not constitute compliance with the claims statute. *Loehr*, 147 CA3d at 1083. Similarly, counsel cannot rely on such papers as, *e.g.,* a notice of intention to sue for medical negligence (see §§9.31-9.32) to constitute the filing of a claim. In *Lutz v Tri-City Hosp.* (1986) 179 CA3d 807, 813, 224 CR 787, the court held that a notice of intention to commence an action against a local hospital district based on the district's alleged professional negligence did not constitute the filing of a claim against the hospital district. Conversely, presenting a claim to a public hospital does not satisfy the "notice of intention to sue" requirements of CCP §364 and does not extend the 1-year statute of limitations for defendant physicians or health care providers who are not employees of the public entity.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.10 2. Printed Forms Provided by Entities

§9.10 2. Printed Forms Provided by Entities

Some public entities supply printed claim forms. The California Victim Compensation and Government Claims Board (formerly known as State Board of Control), for example, supplies forms that must be used for claims against the state or a judicial branch entity. Use of the forms is not optional; a claimant must use the form supplied by the board in order for the claim to meet the requirements of Govt C §910 (content of claim) and §910.2 (signature on claim). Govt C §910.4.

PRACTICE TIP: Claimants should be careful to use required forms; a claim against the state or a judicial branch entity that is submitted without using the required form may be returned, although the claim may be resubmitted using the proper form. See Govt C §910.4.

See also the attorney-drafted form in §9.76.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/ D. Time and Mode of Presentation/§9.11 1. Deadline for Filing Claim

D. Time and Mode of Presentation

§9.11 1. Deadline for Filing Claim

Claims for death or injury to persons, personal property, or growing crops must be presented to the public entity within 6 months after the cause of action accrues; all other claims must be filed within 1 year. Govt C §911.2. There are special rules for determining the commencement date of a claim presented to the California Victim Compensation and Government Claims Board. See Govt C §911.2(b). See California Government Tort Liability Practice §6.13A (4th ed Cal CEB 1999).

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§9.12 2. Accrual of Cause of Action

A claim against a public entity is deemed to accrue on the date that would otherwise be used in determining the timeliness of a cause of action of the same type under the applicable statute of limitations, except that a claim for equitable indemnity accrues on the date the defendant is served with the complaint giving rise to the claim for equitable indemnity against the public entity, rather than on the date on which an adverse judgment is entered. Govt C §901.

NOTE: If the date on which the cause of action accrued is in dispute, the entity cannot, by rejecting the claim as untimely without considering the merits, deny a claimant the right to a jury trial on the disputed issue. When the claim on its face alleges facts that, if true, indicate that the claim was filed in a timely fashion, the public entity's rejection must be treated as a rejection on the merits and not as a denial of permission to file a late claim. *Scott v County of Los Angeles* (1977) 73 CA3d 476, 140 CR 785.

An injured employee's timely filing of a claim against a public entity is sufficient to satisfy the claim requirement for the employer or workers' compensation carrier that seeks reimbursement for benefits paid to the employee. The carrier may intervene in the employee's suit without filing a separate claim against the public entity. *San Diego Unified Port Dist. v Superior Court* (1988) 197 CA3d 843, 243 CR 163.

No additional claim is required to be filed by an insurance carrier that is subrogated to the rights of its insured if the insured has properly complied with the claims procedures. *Smith v Parks Manor* (1987) 197 CA3d 872, 243 CR 256.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.13 3. Amended Claims

§9.13 3. Amended Claims

A claim may be amended any time before expiration of the period designated in Govt C §911.2 (see §9.11) or before final action on it is taken by the public entity, whichever is later. If the claim as amended relates to the same transaction or occurrence that gave rise to the original claim, the amended claim is considered part of the original claim for all purposes. Govt C §910.6.

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§9.14 4. Presenting the Claim: Method; Date

A claim is "presented" to a local public entity by delivery or mail to the clerk, secretary, or auditor of the entity, or to the governing board at its principal office, and to the state by delivery or mail to the State Board of Control. Govt C §915. There are, however, special requirements for presenting a claim against a judicial branch entity. See Govt C §915(c)-(d). The time of presentation is the date of mailing, not of receipt. See Govt C §915.2.

Any period of notice and any duty to respond after receipt of service of a claim, amendment, application, or notice is extended 5 days on service by mail, if the place of address is within the state of California, 10 days if the place of address is within the United States, and 20 days if the place of address is outside the United States. Proof of mailing may be made in the manner prescribed by CCP §1013a. Govt C §915.2.

PRACTICE TIP: Because disputes can arise over issues of mailing, counsel often prefer to present a claim by delivery or certified mail.

To determine the appropriate address of the entity, consult the Roster of Public Agencies maintained by the Secretary of State or the county clerk. See Govt C §53051.

WARNING: Delivering or mailing a claim to the wrong entity is not substantial compliance with the claims statute. A claimant who has otherwise been diligent should request relief under the late claim provisions of the Government Claims Act (formerly known as the Tort Claims Act). See Govt C §§911.3-912.2, 946.6. *Bettencourt v Los Rios Community College Dist.* (1986) 42 C3d 270, 228 CR 190. See *Draper v City of Los Angeles* (1990) 52 C3d 502, 276 CR 864.

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§9.15 5. Claimant Charged With Crime

Persons charged with criminal offenses are prohibited from bringing civil actions against public entities or employees for money damages while their charges are pending. The time for filing suit following the denial of the claim is tolled. Any applicable statute of limitations for filing and prosecuting these actions is tolled during the period that the charges are pending before a superior court. However, the time for filing a claim is not extended. Govt C §945.3.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/ E. Entity Responses to Claims/§9.16 1. Acceptance; Denial; Rejection; Return; No Action

E. Entity Responses to Claims

§9.16 1. Acceptance; Denial; Rejection; Return; No Action

A public entity has 45 days to either accept or reject a claim. See Govt C §912.4. The entity may:

- Accept and pay the claim;
- Deny the claim on its merits (Govt C §913);
- Reject and return the claim as untimely (Govt C §911.3);
- Return the claim for failure to comply with the requirements of Govt C §910; or
- Allow 45 days to elapse without giving notice of action on the claim, in which case it is deemed to have been rejected (Govt C §914.4(c)).

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§9.17 2. Notice of Rejection

The entity is required to give written notice of the rejection of a claim, warning the claimant of the 6-month statute of limitations on filing suit after rejection and advising that the claimant may seek an attorney. Govt C §913(b). An entity's failure to deliver or mail a timely notice of rejection has the effect of extending the statute of limitations for filing suit against the entity to 2 years after the date on which the cause of action accrued. Govt C §945.6(a)(2).

A notice by the entity indicating that it is not ruling on the claim, but is denying leave to present a late claim, is not a notice of rejection. See *Wheeler v County of San Bernardino* (1978) 76 CA3d 841, 143 CR 295, in which the plaintiff presented a timely claim, and the county, instead of ruling on that claim, rejected it as untimely. The county was estopped from relying on the plaintiff's failure to file an action within 6 months. Even if the notice were construed to be a notice of rejection, the county's consistent and erroneous contention that the plaintiff had failed to file a timely claim encouraged the plaintiff to file a petition for late claim relief, instead of filing suit. "If the county had acknowledged the claim as having been timely presented and sent a notice expressly rejecting the claim, we have no reason to doubt that suit would have been filed within six months." 76 CA3d at 848.

In another case, the claim rejection letter did not specify the date on which it was mailed. An allegation that the rejection was mailed "on or about" a date 6 months and 1 day before the filing of the complaint raised an issue of proof regarding the 6-month period that could not be resolved on demurrer. *Childs v State* (1983) 144 CA3d 155, 192 CR 526.

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§9.18 3. Notice of Insufficiencies

If the entity believes that the claim fails to comply substantially with Govt C §910, §910.2, or §910.4, it may, within 20 days after presentation, give notice of the insufficiency, stating with particularity the nature of the defect or omission. The board may not take action on the claim for 15 days after such notice is given. Govt C §910.8. See §9.19 on waiver for failure to give notice.

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4. Waiver; Estoppel

§9.19 a. Failure to Give Notice of Insufficiency

A public entity that fails to give notice of an insufficiency in the claim waives any defense based on a defect in the claim except when the claim fails to provide an address for the claimant or an address to which the claimant desires notices to be sent. Govt C §911.

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§9.20 b. Misleading Claimant

An entity is estopped from asserting the protection of the claims statute if its employees have actually misled the claimant. See *DeYoung v Del Mar Thoroughbred Club* (1984) 159 CA3d 858, 862, 206 CR 28, which lists four elements that the claimant must prove to establish an estoppel for misleading:

- The entity knew the true facts;
- The entity intended that its conduct should be acted on (or acted so that the claimant had a right to believe that its conduct was intended to be acted on);
- The claimant was ignorant of the true facts; and
- The claimant actually relied on the conduct and was injured.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.21 c. Failure to Give Notice That Claim Was Late

§9.21 c. Failure to Give Notice That Claim Was Late

The entity must give a specified notice within 45 days after the claim is presented to any claimant who files late. Failure to give this notice constitutes a waiver of the defense of noncompliance with the time limit for presenting the claim. Govt C §911.3. No notice is required, and the defense is not waived if the claim fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant. Govt C §911.

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§9.22 d. Failure to File Identifying Information

If the public entity fails to file the identifying information required by Govt C §53051 (see §9.35), the claimant's noncompliance with the claims requirement is not a bar or a defense to a suit against that public entity. Govt C §946.4. Likewise, if the entity fails to identify itself as a public entity in its dealings with the public, written application for leave to file a late claim "shall be granted" if the claimant acted with reasonable diligence. Govt C §7530.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.23 e. Failure to Advise of Limitations Period After Advance or Partial Payment

§9.23 e. Failure to Advise of Limitations Period After Advance or Partial Payment

If the entity or its insurance carrier makes an advance or a partial payment of damages to an injured party without advising him or her of the limitations period applicable to the claim, as required by Ins C §11583, the limitations period is tolled from the time of the payment to the time of the notification. Ins C §11583.

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§9.24 f. Failure to Give Notice of Denial of Application to File Late Claim

The claimant has 6 months after the date that an entity denies the claimant's application for leave to present a late claim to petition the court for late claim relief. See §9.27. Although the 6-month period runs from the date on which the application is denied, a significant delay in notifying the claimant of that denial may estop the entity from objecting to the timeliness of the suit. *Rason v Santa Barbara City Hous. Auth.* (1988) 201 CA3d 817, 825, 247 CR 492.

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F. Applying to Entity for Leave to Present Late Claim

§9.25 1. Procedure; Contents of Application

A claimant who has failed to file a timely claim (when the time to present such a claim is 6 months) may apply to the entity in writing for leave to present the claim with the application. Govt C §911.4. The application is presented in the same way that claims are presented (see §9.3), and the proposed claim must be attached to the application.

The written application need not be in any particular form but must state the reasons for the delay in presenting the claim. See form in §9.77.

A timely application must be granted if the claimant shows that (Govt C §911.6(b)):

- The failure to present a timely claim arose from mistake, inadvertence, surprise, or excusable neglect and that the entity was not prejudiced in its defense by the delay;
- The person who sustained the injury or loss was a minor throughout the 6-month claim period;
- The person was mentally incapacitated throughout that period and failed to present a timely claim because of that disability; or
- The person died before the period expired.

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§9.26 2. Time Limits on Presenting Application

A claimant who failed to present a timely claim must apply to the entity for leave to present a late claim "within a reasonable time not to exceed one year after the accrual of the cause of action." Govt C §911.4(b).

The minority of the claimant does not toll the 1-year period for applying for leave to file a late claim. Govt C §911.4(c). Conversely, the time during which the minor is a dependent of the juvenile court does toll the period if:

- The minor is in custody of the agency to which the claim is to be presented; and
- The agency fails to make a required report of injury, abuse, or neglect to either the juvenile court or the minor's attorney within the time required by statute.

The tolling period starts on the date when the public agency becomes aware of the injury, neglect, or abuse. Govt C §911.4(c)(2)(A)-(B). The time shall not be counted during which a minor is adjudged a dependent of the juvenile court if the minor is without a guardian ad litem or conservator for purposes of filing civil actions. Govt C §911.4(c)(3).

Mental incapacity tolls the period for applying for leave to file a late claim until a guardian or conservator is appointed for the claimant (Govt C §911.4(c)), unless the claimant is a minor.

WARNING: The time during which the claimant is mentally incapacitated and does not have a guardian or a conservator is not counted. Govt C §911.4(c)(1). However, in *Hernandez v County of Los Angeles* (1986) 42 C3d 1020, 1025, 232 CR 519, the court held that the tolling provisions for mental incapacity of the claimant do not apply to minors. The parents or guardians of mentally incapacitated minors have no more than one year after the cause of action accrues to apply for leave to present a late claim.

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G. Petitioning Court for Late Claim Relief

§9.27 1. Procedure; Time to File Petition

After a public entity has denied a claimant's application for leave to file a late claim, the claimant may, within 6 months, petition the court in which suit against the entity is to be brought for permission to file suit against the entity despite the failure to present a timely claim. Govt C §946.6.

WARNING: The court does not order the entity to accept a late claim, but allows the claimant to file the lawsuit within 30 days after the court's order granting relief. *Tuolumne Air Serv. v Turlock Irrig. Dist.* (1978) 87 CA3d 248, 150 CR 809. In *Tuolumne,* the trial court's order purported to allow the plaintiff to file a late claim. The plaintiff subsequently presented a claim and did not actually file a complaint until 105 days after the trial court's order. Despite the court's order, the plaintiff's suit was deemed time barred.

The 6-month period in which to petition the court for relief runs from the date the application is denied (Govt C §946.6(b)), not from the date notice of denial is mailed or delivered to claimant.

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§9.28 2. Grounds for Late Claim Relief

A trial court must relieve the petitioner from the provisions of Govt C §945.4 if the court finds that (1) the application for leave to file a late claim (see §9.25) was made within a reasonable time (not to exceed 1 year after the date of accrual of the cause of action) and was denied or deemed denied under Govt C §911.6, and (2) one or more of the following apply (Govt C §946.6):

- The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect, and the entity would not be prejudiced by the granting of relief. The burden of proof is on the entity to establish prejudice. Govt C §946.6(c)(1); *Ramariz v County of Merced* (1987) 194 CA3d 684, 239 CR 774. The showing required of the claimant is the same as under CCP §473. *Ebersol v Cowan* (1983) 35 C3d 427, 435, 197 CR 601.
- The claimant was a minor throughout the claim period. Govt C §946.6(c)(2).
- The claimant died before expiration of the claim period. Govt C §946.6(c)(4).
- The claimant was mentally or physically incapacitated throughout the claim period and for that reason failed to present a claim. Govt C §946.6(c)(3); see *Draper v City of Los Angeles* (1990) 52 C3d 502, 276 CR 864 (plaintiff who was unconscious during claim-filing period not bound by claim filed by attorney with wrong agency).

Requirements for service of the petition and notice of hearing are set forth in Govt C §946.6(d). There are special provisions for service and notice of hearing for claims brought against a judicial branch entity. Govt C §946.6(d)(1)-(4). The court must make an independent determination of the merits of the petition based on supporting and opposing declarations and any evidence received at the hearing. Govt C §946.6(e). If the court makes an order relieving the petitioner from Govt C §945.4, suit on the cause of action must be filed with the court within 30 days. Govt C §946.6(f).

Government Code §946.6 is a remedial statute intended "to provide relief from technical rules that otherwise provide a trap for the unwary claimant" and is to be construed in favor of relief whenever possible. *Bettencourt v Los Rios Community College Dist.* (1986) 42 C3d 270, 275, 228 CR 190. However, when a plaintiff seeking relief under §946.6 fails to present anything to the trial court to support a finding of legally cognizable mistake, inadvertence, surprise, or excusable neglect, the trial court has no evidentiary basis on which to grant relief. *El Dorado Irrig. Dist. v Superior Court* (1979) 98 CA3d 57, 159 CR 267. See *Department of Water & Power v Superior Court* (2000) 82 CA4th 1288, 99 CR2d 173 (late claim relief unavailable because information available at time of accident, *e.g.*, wet road, police accident report indicating nearby DWP work caused flooding and naming DWP crew supervisor, gave petitioner ample notice of DWP's potential liability); *Spencer v Merced County Office of Educ.* (1997) 59 CA4th 1429, 69 CR2d 750 (late claim relief unavailable when plaintiff's counsel served claim on wrong public entity; counsel had received file from plaintiff's former counsel containing documents listing correct public entity).

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H. Filing Suit

§9.29 1. Filing After Claim Rejected

A claimant who has received no response to a timely claim may file suit 45 days after the claim was presented; the claim is deemed to have been rejected on the 45th day. Govt C §912.4.

Suit must be filed within 6 months after the entity has given a Govt C §913 written notice that the claim is rejected, entirely or partially, expressly or by operation of law. Govt C §945.6(a). If the entity fails to give the required notice, suit must be filed within 2 years after the date of accrual of the cause of action. Govt C §945.6(a).

WARNING: The 6-month period runs from the date of mailing or delivery of the notice of rejection. Govt C §945.6(a)(1). There is no extension of time to file suit under CCP §1013(a), which extends some time periods when a paper is served by mail. *Cole v Los Angeles Unified Sch. Dist.* (1986) 177 CA3d 1, 222 CR 426; *Edgington v County of San Diego* (1981) 118 CA3d 39, 173 CR 225. Note also that in *Edgington,* the plaintiff contended that Govt C §915.2 permits notice to be served only by first-class mail, but the court held that certified mail with return receipt requested may also be used.

The language of Govt C §910.6 suggests that if claimant files an amended claim after a previous claim is rejected and the amended claim is also rejected, the 6-month period runs from the date of the first rejection, because an amended claim relates back to the first claim. *Sofranek v County of Merced* (2007) 146 CA4th 1238, 1247, 53 CR3d 426. It has also been held that if a defective claim and an amended claim have been timely presented, and the entity has rejected both claims, the time to sue runs from the rejection of the amended claim. *Norwood v Southern Cal. Rapid Transit Dist.* (1985) 164 CA3d 741, 211 CR 6.

The 6-month limitation period for filing a lawsuit following denial of a claim (Govt C §945.6) is suspended by the filing of an action in a United States District Court unless it is subsequently held that the district court lacks jurisdiction over the action. *Addison v State* (1978) 21 C3d 313, 146 CR 224. This doctrine of "equitable tolling" also requires timely notice and lack of prejudice to the defendant and reasonable and good faith conduct by the plaintiff. Note that a public entity must be actually named as a defendant within the 6-month period. *Chase v State* (1977) 67 CA3d 808, 136 CR 833.

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§9.30 2. Filing Suit After Obtaining Court Permission to Sue

Under Govt C §946.6(f), a suit against a public entity must be filed within 30 days following the court's granting of a petition for relief from the claim-filing requirements. The time period begins to run on the entry of a minute order unless a formal order is required, in which case the time period begins to run on the entry of the formal order. *County of Nevada v Superior Court* (1986) 183 CA3d 806, 228 CR 447.

PRACTICE TIP: In *County of Nevada,* the minute order did not require the preparation of a formal order, but the court of appeal held that a formal order was required by local court rules unless otherwise ordered. Counsel should take the cautious approach and file the suit within 30 days after entry of any minute order granting relief from the claim-filing requirements.

The provisions of CCP §1013, which extend the time to act when service is by mail, do not apply to the 30-day limitation period in Govt C §946.6(f) for commencement of suit following the superior court's grant of a petition for relief from the claim requirements. *Fritts v County of Kern* (1982) 135 CA3d 303, 308, 185 CR 212. The court of appeal pointed out that CCP §1013 is inapplicable because Govt C §946.6(f) does not require mailed notice.

The limitation period for filing an action against a public entity is not tolled by the plaintiff's minority. See *Todd v County of Los Angeles* (1977) 74 CA3d 661, 141 CR 622.

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III. SUING PROFESSIONALS

A. Notice to Health Care Provider Before Filing Medical Malpractice Suit

§9.31 1. Notice Requirement

The attorney for a plaintiff who seeks damages for medical malpractice must, before filing suit, give 90 days' notice of intention to sue to every known defendant. CCP §364. Failure to comply with CCP §364 does not bar the plaintiff's action, but an attorney who fails to comply is subject to disciplinary action by the State Bar. CCP §365. The notice requirement applies to any action based on a "health care provider's professional negligence," as defined in CCP §364(f)(1)-(2). CCP §364(a). It does not apply to a defendant whose name is unknown to the plaintiff at the time the complaint is filed and who is sued by a fictitious name. CCP §364(e).

NOTE: The Medical Injury Compensation Reform Act (MICRA) (Stats 1975, 2d Extra Sess, ch 1-2), which includes CCP §§364-365, does not say why this notice of intent to sue is required, although its purpose may be to give health care providers and their insurers an opportunity to offer a settlement before a lawsuit, with its attendant publicity and expense, is filed.

A significant benefit of giving the required notice is that the statute of limitations is tolled for 90 days when the plaintiff gives notice of intent to sue in the last 90 days of the applicable statute of limitations. CCP §364(d); *Russell v Stanford Univ. Hosp.* (1997) 15 C4th 783, 64 CR2d 97 (construing §364(d) as "tolling" rather than "extending" 3-year statute of limitations); *Woods v Young* (1991) 53 C3d 315, 279 CR 613 (construing §364(d) as "tolling" rather than "extending" 1-year statute of limitations, but running of statutory period not otherwise affected by service of notice). See also *Kaplan v Mamelak* (2008) 162 CA4th 637, 641, 75 CR3d 861 (tolling under CCP §351 of prelitigation notices in medical malpractice cases).

The statute of limitations is tolled only if the original notice is served within the last 90 days. *Bennett v Shahhal* (1999) 75 CA4th 384, 390, 89 CR2d 272 (second CCP §364 notice served within last 90 days of limitations period without knowledge that another attorney had previously served 90-day notice did not toll statute of limitations). The tolling provisions apply to an equitable indemnity action that is based on a health care provider's professional negligence, even though the action is governed by a non-MICRA statute of limitations, such as CCP §335.1. *Preferred Risk Mut. Ins. Co. v Reiswig* (1999) 21 C4th 208, 87 CR2d 187.

PRACTICE TIP: There appears to be no requirement or reason for a complaint filed in the medical malpractice action to contain an allegation that notice of intention to commence the action was duly given.

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§9.32 2. Form and Contents of Notice

No particular form of notice of intention to sue is required by CCP §364(b), but the notice should be written so that it can be served in the manner prescribed by CCP §§1010-1020. CCP §364(c). See form in §9.81.

The notice of intention to sue must notify defendant "of the legal basis of the claim." CCP §364(b). There is no express requirement that the notice state details such as dates or places of alleged professional negligence, the specific acts or omissions, or the amounts claimed. See CCP §§364-365. See also *Edwards v Superior Court* (2001) 93 CA4th 172, 181, 112 CR2d 838 (plaintiff's failure to allege specific factual basis of each cause of action in CCP §364 90-day notice did not prevent alleging omitted injury in lawsuit filed against medical practitioner).

NOTE: The phrase "legal basis of the claim," is not defined. The form in §9.81 seeks to satisfy this requirement with the phrase "negligently diagnosed and treated [the plaintiff(s) or decedent] causing bodily injury [and death,]" which may be read to encompass any act or omission by the defendant in rendering professional services that may be the basis for recovery. Other phrases, such as "negligently rendered professional services to [plaintiff(s) or decedent] causing bodily injury [and death]" or more detailed statements, may also be effective.

The notice must also inform the defendant of the "type of loss sustained, including with specificity the nature of the injuries suffered." CCP §364(b).

NOTE: The quoted phrase is not defined. Although "bodily injury" or "death" are probably sufficient to state type of loss, the form in §9.81 shows a listing of elements for which damages for injury or death may be claimed. See California Tort Damages (2d ed Cal CEB 2002) for discussion of these elements.

It is unclear whether a statement of the amounts claimed for separate elements of damages is either necessary or proper, but the total amount of damages sought must be stated except in personal injury or wrongful death cases. See, *e.g.,* CCP §425.10(b) (complaints in superior courts seeking recovery of money or damages must state amount; complaints in personal injury or wrongful death cases, however, should not state amount of recovery sought but they must comply with CCP §422.30 (caption requirements) and Govt C §70613(b) (requirements for first paper of limited civil case)). For further discussion of limited civil cases, see chap 6.

NOTE: If a purpose of giving notice is to encourage settlement, it seems appropriate to give some indication of past and future damages. Failure to list an injury apparently does not preclude the plaintiff from recovering damages from that injury. See CCP §365.

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B. Certificate of Merit in Professional Negligence Suit Against Architect, Engineer, or Land Surveyor

§9.33 1. Requirement

An attorney who files a professional negligence action against an architect, engineer, or land surveyor for damages or indemnity must, under CCP §411.35, also file and serve a certificate showing that the attorney:

- Has reviewed the facts, consulted with and received an opinion from at least one professional in the defendant's discipline who is not a party to the litigation as to whether the defendant was negligent in performing the professional services, and concluded on the basis of this review and consultation that there is a reasonable and meritorious cause for filing the action (see form in §9.82); or
- Has been unable to obtain the required consultation
- in time to prevent impairment of the action by a statute of limitations (see form in §9.84); or
- because none of at least three professionals contacted agreed to consult (see form in §9.85); or
- Intends to rely on limited theories (see below).

The certificate of intention to rely on limited theories need not state that consultation with a professional was sought or that there is reasonable and meritorious cause for filing the action, but it must state that the reason the attorney is not filing and serving a certificate of merit or of inability to obtain consultation is that the attorney intends to rely:

- Solely on the doctrine of res ipsa loquitur as defined in Evid C §646;
- Exclusively on a failure to inform of the consequences of a procedure; or
- On both these theories.

See form in §9.83.

NOTE: The requirement applies whether the action is commenced by complaint or cross-complaint and even if the words "professional" or "negligence" are not used. CCP §411.35(i). It is good practice to serve the complaint or cross-complaint with the certificate attached.

An attorney who files a certificate showing the impending expiration of the statute of limitations has 60 days after filing the complaint in which to file a certificate of merit. CCP §411.35(b)(2). Presumably, the attorney could file, within 60 days after filing the complaint, a certificate of inability to obtain the required consultation (see CCP §411.35(b)(3)) in lieu of a certificate of merit.

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§9.34 2. Procedures After Certificate Filed

After a plaintiff's attorney has filed and served a required certificate of merit, both the attorney and a professional consultant have a privilege to refuse to disclose the identity of the consultant and the content of the consultation unless the defendant architect, engineer, or surveyor prevails. If the attorney has been unable to find a consultant after three attempts, the court may require the attorney to divulge the names of the persons refusing to consult. CCP §411.35(e).

A defendant who prevails, or the court, may require disclosure of the consultants' names and addresses in an in camera proceeding from which the prevailing professional is excluded. Failure of the plaintiff's attorney to comply permits the court to order the attorney, the client, or both to pay the defendant's reasonable costs, including attorney fees. CCP §411.35(h).

Failure to comply with CCP §411.35 is grounds for a demurrer to the complaint (see chap 23) and may constitute unprofessional conduct and grounds for discipline against the attorney. CCP §411.35(f)-(g).

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C. Leave to Sue Unpaid Officer or Director of Nonprofit Corporation

§9.35 1. Requirement

An attorney who wants to include in a complaint or cross-complaint a cause of action against a person serving without compensation as an officer or director of a nonprofit corporation for negligent acts or omissions committed by that person within the scope of his or her duties must first apply for and obtain a court order allowing the pleading to be filed. CCP §425.15(a). See generally Corp C §5047.5. See Corp C §24001.5 on damages immunity for uncompensated director or officer of a nonprofit medical association.

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§9.36 2. Form and Contents of Application; Service

An application for leave to sue the director or officer of a nonprofit corporation must be in the form of a "verified petition" to which are attached any supporting declarations stating the facts on which liability is based and the proposed complaint or cross-complaint. CCP §425.15(a). The petition may be verified by the plaintiff's attorney using the form in chap 15.

NOTE: Before the court decides whether to grant the requested leave, it must order the petition (and, presumably, supporting affidavits and proposed pleading) to be served on the defendant, who must be given an opportunity to submit opposing declarations.

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§9.37 D. Leave to Sue Attorney for Civil Conspiracy

A procedure similar to that described in §§9.35-9.36 must be followed by a party who files a pleading that states a cause of action against an attorney for civil conspiracy with his or her client. Civil Code §1714.10 requires that the party must obtain a court order, following the court's determination that a reasonable probability exists that the party will prevail, before the party may file a complaint or other pleading that contains such a cause of action. See generally *Pavicich v Santucci* (2000) 85 CA4th 382, 102 CR2d 125.

The party may file and present to a judge a verified petition requesting an order that the pleading may be filed, and the judge may allow the filing on the basis of that petition and supporting declarations that state the facts on which the liability is based. See *Evans v Pillsbury, Madison & Sutro* (1998) 65 CA4th 599, 76 CR2d 679, in which the court of appeal directed the trial court to strike a civil conspiracy cause of action against an attorney for the plaintiffs' failure to obtain a prefiling order. See generally *Howard v Superior Court* (1992) 2 CA4th 745, 3 CR2d 575 (cause of action for attorney's "aiding and abetting" client was equivalent to cause of action for civil conspiracy); *Villa Pac. Bldg. Co. v Superior Court* (1991) 233 CA3d 8, 284 CR 227 (§1714.10 is not jurisdictional but is an objection that must be timely made).

Civil Code §1714.10 was upheld against constitutional challenges on due process and equal protection grounds in *Hung v Wang* (1992) 8 CA4th 908, 11 CR2d 113. The court also held that §1714.10 does not require factual determinations by the court that violate the right to a jury trial. 8 CA4th at 926.

An order under CC §1714.10 authorizing or denying authorization for a civil conspiracy suit against an attorney is appealable as a final judgment. CC §1714.10(d).

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IV. CLAIMS AGAINST ESTATES

A. Filing Claim as Prerequisite to Suit

§9.38 1. Situations Requiring Claims

A person's death does not normally bar prosecution of a cause of action that existed against that person. CCP §§377.20, 377.40-377.43. An action may be maintained or continued against a decedent's personal representative for all damages that might have been recovered against the decedent had the decedent lived, except for punitive damages (CC §3294) or other damages imposed primarily for the sake of example and by way of punishing the defendant (CCP §377.42). However, no action may be maintained against a decedent's estate and no lawsuit pending against the decedent at time of death may be continued against the estate unless the plaintiff has complied with the claims requirements of the Probate Code and has filed a timely creditor's claim in the probate proceeding. Prob C §§9002, 9351.

The estate claims procedure applies to all liabilities of the decedent, arising in contract, tort, or otherwise. Prob C §9000(a)(1). The procedure covers demands for payment that are not yet due or accrued, or are contingent or unliquidated as well as fixed, accrued liabilities. Prob C §9000(a).

The claims procedures have their own time limits, which supersede the otherwise applicable statutes of limitations. CCP §366.2(b)(2); Prob C §9100. See §9.44.

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§9.39 2. Situations Not Requiring Prior Claims

Specific statutes exempt certain lawsuits from Probate Code claims filing requirements. For example:

Title to property. The Probate Code claims procedure does not apply to a dispute regarding title of a decedent to specific property alleged to be included in the decedent's estate. Prob C §9000(b).

Claims covered by insurance. To the extent a decedent was protected by insurance, an action to establish the decedent's liability may be brought or continued and a judgment enforced against the insurer without filing a claim under the Probate Code. Prob C §9390(a). The complaint may be served on the liability insurer or someone designated by it. Recovery is limited to the insurance proceeds unless a probate claim has been timely filed and the personal representative joined as a defendant. Prob C §§550-555, 9390(b).

WARNING: Specific limits on, and requirements for, proceeding on claims covered by liability insurance are set out in Prob C §§550-555. In addition, it may be useful to state in the complaint that the plaintiff is proceeding under those sections and Prob C §9390 and that a claim has not been filed.

Secured claims. An action may be brought by the holder of a mortgage or lien on property belonging to the decedent's estate to enforce the lien or mortgage without first filing a creditor's claim, when recourse against all other property of the estate is expressly waived in the complaint. Prob C §9391.

Execution liens. If property of the decedent is subject to an execution lien at the time of the decedent's death, enforcement may proceed. Any remaining balance is payable in the course of the administration of the estate, and any excess must be returned to the estate. Prob C §9303.

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§9.40 3. Statute of Limitations

If a potential defendant in a lawsuit dies before expiration of the applicable limitations period and the cause of action survives death, any action must be brought within 1 year after the date of death. CCP §366.2. Section 366.2 specifically excludes from its operation:

- Claims against a decedent's estate covered by Prob C §§9000-9399 (*i.e.*, the claims discussed in this chapter);
- Claims relating to liabilities of a deceased settlor of a revocable trust (Prob C §§19000-19403) (see *Levine v Levine* (2002) 102 CA4th 1256, 126 CR2d 255); and
- Certain petitions by beneficiaries concerning the construction and applicability of a "no contest" clause in a will or other instrument (Prob C §§21300-21322).

WARNING: Code of Civil Procedure §366.2 sets the limitations period at 1 year after death even if the otherwise applicable period would not expire until later than 1 year after death. In *Collection Bureau v Rumsey* (2000) 24 C4th 301, 99 CR2d 792, the supreme court held the 1-year limitations period applicable to an attempt to collect a debt incurred by the decedent from the decedent's surviving spouse. Thus, the plaintiff's claim, which would have been timely as an open book account if the debtor spouse had not died, was time-barred by operation of former CCP §353 (the predecessor to CCP §366.2).

The 1-year limitations period of CCP §366.2 is not tolled during the plaintiff's minority and applies to an action on the liability of a deceased person without regard to the location of decedent's personal representative or estate. *Farb v Superior Court* (2009) 174 CA4th 678, 94 CR3d 586.

In addition, Prob C §551 extends the statute of limitations for an action brought to establish a liability for which the decedent was protected by insurance to 1 year after the expiration of the limitations period that otherwise would be applicable.

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§9.41 4. Effect of Failure to Present Claim; Waiver

A claim that is not filed or presented as required by statute is barred (Prob C §9002), and a complaint that fails to allege compliance with the claims statutes fails to state a cause of action (*Chahon v Schneider* (1953) 117 CA2d 334, 256 P2d 54).

In some circumstances, compliance with the claim requirement may be excused by pleading and proof of a waiver by the personal representative. *Satterfield v Garmire* (1967) 65 C2d 638, 56 CR 102. But see *Segovia v Superior Court* (1976) 55 CA3d 464, 127 CR 501 (estate representative's knowledge of claim, without further showing, is insufficient to establish waiver or estoppel). See also *Clark v Kerby* (1992) 4 CA4th 1505, 6 CR2d 440 (questioning whether, under procedure for 1988 death, personal representative gave adequate notice and whether former claims statutes met constitutional due process standards).

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§9.42 5. Claims of Public Entities

With limited exceptions, a claim by a public entity is barred unless the claims procedures are followed. Prob C §9200(a). But if the claim of the public entity arises under a law, act, or code listed in Prob C §9201(b), the claim is barred only if written notice or a request to file a claim is given to the public entity and the entity fails to file a claim before expiration of the period provided in the applicable section.

Probate Code §9202 requires that, when a deceased person has received health care or was the surviving spouse of a person who received health care under Welf & I C §§14000-14499.77, the heirs or personal representative must give the Director of Health Services notice of the death within 90 days after the date of death. The director has four months after notice is given to perfect claims against the estate or, if the assets of the estate have been distributed to the heirs, against the heirs to the full extent of the director's claim or the distributed assets, whichever is less.

The publication of notice under Prob C §8121 and the giving of notice to creditors of administration of the estate of the decedent under Prob C §§9050-9054 are not sufficient to comply with the notice to public entities requirements in Prob C §§9200-9205. Prob C §9001(b).

If estate property is distributed before expiration of the time allowed a public entity to file a claim, the public entity will have a claim against the distributees to the full extent of the entity's claim or each distributee's share, whichever is less. Prob C §9203. The entity's claim will include interest to the extent provided in Prob C §9203(b).

The claims procedure applicable to public entities does not apply to liability for the restitution of amounts illegally acquired through the means of a fraudulent, false, or incorrect representation or a forged or unauthorized endorsement. Prob C §9205.

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B. Procedure for Filing Claim

§9.43 1. Notice to Creditors

A personal representative must, except in a few specified instances, give notice of the administration of the estate in conformity with Prob C §9052 and as provided in Prob C §1215 to the known or reasonably ascertainable creditors of the decedent. Prob C §9050(a); *Tulsa Prof. Collection Servs. v Pope* (1988) 485 US 478, 99 L Ed 2d 565, 108 S Ct 1340; *Clark v Kerby* (1992) 4 CA4th 1505, 6 CR2d 440. The giving of notice is in addition to publication of notice under Prob C §8120. Prob C §9050(b).

The notice must be given within the later of the 4-month period after the date letters are first issued or 30 days after the personal representative first has knowledge of the existence of the creditor. Prob C §9051.

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§9.44 2. Time Limits on Filing

A creditor is required to file a claim within the later of four months after the date letters are first issued to a general personal representative (Prob C §9100(a)(1)) or 60 days after the date notice of administration is mailed or personally delivered to the creditor, if notice is given at least 60 days before expiration of the CCP §366.2 statute of limitations (1 year after the date of death) (Prob C §9100(a)(2)).

Failure to file a creditor's claim does not destroy the court's jurisdiction. If the defendant does not raise the defect until after the judgment has become final, the defect is waived. *Rogers v Hirschi* (1983) 141 CA3d 847, 190 CR 575.

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§9.45 3. Petition to File Late Claim

On petition by a creditor or the personal representative, the court may allow a claim to be filed after the time to file a claim provided in Prob C §9100 if the creditor establishes either of the following conditions (Prob C §9103(a)):

- The personal representative failed to send proper and timely notice of estate administration to the creditor, and the petition is filed within 60 days after the creditor has actual knowledge of the estate administration; or
- The creditor had no knowledge of facts reasonably giving rise to the existence of the claim more than 30 days before expiration of the Prob C §9100 deadline, and the petition is filed within 60 days after the creditor has actual knowledge of facts giving rise to the existence of the claim and administration of the estate.

The claim cannot be allowed after the court makes the final order of distribution or more than 1 year after letters are first issued to the decedent's general personal representative. Prob C §9103(b).

The court has broad discretion to deny the claim, or limit or condition the allowance on terms that are just and equitable. Prob C §9103(c). Payments made or properly distributed before the claim is filed are not subject to the claim.

NOTE: The late claim statute has been made largely irrelevant by amendments to Prob C §9100. Stats 1996, ch 862. Under Prob C §9100(a)(2), a claim is timely if it is given within 60 days after notice of administration is mailed or personally delivered to a creditor. A major problem with the amended statute is that this time limit never runs unless the creditor has been given notice. If the creditor does not receive notice, the claim is not late. Even a creditor who has actual knowledge of the proceedings may delay filing a claim for almost a year, because the California laws barring late claims by persons having actual knowledge of the proceeding are all contained in the now-irrelevant late claim statute.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.46 4. Amending Claims

§9.46 4. Amending Claims

Although a claim properly filed may be amended or revised, an amendment may not be made to increase the amount of the claim after the time for filing a claim has expired. An amendment may not be made for any purpose after the court makes the final order of distribution or more than one year after letters are first issued to the decedent's general personal representative. Prob C §9104.

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§9.47 5. Place to File; Method

The claim must be filed with the court in which the decedent's estate is being administered, and a copy of the claim must be served on the decedent's personal representative. Failure to file the claim with the court and serve a copy on the personal representative invalidates the claim. Prob C §9150.

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§9.48 C. Contents of Claim

The creditor's claim must be supported by a declaration of the claimant or a person on his or her behalf, as well as other documents required by Prob C §§9150-9153. The supporting declaration must state (see Creditor's Claim (Probate) (Judicial Council Form DE-172) in §9.87):

- That the debt is a just claim (Prob C §9151(a)(1));
- If the claim is due, the facts supporting the claim, the amount of the claim, and that all payments on and offsets to the claim have been credited (Prob C §9151(a)(2));
- If the claim is not due or contingent, or the amount is not yet ascertainable, the facts supporting the claim (Prob C §9151(a)(3)); and
- If the affidavit is made by a person other than the creditor, the reason it is not made by the creditor (Prob C §9151(a)(4)).

If the claim is based on a written instrument, the original or a copy of the instrument with all endorsements must be attached to the claim and the original made available to the personal representative or the court on demand. If the original is lost, this fact must be stated on the face of the claim. Prob C §9152(a).

If the claim or part of the claim is secured by a recorded trust deed or similar lien, it is sufficient to describe the security and supply the book and page number where recorded. Prob C §9152(b).

A written demand for payment made within 4 months after the date letters are first issued may be accepted by the personal representative as a claim. Formal defects are waived if the personal representative pays the amount demanded within 30 days after expiration of the 4-month time limit and it is determined that

- The debt was in fact due and was paid in good faith;
- The amount paid was the true amount owed over and above all payments and offsets; and
- The estate is solvent.

Prob C §9154.

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§9.49 D. Rejection of Claim

If the personal representative fails to act on the claim, the creditor has the option to treat the claim as rejected 30 days after filing. Prob C §9256. If the claim is allowed or rejected, written notice must be given to the creditor in compliance with Prob C §9250.

If the personal representative is unauthorized to act under the Independent Administration of Estates Act (Prob C §§10400-10600), or if the representative or his or her attorney is a creditor of the estate, judicial review and approval of the claim is required. Prob C §§9251-9252.

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E. Suit Following Rejection of Claim

§9.50 1. In General

Suit on a rejected claim is barred unless the claimant files suit in a proper court within the following time periods:

- If the claim is due, 3 months after the notice of rejection (Prob C §9353(a)(1)); or
- If the claim is not due at the time the notice is given, 3 months after it becomes due (Prob C §9353(a)(2)).

WARNING: See *Independent Bankers Trust Co. v Superior Court* (1982) 138 CA3d 238, 188 CR 14. After denial of his claim by decedent's executor, plaintiff filed suit in a timely manner and filed notice in the probate action of the pendency of the suit but did not serve summons or complaint on decedent's executor until after discharge by probate court. The court of appeal issued a peremptory writ of mandate ordering the trial court to quash service of summons on the executor.

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§9.51 2. Action Pending on Date of Death

An action or a proceeding against the decedent pending at the time of death cannot be continued unless the plaintiff presents a proper and timely claim against the estate (Prob C §9370(a)(1)), the claim is rejected in whole or in part (Prob C §9370(a)(2)), and the plaintiff applies to the court in which the action or proceeding is pending for an order to substitute the personal representative in the action (Prob C §9370(a)(3), which also provides that the time limit applies only if the notice of rejection contains a statement that the plaintiff has three months within which to apply for an order for substitution).

Substitution of a decedent's personal representative as party defendant in place of the decedent does not obviate the need to file or present a formal creditor's claim. *Wood v Brown* (1974) 39 CA3d 232, 114 CR 63.

After a claim is presented, the proper procedure is to file a supplemental complaint alleging the defendant's death and due presentation of the claim. *Wood v Brown* (1974) 39 CA3d 232, 240, 114 CR 63. The plaintiff's failure or inability to prove compliance with the claim requirement is a complete defense to the action against the estate. Prob C §9370(b); *Wood v Brown, supra* (motion for summary judgment granted).

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V. APPOINTING GUARDIANS AD LITEM

A. When Available

§9.52 1. Defined

A minor is a person under 18 years of age. Fam C §6500. See Fam C §6601 on minor's right to enforce rights by civil action or other legal proceedings.

The legislature has replaced the term "incompetent person" with the phrase "person with a disability" as defined in Prob C §3603. A "person with a disability" includes (Prob C §3603):

- A person for whom a conservator may be appointed (Prob C §1801);
- A person who meets the definition of disability under 42 USC §1382c(a)(3) (Title II of the Social Security Act (42 USC §§401-434)) and 20 CFR §416.905;
- A person who meets the definition of disability under 42 USC §423(d)(1), (2), and (3) (Title II of the Social Security Act (42 USC §§401-434)) and 20 CFR §404.1505;
- A minor who meets the definition of disability under 20 CFR §416.906; and
- A person with a developmental disability under Welf & I C §4512.

See also *Sarracino v Superior Court* (1974) 13 C3d 1, 118 CR 21 (incompetency may exist independently of judicial determination); *In re Sara D.* (2001) 87 CA4th 661, 667, 104 CR2d 909 (Prob C §1801 is not exclusive standard for determining when adult is incompetent in Welf & I C §300 proceeding).

NOTE: If an adult has the capacity under Prob C §812 to consent to an order and does not have a conservator with such authority, a court may not make an order or give a judgment under Prob C §§3600, 3601, 3610, or 3611 without the express consent of that person. Prob C §3613.

At common law, the person appointed or informally admitted to the court to prosecute a lawsuit for a minor or person with a disability as a plaintiff was called a "next friend." The appointee for a minor or person with a disability as a defendant was called a "guardian ad litem." Although these distinctions have disappeared, there are still procedural differences between appointments for minors or persons with a disability who are plaintiffs (CCP §373(a)) and those who are defendants (CCP §373(b)).

A guardian ad litem is not a party to the litigation, but the representative of a party. See *Dixon v Gries* (1895) 106 C 506, 39 P 857; *Estate of Cochems* (1952) 110 CA2d 27, 242 P2d 56. The guardian's duties are limited to matters involving prosecution and defense of the action involving the ward (see CCP §372(a)); the guardian ad litem does not have the powers of a general guardian over the ward's estate. See §9.68.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.53 2. Situations in Which Appointment of Guardian Is Required or Desirable

§9.53 2. Situations in Which Appointment of Guardian Is Required or Desirable

Appointment of a guardian ad litem must be obtained before filing suit on behalf of or against any minor or person with a disability for whom a guardian or conservator of the estate has not already been appointed (CCP §372(a)), unless that necessity is dispensed with by a specific exception, as in suits relating to emancipation (Fam C §§7000-7143) or in proceedings to obtain a protective order

- To prohibit harassment (CCP §527.6);
- Against violence or a credible threat of violence in the workplace (CCP §527.8);
- Under the Domestic Violence Prevention Act (Fam C §§6200-6389); or
- Under Fam C §7710 or §7720 (CCP §372(b)).

NOTE: A guardian ad litem need not be appointed for a minor whose parents settle a disputed claim without court action, as long as the settlement is approved by the superior court of the county in which the minor resides. Prob C §3500.

Even when the minor or person with a disability has a guardian of the estate, the court has the power to appoint a guardian ad litem if the court deems it expedient. CCP §372(a). However, if an adult has the capacity under Prob C §812 to consent to an order and does not have a conservator with such authority, a court may not make an order or give a judgment under Prob C §§3600, 3601, 3610, or 3611 without the express consent of that person. Prob C §3613. For federal practice, see Fed R Civ P 17(c).

EXAMPLE: Appointment of a guardian ad litem may be sought for a minor or a person with a disability who has a general guardian if that guardian has neglected or refused to represent the ward or has an adverse interest in the litigation. Conflict of interest situations can arise when the general guardian is also the executor or administrator of an estate in which the minor or person with a disability has an interest, either as an heir or a legatee. Sometimes the trustee of a trust is also an income beneficiary of the trust and guardian of a minor who is a remainderman of the trust.

The court may appoint a guardian ad litem for an unborn person or an unascertained person in a designated class who may become legally or equitably interested in real or personal property that may be affected by a lawsuit or proceeding. CCP §373.5.

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3. Effect of Failure to Appoint

§9.54 a. Right to Disaffirm Judgment

A judgment against a minor or a person with a disability who has not been represented by a general guardian or guardian ad litem is voidable and may be disaffirmed by the ward after having attained capacity, or by a guardian subsequently appointed on the ward's behalf. *Field v Hughes* (1933) 131 CA 144, 20 P2d 990 (minor); *Winslow v McCarthy* (1918) 39 CA 337, 178 P 720 (incompetent). See also *Olivera v Grace* (1942) 19 C2d 570, 122 P2d 564 (default judgment against incompetent person set aside because plaintiff, who knew defendant to be incompetent even though she had not been so adjudicated, failed to request appointment of a guardian ad litem).

WARNING: Disaffirmance must be sought within a reasonable time after attaining majority or competency. Failure to do so may result in waiver of the right to disaffirm. See §9.55.

If a complaint alleges an appointment when in fact none was made, the defendant may file a demurrer under CCP §430.10(b) on grounds of lack of capacity to sue (see chap 23) or move to strike the complaint under CCP §435 (see generally chap 24).

Failure to appoint a guardian ad litem as required by CCP §372 is not a jurisdictional defect. *Johnston v Southern Pac. Co.* (1907) 150 C 535, 89 P 348; *Hughes v Quackenbush* (1934) 1 CA2d 349, 37 P2d 99. But see *Keane v Penha* (1946) 76 CA2d 693, 173 P2d 835.

A minor or a person with a disability serving as a plaintiff who is unrepresented by a guardian ad litem may disaffirm a judgment. In some instances, a defendant may disaffirm a judgment after learning that a required guardian ad litem had not been appointed for the plaintiff, on the theory that the judgment does not bind any party if it does not bind all parties. See *Johnston v Southern Pac. Co., supra*.

The usual procedure for disaffirmance is to make a noticed motion to vacate or set aside the judgment. See, *e.g., Gouanillou v IAC* (1920) 184 C 418, 193 P 937; *Garbutt v Campbell* (1955) 130 CA2d 167, 278 P2d 508. For a form for notice of motion to vacate judgment, see California Civil Litigation Forms Manual §46.6 (Cal CEB 1980).

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§9.55 b. Waiver of Right to Disaffirm

A minor or a person with a disability who did not have a guardian ad litem as required by CCP §372(a) may waive the right to disaffirm a judgment. A voluntary waiver may occur by, *e.g.,* expressly affirming a favorable judgment after having attained majority. See *Johnston v Southern Pac. Co.* (1907) 150 C 535, 89 P 348 (affirmance pending defendant's appeal cured defect). An involuntary waiver may occur, *e.g.,* under the doctrine of laches, for failing to seek disaffirmance promptly. See *Cikuth v Loero* (1936) 14 CA2d 32, 57 P2d 1009 (court refused to grant motion to vacate made more than a year after entry of judgment). Waiver (or estoppel to disaffirm) also may result from conduct that is inconsistent with disaffirmance.

EXAMPLE: See, *e.g., Hughes v Quackenbush* (1934) 1 CA2d 349, 37 P2d 99 (minor defendant who attains majority before trial and who continues to participate at trial through counsel may not speculate on outcome and seek to disaffirm if result is unfavorable); *King v Wilson* (1931) 116 CA 191, 2 P2d 833 (minor defendant sat through trial without disclosing minority to attorney or court until after unfavorable judgment rendered); *Childs v Lanterman* (1894) 103 C 387, 37 P 382 (defendant, who attained majority shortly before adverse judgment rendered against him, moved for new trial and appealed on merits before moving to disaffirm on grounds of minority almost 3 years later). See 4 Witkin, California Procedure, *Pleading* §85 (5th ed 2008).

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B. Petitioning for Appointment

1. Selecting Petitioner

§9.56 a. General Qualifications

Generally, no statute or rule specifies who may be appointed as a guardian ad litem. One exception is Fam C §2332(b), which provides that in certain circumstances the district attorney or county counsel may be appointed guardian ad litem for an insane spouse in a marital dissolution proceeding.

The statutes suggest, however, that appointment of a "relative or friend" of the minor or the person with a disability is proper. See CCP §373. In practice, courts routinely accept petitions for appointment of parents or other relatives, general guardians, or attorneys. Parents of a minor may have preferential status for appointment. *State v Superior Court (Waring)* (1978) 86 CA3d 475, 482, 150 CR 308, disapproved on other grounds in *Hernandez v County of Los Angeles* (1986) 42 C3d 1020, 1027, 232 CR 519. But see *D. G. v Superior Court* (1979) 100 CA3d 535, 545, 161 CR 117 (no order of preference). A parent does not have the primary right to select the appropriate guardian ad litem. *Williams v Superior Court* (2007) 147 CA4th 36, 48, 54 CR3d 13.

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§9.57 b. Serving Ward's Best Interest; Avoiding Conflict

The paramount consideration in selecting a guardian ad litem is protecting the best interest of the minor or the person with a disability, and it is the court's duty to determine that best interest. Because the guardian's principal duty is to represent the minor or the person with a disability in litigation, the person selected should have sufficient ability, experience, time, and interest in the ward's welfare to do this successfully.

The court may consider the parent's wishes, but they are not controlling. The court may also consider the preference of a minor 14 or older who has the right to nominate (see §9.58).

Before seeking the appointment of a parent as a minor's guardian ad litem, care must be taken to identify possible generational conflicts. If a potential conflict exists between the minor and a parent (or other relative, when there is no parent), someone else should be appointed.

EXAMPLE: Conflicts of interest that may occur between a minor and a parent include:

- Life tenant versus remainderman of property;
- Income beneficiary versus remainderman of a trust; and
- Heir not mentioned in a will versus legatee or devisee under the will.

The attorney for a plaintiff may petition for appointment of a guardian ad litem for a defendant, but may wish to refrain from nominating a specific person, to avoid any appearance of conflict.

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c. Eligible Petitioners

§9.58 (1) For Minor Plaintiff

When the minor is a plaintiff, the petition for appointment must be made by the minor if 14 or older and by a relative or friend if younger. CCP §373(a). It is error to appoint a guardian ad litem for a 14-year-old on the petition of the guardian alone, and any subsequent judgment may be disaffirmed by the minor when he or she attains majority. See *Johnston v Southern Pac. Co.* (1907) 150 C 535, 89 P 348; see §§9.54-9.55 on disaffirmance and waiver of the right to disaffirm.

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§9.59 (2) For Minor Defendant

When the minor is a defendant, and is 14 or older, the petition for appointment may be made by the minor within 10 days after service of the summons. If the minor is under 14, or has failed to apply within 10 days, the petition may be made by a relative, a friend, or any other party to the action, or the court may appoint a guardian ad litem on its own motion. CCP §373(b). Even if the minor is 14 years or older, appointment of a guardian on petition of the guardian alone is not error, and a resulting judgment cannot be disaffirmed. See *Estate of Corotto* (1954) 125 CA2d 314, 270 P2d 498.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.60 (3) For Person With a Disability

§9.60 (3) For Person With a Disability

Code of Civil Procedure §373 does not distinguish between persons with a disability on the basis of party status. For both plaintiffs and defendants, the petition for appointment is made by a relative or friend or any other party to the action, and the court may appoint on its own motion. CCP §373(c).

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2. Time to File Petition

§9.61 a. For Minor Plaintiff

When a minor is a plaintiff, the petition for appointment of guardian ad litem is filed and presented to a judge before, or at the same time as, the complaint is filed and the appointment must be made before a summons is issued. CCP §373(a). This requirement is not jurisdiction al, however, and appointment after summons issues cures the defect. *Estate of Cahill* (1887) 74 C 52, 15 P 364.

PRACTICE TIP: Filing the petition for appointment of a guardian ad litem at the same time the complaint is filed enables the pleader to (1) anticipate the appointment and allege it in the complaint, thus precluding a demurrer for lack of capacity to sue (see CCP §430.10(b)), and (2) use the same caption on the petition that is used on the complaint, thus avoiding confusion over filing fees, which can arise when different captions are used. See §9.88 for a petition form.

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§9.62 b. For Minor Defendant

The petition to appoint a guardian ad litem for a minor defendant should not be filed until after a summons has been served. See CCP §373(b). The court has no jurisdiction to appoint a guardian before the summons has been served on the minor (*Johnston v San Francisco Sav. Union* (1883) 63 C 554, 562; *Weisfeld v Superior Court* (1952) 110 CA2d 148, 242 P2d 29), and a judgment against the minor in that situation may be disaffirmed (see §9.54) unless the right to do so has been waived (see §9.55).

PRACTICE TIP: If the minor is 14 or older, petitioning within 10 days after service of summons forestalls the plaintiff from petitioning for appointment of a guardian for the defendant. See §9.59.

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§9.63 c. For Person With a Disability

Although the Code of Civil Procedure does not say so, it appears that the rules on timing minor plaintiffs' and defendants' petitions for appointment of guardians ad litem (see §§9.61-9.62) apply to petitions to appoint guardians ad litem for persons with a disability. See 4 Witkin, California Procedure, *Pleading* §75 (5th ed 2008).

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§9.64 3. Form and Content of Petition

Appointment of a guardian ad litem is sought by "application" (CCP §373), usually in the form of a written petition to the court. See *Emeric v Alvarado* (1884) 64 C 529, 594, 2 P 418. No notice is required for the petition and no form is prescribed. See 4 Witkin, California Procedure, *Pleading* §76 (5th ed 2008).

NOTE: Local rules or practice may preclude oral or informal application except in rare instances.

The written petition should be verified and prepared in the form of a declaration under penalty of perjury so that the statements it contains can be taken as evidence supporting the ex parte issuance of the appointment. For verification of pleadings, see chap 15. The petition should show:

- The birthdate (or age) of the ward (*i.e.,* whether younger or older than 14 years);
- The nature of any disability or of any determination of disability (see *Sarracino v Superior Court* (1974) 13 C3d 1, 118 CR 21), whether a guardian of the estate was appointed, and reasons the latter should or should not be appointed guardian ad litem (including any failure or refusal of general guardian to act);
- The ward's desire to sue, or the date on which the ward was served with summons;
- The nature of the claim on which the action is based;
- The status of the petitioner (*e.g.,* minor age 14 or older, parent, relative, guardian of the estate, party needing to have guardian appointed for the defendant);
- The identity, status, and competence to serve of the nominated guardian (*e.g.,* parental, other relationship; time and place of appointment as guardian of ward's estate);
- The consent of a 14-year-old or of a person with a disability who is capable of consenting (see *Sarracino v Superior Court, supra*; Prob C §3613); and
- The consent of the nominee.

See forms, Petitions for Appointment of Guardian Ad Litem, in §§9.88-9.89.

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§9.65 4. Filing and Serving Petition and Proposed Order

A petition for appointment of guardian ad litem must be filed with the court in which the action or proceeding is to be prosecuted or is pending. CCP §372(a). The court clerk with whom the petition is filed can tell the attorney when and how it should be taken to a judge of the court to obtain the judge's signature on the attached order.

It has been held that a guardian ad litem is duly appointed simply by entry of a minute order. See *Foley v Northern Cal. Power Co.* (1913) 165 C 103, 130 P 1183. The better practice, however, is to prepare and file with the petition a written order for the judge to sign.

The order issues without conditions; notice to opposing parties is not required (*Granger v Sherriff* (1901) 133 C 416, 65 P 873; but see *In re Sara D.* (2001) 87 CA4th 661, 104 CR2d 909 (in Welf & I C §300 proceeding, parent's right to due process requires notice and opportunity to be heard before guardian ad litem appointed)), and the guardian ad litem need not take an oath (see *Jones v Alameda* (1927) 85 CA 607, 259 P 976), furnish a bond, or receive letters of guardianship (*Estate of Hathaway* (1896) 111 C 270, 43 P 754).

The petition and the order need not, but may, be served on other parties. It is customary to allege in the pleading that a guardian ad litem has been duly appointed.

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C. Powers and Duties of Guardian Ad Litem

§9.66 1. Introduction; Ethical Considerations

The powers of guardians ad litem are more restricted than are those of a general guardian and are limited strictly to matters connected with the proceedings in which they are appointed. See *Walters v Superior Court* (1933) 129 CA 19, 18 P2d 343. Their power to appear for the ward and manage the suit is exclusive. *In re Price* (1923) 61 CA 592, 215 P 710. Guardians ad litem are agents with limited powers, however, and their acts with reference to matters outside the litigation are void.

The guardian should be active and diligent in marshaling all facts regarding the ward's case, and should make certain that these facts are presented in a manner that best protects the ward's interests. See *Leonardini v Wells Fargo Bank & Union Trust Co.* (1955) 131 CA2d 9, 280 P2d 81. The guardian should not perform requisite duties in a perfunctory or inconclusive manner, or merely file an appearance and then stand by inactive. *Wogman v Wells Fargo Bank & Union Trust Co.* (1954) 123 CA2d 657, 267 P2d 423.

WARNING: If a trial court decision favorable to the ward is appealed, it seems clear that the guardian has a duty to oppose the appeal. It is less clear whether the guardian has the duty to appeal an adverse trial court decision. See *Guardianship of Walters* (1949) 93 CA2d 208, 208 P2d 713. The guardian and attorney should weigh this matter carefully, keeping in mind that the real party in interest (the minor incompetent) cannot authorize an appeal or agree to pay fees and costs.

The guardian ad litem owes a high degree of loyalty to the ward and should not have any interest even slightly adverse to the ward or any divided loyalties. See §9.57. When actions of the guardian ad litem are fraudulent, the minor or person with a disability is not bound by the guardian's actions and consent to judgment. *Newport v Hatton* (1924) 195 C 132, 231 P 987.

As an appointee and agent of the court, a guardian ad litem may have benefit of quasi-judicial immunity for acts taken within the scope of this authority. *Ward v San Diego County Dep't of Soc. Servs.* (ND Cal 1988) 691 F Supp 238; *D. G. v Superior Court* (1979) 100 CA3d 535, 161 CR 117.

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§9.67 2. Power to Employ Attorney

Guardians ad litem have authority to employ an attorney to prosecute or defend a ward's case, but not the power to bind the minor or the person with a disability to a contract or agreement to pay a specified fee to the attorney. See Fam C §6602 (attorney contract for legal services rendered to minor void unless approved by court). This rule applies to persons with a disability as well as minors. *Stafford v Superior Court* (1934) 1 C2d 321, 34 P2d 998.

When the minor or person with a disability is a plaintiff, the practice is simply for the guardian to employ counsel at a fee to be set by the court. The court ordinarily approves the fee and deducts it from the plaintiff's recovery at the close of litigation. See §9.75.

When the minor or person with a disability is a defendant, however, and the cost of employing counsel is to be charged to the ward's estate, the practice is to petition for an order authorizing employment of an attorney at a reasonable fee. A contingent fee contract also requires court approval. See, *e.g., In re Price* (1923) 61 CA 592, 215 P 710. Prob C §2644. For a petition form, see §9.91.

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§9.68 3. Power to Conduct Litigation

The primary duty of a guardian ad litem is to represent the ward in the subject litigation. *Morris v Standard Oil Co.* (1923) 192 C 343, 348, 219 P 998. The guardian's powers to direct, manage, and control the litigation are exclusive (*In re Price* (1923) 61 CA 592, 215 P 710), but limited. The guardian has the power to bind the ward in procedural steps of the litigation (*Cloud v Market St. Ry.* (1946) 74 CA2d 92, 168 P2d 191), but may not, without court approval, admit or stipulate matters that adversely affect the ward's interest (*Berry v Chaplin* (1946) 74 CA2d 652, 169 P2d 442).

In *Regency Health Servs. v Superior Court* (1998) 64 CA4th 1496, 76 CR2d 95, the trial court ruled that only the actual party was required to sign answers to interrogatories and that, because the plaintiff was incompetent, she was exempt from responding. The court of appeal held that the guardian ad litem had the responsibility to facilitate compliance with the ward's discovery obligations, including conducting a reasonable investigation to obtain and furnish responsive information and to verify the responses.

A minor's statements to a guardian ad litem in response to questions asked at the request of the minor's attorney, either for the purpose of preparing answers to interrogatories or to assist the attorney in preparation for trial, are protected from disclosure by the attorney-client privilege. *De Los Santos v Superior Court* (1980) 27 C3d 677, 166 CR 172. The court in *De Los Santos* held that the guardian was "reasonably necessary" for the transmission of the information to the lawyer for the accomplishment of the purpose for which the lawyer was consulted.

The failure of the guardian ad litem of a minor (who was rendered permanently incompetent through another's fault) to commence litigation within 1 year after the guardian's appointment will not prevent commencement of a lawsuit when the minor reaches majority. *Tzolov v International Jet Leasing, Inc.* (1991) 232 CA3d 117, 283 CR 314.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/ 4. Power to Compromise Claim/§9.69 a. Statutory Authority

4. Power to Compromise Claim

§9.69 a. Statutory Authority

Code of Civil Procedure §372(a) provides that on approval of the court in which the action or proceeding is pending, the guardian ad litem may:

- Compromise the claim or demand;
- Agree to entry of an order or judgment for or against the ward;
- Satisfy any order or judgment in favor of the ward; or
- Release or discharge any claim of the ward under a compromise.

See also CCP §373.5 (guardian ad litem for unborn or unascertained persons).

On the right of a parent or guardian to compromise a claim in favor of the minor or person with a disability before suit is brought, see Prob C §3500.

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b. Procedures

§9.70 (1) Contents of Petition

Under Cal Rules of Ct 3.1384(a), a petition for court approval to compromise the claim of a minor or a person with a disability under CCP §372(a) or Prob C §3500 must comply with Cal Rules of Ct 7.950-7.952. The petition must be verified and must contain a full disclosure of all information that has any bearing on the reasonableness of the compromise, covenant, settlement, or disposition. Cal Rules of Ct 7.950 (petition must be prepared on Judicial Council Form MC-350, Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Person with a Disability).

California Rules of Court 7.951 requires that, when the plaintiff is represented by counsel, the petition must also disclose the attorney's interest in the petition to compromise a claim. Rule 7.951 further lists the information that the petition must disclose.

In certain circumstances, an expedited petition may be submitted for approval. Cal Rules of Ct 7.950.5 (petitioner must fully complete Judicial Council Form MC-350EX, Expedited Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Person With a Disability).

When the case involves a personal injury claim, it is good practice, and required by some courts, to attach to the petition a copy of a recent medical report. The petition should be verified or in the form of a declaration. See form in §9.92.

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§9.71 (2) Hearing

Although not required (*Burge v City & County of San Francisco* (1953) 41 C2d 608, 262 P2d 6), an ex parte hearing on the petition for approval of compromise is commonly held by the court. If a hearing is held, both the guardian ad litem (or, for a compromise under Prob C §3500, the person representing the minor or person with a disability) and the minor or person with a disability must be present, unless excused for good cause. The court may require evidence on the merits of the claim and, in a personal injury compromise, evidence on the nature and extent of injury, care, treatment, and hospitalization, as well as the presence and testimony of the attending physician. Cal Rules of Ct 7.950; Judicial Council Form MC-350.

The court must determine an expedited petition without a hearing unless the petitioner requests one at the same time that:

- The plaintiff files the expedited petition;
- An interested party files an objection; or
- The court schedules a hearing, either on its own motion or because it decides not to grant the expedited petition in full.

Cal Rules of Ct 7.950.5(c).

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§9.72 (3) Distribution of Award

Any money awarded to a minor or a person with a disability under a court-approved settlement or judgment must be paid in accordance with Prob C §§3600-3612. CCP §372(a). See also CCP §373.5 (stating that distribution of funds from settlements or judgments in favor of unborn or unascertained persons are also governed by Prob C §§3600-3612). These sections provide that from the total award the court shall order paid such reasonable expenses (medical or otherwise, including reimbursement to a parent or guardian), costs, and attorney fees as the court approves.

If the settlement or judgment does not exceed $20,000, and there is no general guardian, the court *may* (Prob C §3611):

- Require that the balance of the funds be deposited in an insured account in a financial institution in California, or with a county treasurer (under certain conditions), or in a single premium deferred annuity, subject to withdrawal only on court order;
- Require appointment of a general guardian to receive the funds or property;
- Require that the balance of any money be paid to a special needs trust;
- Prescribe other conditions that the court considers are in the best interests of the ward;
- Require that the remaining balance be deposited with the county treasurer;
- In the case of a minor, require that the money be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act (Prob C §§3900-3925);
- In the case of a minor, require that the property or money be placed in a trust revocable by the minor on reaching age 18; or
- Require that the remaining balance or other property be delivered to the person with a disability.

If the funds or property exceed $20,000, the court *must* adopt one of the above procedures. In either event, the court may prescribe such other conditions as it considers to be in the best interests of the ward.

When settlement or judgment does not exceed $5000, the court may order payment directly to a parent of the minor or the person with a disability on terms and conditions specified in Prob C §§3400-3402. Prob C §3611(e).

Funds deposited subject to withdrawal on court order may be withdrawn on ex parte petition by the trustee of the account. The court in which the action is pending normally retains jurisdiction over the funds until the minor reaches age 18 (Prob C §3612) or until the person with a disability attains capacity and the court terminates jurisdiction. Prob C §3612. Some counties have printed forms for withdrawal requests.

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D. Terminating Appointment; Compensation

§9.73 1. Procedures

When the litigation ends, the guardian ad litem's duties automatically terminate. The duties do not include collection of funds, or custody of money or property of the ward. These duties are performed by a guardian or conservator of the estate, whom the court may appoint specifically for this purpose, or as otherwise ordered by the court. CCP §372(a); Prob C §3601. See also *In re Price* (1923) 61 CA 592, 215 P 710.

Termination may also occur during litigation on petition by (1) the guardian or some other interested person (*e.g.,* on grounds of conflict of interest; see §9.57) or (2) the minor or person with a disability who has since attained capacity and wishes to personally conduct the litigation (see §9.74).

A petition to terminate a guardianship should be set for hearing with notice of the hearing given to all persons as provided in Prob C §1460(b)(5). See Prob C §1601.

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§9.74 2. Termination When Ward Attains Majority or Competence

When a guardian is appointed solely because of a person's minority, the guardianship is terminated by adoption or emancipation of the minor or by the minor's having attained majority (18 years of age). Prob C §1600. Although §1600 implies that termination of the minor's guardianship is automatic on emancipation or attainment of majority, the better practice is to petition the court for an order of termination. See §§9.73 (text), 9.94 (form).

Conservatorships continue until terminated by the court or until the death of the conservatee. Prob C §1860.

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§9.75 3. Compensation

Code of Civil Procedure §372(a), which provides for appointment and duties of guardians ad litem generally, is silent on the subject of compensation.

Code of Civil Procedure §373.5, which permits appointment of a guardian ad litem to represent a class of unascertained or unknown persons or persons not in being who may have an interest in property under a written agreement, provides that the guardian is entitled to reasonable compensation for services rendered and to reimbursement for expenses reasonably incurred. Compensation is paid either from the property or by the plaintiff or petitioner, as ordered by the court. If paid by the plaintiff or petitioner, execution may issue on behalf of the guardian. CCP §373.5.

PRACTICE TIP: A guardian ad litem might ask for compensation and reimbursement under the provisions of the Probate Code for compensating guardians generally. See Prob C §2623 and Prob C §2640 on procedure and compensation, including the unavailability of compensation in certain circumstances. The amount would be determined by the facts of each case and be within the discretion of the court. *Estate of Schluter* (1930) 209 C 286, 286 P 1008. See also *Guardianship of Ewing* (1941) 42 CA2d 629, 109 P2d 748; *Guardianship of Forthmann* (1931) 118 CA 332, 5 P2d 472.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/ VI. FORMS/ A. Claims Against Public Entities/§9.76 1. Form: Claim Against Public Entity

VI. FORMS

A. Claims Against Public Entities

§9.76 1. Form: Claim Against Public Entity

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Claimant, _ _[*name*]_ _

Claim of _ _[*name*]_ _	**)**	**CLAIM FOR** _ _[*E.G., INJURY*
against	**)**	*TO PROPERTY*]_ _
_ _[*Name of entity*]_ _	**)**	
	)	
	)	
_____	**)**	

To _ _[*title of governing body*]_ _ **of** _ _[*name of entity*]_ _**:**

1. Claimant, _ _[*name*]_ _**, whose address is** _ _[*specify*]_ _**, claims damages from** _ _[*name of entity*]_ _ **in** _ _[*the amount of $_ _ _ _ _ _/an amount that exceeds $10,000*]_ _ **for** _ _[*e.g., injury to claimant's personal property, namely* _ _[*describe*]_ _]_ _**.**

2. Jurisdiction over this claim would rest in _ _[*superior*]_ _ **court.**

3. This claim is based on _ _[*state nature, date, and place of occurrence or transaction*]_ _ **under the following circumstances:**

[*Briefly describe in series of short paragraphs circumstances entitling claimant to recover from entity*]

4. _ _[*Claimant does not know the names of the public employees who caused claimant's* _ _[*injury/damage/loss*]_ _*/The public employees who caused claimant's* _ _[*injury/damage/loss*]_ _ *are:* _ _[*List names*]_ _]_ _**.**

5. The _ _[*injury/damage/loss*]_ _ **sustained by claimant consists of** _ _[*specify*]_ _**.**

6. The _ _[*injury/damage/loss*]_ _ **expected to be incurred in the future includes** _ _[*specify*]_ _**.**

7. All notices and communications concerning this claim should be sent to _ _[*attorney's name and address*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (present to entity); ___ copies (check entity rules to determine whether to present multiple copies); ___ office copies.

Comment: See discussion of contents in §9.9. A competent adult claimant may sign the claim. If the claimant's attorney or a parent or guardian signs the claim, the relationship to the claimant should be noted below the signature.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.77 2. Form: Application for Leave to Present Late Claim

§9.77 2. Form: Application for Leave to Present Late Claim

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Claimant, _ _[*name*]_ _

Claim of _ _[*name*]_ _	**)**	**APPLICATION FOR LEAVE TO**
against	**)**	**PRESENT LATE CLAIM (GOVT**
_ _[*Name of entity*]_ _	**)**	**C §911.4)**
	)	
	)	
_____	**)**	

To _ _[*title of governing body*]_ _ **of** _ _[*name of entity*]_ _**:**

1. Claimant, _ _[*name*]_ _**, applies under Government Code §911.4 for leave to present the claim that is attached to and presented with this application.**

2. On _ _[*date cause of action accrued*]_ _**, claimant acquired a cause of action against** _ _[*name of entity*]_ _ **for** _ _[*state general nature of cause of action*]_ _**. The date, place, and circumstances giving rise to this cause of action are set forth in the attached claim.**

3. Claimant has not presented this claim earlier for the following reasons: _ _[*State reasons; see §9.25*]_ _**.**

4. All notices and communications concerning this claim should be sent to _ _[*attorney's name and address*]_ _**.**

WHEREFORE, claimant asks that you grant this application, deem the attached claim to have been presented on your receipt of this application, and act on the claim as required by Government Code §911.6.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (present to entity); ___ copies (check entity rules to determine whether to present multiple copies); ___ office copies.

Comment: See discussion of contents in §9.25. It appears that, like the claim itself, the application may be signed by the claimant (if a competent adult) or by an attorney, parent, or guardian on the claimant's behalf.

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§9.78 3. Form: Petition for Leave to File Civil Action

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**PETITION FOR LEAVE TO FILE CIVIL ACTION AGAINST PUBLIC ENTITY (GOVT C §946.6);** _ _[*SUPPORTING MEMORANDUM;*]_ _
_ _[*Name of entity*]_ _, **Defendant(s)**	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	[*In limited civil case, add: Amount demanded* _ _[*exceeds/does not exceed*]_ _ *$10,000*]

_ _[*Name*]_ _ **declares:**

1. Claimant, _ _[*name*]_ _**, petitions the Court for an order permitting** _ _[*her/him/it*]_ _ **to commence and pursue a civil action against respondent,** _ _[*name of entity*]_ _**.**

2. On _ _[*date cause of action accrued*]_ _**, claimant acquired causes of action against respondent under the circumstances described in the attached claim, a copy of which, marked Exhibit** _ _**, is incorporated in this petition.**

3. On _ _[*date late claim application was presented to entity*]_ _**, claimant presented to respondent, by** _ _[*means by which application was made*]_ _**, the attached claim and the attached application for leave to present late claim, a copy of which, marked Exhibit** _ _**, is incorporated in this petition. This application was denied by respondent on** _ _[*date*]_ _**, by** _ _[*e.g., notice of rejection dated* _ _[*specify*]_ _*/failure to act on the claim or the application*]_ _**.**

4. The grounds for issuance of the order sought by this petition are: _ _[*Specify grounds; see §9.28*]_ _**.**

5. _ _[*Continue declarant's statements*]_ _**.**

This petition is based on the attached documents and exhibits, including _ _[*specify any not already described*

by title and date, e.g., the declaration of _ _[name]_ _, dated _ _[specify]_ _, and on any evidence received at the hearing]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one or more for entity); ___ office copies.

Comment: See §§9.27-9.28 on timing and contents of petition. The petition may be drafted in the form of a declaration under penalty of perjury to ensure that the court gives evidentiary weight to its contents.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.79 4. Form: Order Permitting Suit to Be Filed

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER PERMITTING SUIT TO**
vs	)	**BE FILED**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _

The petition of _ _[*name*]_ _ for an order permitting _ _[*him/her/it*]_ _ to file suit against respondent, _ _[*name of entity*]_ _, was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. Petitioner be authorized to commence, within 30 days, a civil action against respondent.

2. Petitioner be relieved from the requirements of Government Code §945.4.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for entity); ___ office copies.

Comment: See §§9.27-9.28 on late claim relief and chap 12 on use of proposed orders and formal requirements.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.80 5. Form: Allegation in Complaint: Compliance With Claim Requirement

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On _ _[*date*]_ _**,** _ _[*plaintiff/cross-complainant*]_ _ **presented a claim for the** _ _[*injury/damage/loss*]_ _ **that is the basis of this action to** _ _[*name of entity*]_ _**. On** _ _[*date*]_ _**, that claim** _ _[*was rejected in its entirety/was allowed to the extent of $*_ _ _ _ _ _ *but otherwise rejected/had not been acted on and was thus deemed to have been rejected*]_ _**.**

Comment: A complaint that fails to allege compliance with an applicable claim requirement is demurrable for failure to state a cause of action. See §9.5.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/ B. Suing Professionals/§9.81 1. Form: Notice of Intention to Sue Health Care Provider

B. Suing Professionals

§9.81 1. Form: Notice of Intention to Sue Health Care Provider

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

NOTICE OF INTENTION TO COMMENCE ACTION

To _ _[*name of health care provider*]_ _**:**

PLEASE TAKE NOTICE that _ _[*name(s) of plaintiff(s)*]_ _ **intend(s) to commence an action against you as a defendant, based on your professional negligence, 90 or more days after the date of this notice. The action will be based on allegations that you and other defendants negligently diagnosed and treated** _ _[*name(s) of plaintiff(s) or decedent*]_ _**, causing bodily injury** _ _[*and death*]_ _**.**

[*Specify for each injured plaintiff*]

At the present time, the injuries to _ _[*name of plaintiff*]_ _ **include:** _ _[*Specify nature of injuries*]_ _**.**

Detriment and loss sustained by _ _[*name of plaintiff*]_ _ **include:**

1. Medical and related expenses _ _[*in the amount of $_ _ _ _ _ _/in an amount over $_ _ _ _ _ _/in an amount not yet fully ascertained*]_ _ _ _[*plus expenses reasonably certain to be incurred in the future*]_ _]_ _**.**

2. Impairment of earning capacity _ _[*in the amount of $_ _ _ _ _ _/in an amount over $_ _ _ _ _ _/in an amount not yet fully ascertained*]_ _ _ _[*plus loss reasonably certain to be incurred in the future*]_ _]_ _**.**

3. Loss and expense of services _ _[*in the amount of $_ _ _ _ _ _/in an amount over $_ _ _ _ _ _/in an amount not yet fully ascertained*]_ _ _ _[*plus loss reasonably certain to be incurred in the future*]_ _]_ _**.**

4. Pain, suffering, emotional distress, and impairment of enjoyment of life.

[*Add if appropriate*]

5. Detriment and loss sustained by _ _[*name of plaintiff's spouse*]_ _ **include loss of consortium.**

[*Add for each decedent*]

[6.] Detriment and loss sustained by _ _[*names of decedent's heirs*]_ _ **include** _ _[*e.g., loss of financial support, services, contributions, gifts, society, comfort, companionship, care, training, and advice*]_ _ **from** _ _[*name of decedent*]_ _**, plus funeral and burial expense in the amount of $**_ _ _ _ _ _**.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (one copy, or separate original, for each known defendant); ___ copies for service (one for each other party and the Medical Board of California or the Board of Podiatric Medicine, as applicable); ___ office copies.

Comment: See §§9.31-9.32. Presumably, the notice could be in the form of a letter to each defendant or typed as a court paper. Code of Civil Procedure §§364-365 do not indicate that the notice must be signed, but it probably should *not* be signed by the plaintiff in order to avoid being confronted with a statement or an omission in the notice at deposition or trial.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/ 2. Suit Against Architect, Engineer, or Surveyor/§9.82 a. Form: Certificate of Merit

2. Suit Against Architect, Engineer, or Surveyor

§9.82 a. Form: Certificate of Merit

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**CERTIFICATE OF MERIT**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

_ _[*Name*]_ _ **declares:**

1. I am the attorney for plaintiff, _ _[*name*]_ _, in this action.

2. This action is one for damages arising from professional negligence.

3. I have reviewed the facts of this case and consulted with and received an opinion from at least one _ _[*insert category of professional consulted*]_ _ _ _[*who is licensed to practice and* _ _[*practices in* _ _[*name of state*]_ _/*who teaches at an accredited college or university*]_ _ **as to whether the** _ _[*defendant/cross-defendant*]_ _, _ _[*name*]_ _**, was negligent in performing the professional services.**

4. The _ _[*category of professional consulted*]_ _ **is not a party to the litigation.**

5. I reasonably believe that the _ _[*category of professional consulted*]_ _ **is knowledgeable about the issues relevant to this action.**

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each defendant served with the complaint); ___ office copies.

Comment: See §9.33.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading

paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.83 b. Form: Certificate of Reliance on Res Ipsa Loquitur or Failure to Inform

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**CERTIFICATE OF RELIANCE**
vs	)	**ON** _ _[*RES IPSA*
	)	*LOQUITUR*]_ _ _ _[*AND ON*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*FAILURE TO INFORM*]_ _ **(CCP §411.35(d))**
_____	)	

_ _[*Name*]_ _ **declares:**

1. I am the attorney for plaintiff, _ _[*name*]_ _**, in this action.**

2. This action is one for damages arising from professional negligence.

3. A certificate of merit is not required because plaintiff intends to rely solely on _ _[*the doctrine of res ipsa loquitur*]_ _ _ _[*and on defendant* _ _[*name*]_ _*'s failure to inform plaintiff of the consequences of a procedure*]_ _**.**

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each defendant served with complaint); ___ office copies.

Comment: This certificate must be filed when the complaint is filed, in contrast to the certificate of merit, which must be filed on or before the service of the complaint. See §9.33.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.84 c. Form: Certificate of Impending Impairment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	**CERTIFICATE OF IMPENDING IMPAIRMENT (CCP §411.35(b)(2))**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

_ _[*Name*]_ _ **declares:**

1. I am the attorney for plaintiff, _ _[*name*]_ _, in this action.

2. This action is one for damages arising out of professional negligence.

3. I am unable to obtain a consultation with a _ _[*category of professional to be consulted*]_ _ as required by Code of Civil Procedure §411.35 before the applicable statute of limitations, _ _[*CCP §___*]_ _, will impair this action.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each defendant served with complaint); ___ office copies.

Comment: See §9.33.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.85 d. Form: Certificate of Inability to Obtain Consultation

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**CERTIFICATE OF INABILITY TO OBTAIN CONSULTATION (CCP §411.35(b)(3))**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

_ _[*Name*]_ _ **declares:**

1. I am the attorney for plaintiff, _ _[*name*]_ _**, in this action.**

2. This action is one for damages arising from professional negligence.

3. I have made three separate good faith attempts with three separate _ _[*category of professional to be consulted*]_ _ **to obtain a consultation as required by Code of Civil Procedure §411.35.**

4. None of the _ _[*category of professional to be consulted*]_ _ **contacted would agree to a consultation.**

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each defendant served with complaint); ___ office copies.

Comment: See §9.33.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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C. Claims Against Estates

§9.86 1. Form: Allegation in Complaint: Compliance With Claim Requirement

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_ _[*Name of obligor/tortfeasor*]_ _ **died on or about** _ _[*date*]_ _**.** _ _[*Name of personal representative*]_ _ **was thereafter duly appointed, and is now acting, as the** _ _[*executor/administrator*]_ _ **of the** _ _[*will/estate*]_ _ **of that decedent.**

On _ _[*date*]_ _**, plaintiff,** _ _[*name*]_ _**,** _ _[*presented to* _ _[*name of personal representative*]_ _*/filed with the clerk of* _ _[*name of court in which will is probated or estate is administered*]_ _]_ _ **a written, verified claim for the relief demanded in this action.** _ _[*A copy of that claim, marked Exhibit A, is attached to and incorporated in this complaint.*]_ _

[*Option 1: If claim is actually rejected*]

On _ _[*date*]_ _**, plaintiff received written notice that the claim had been rejected by the personal representative.**

[*Option 2: If time to reject has elapsed without action by personal representative*]

More than 30 days have elapsed from the _ _[*presentation/filing*]_ _ **of that claim and the personal representative has failed to take any action on it. Plaintiff hereby elects to treat the claim as rejected by the personal representative.**

Comment: The foregoing allegation may be used in a complaint to show compliance with decedent's estate claim presentation requirements. See §9.40. A complaint in an action against a decedent's estate that fails to allege compliance or excuse from compliance with applicable claim presentation requirements fails to state a cause of action. See §9.41. For further discussion of allegations, see 1 California Decedent Estate Practice §§12.48-12.61 (Cal CEB 1986).

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.87 2. Form: Creditor's Claim (Probate) (Judicial Council Form DE-172)

§9.87 2. Form: Creditor's Claim (Probate) (Judicial Council Form DE-172)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:	TELEPHONE AND FAX NOS.:	*FOR COURT USE ONLY*
ATTORNEY FOR *(Name)*:		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
ESTATE OF *(Name)*: DECEDENT		
CREDITOR'S CLAIM		CASE NUMBER:

You must file this claim with the court clerk at the court address above before the LATER of (a) four months after the date letters (authority to act for the estate) were first issued to the personal representative, or (b) sixty days after the date the *Notice of Administration* was given to the creditor, if notice was given as provided in Probate Code section 9051. You must also mail or deliver a copy of this claim to the personal representative and his or her attorney. A proof of service is on the reverse.
WARNING: Your claim will in most instances be invalid if you do not properly complete this form, file it on time with the court, and mail or deliver a copy to the personal representative and his or her attorney.

1. Total amount of the claim: $
2. Claimant *(name)*:
   a. ☐ an individual
   b. ☐ an individual or entity doing business under the fictitious name of *(specify)*:
   c. ☐ a partnership. The person signing has authority to sign on behalf of the partnership.
   d. ☐ a corporation. The person signing has authority to sign on behalf of the corporation.
   e. ☐ other (specify):
3. Address of claimant *(specify)*:
4. Claimant is ☐ the creditor ☐ a person acting on behalf of creditor *(state reason)*:
5. ☐ Claimant is ☐ the personal representative ☐ the attorney for the personal representative.
6. I am authorized to make this claim which is just and due or may become due. All payments on or offsets to the claim have been credited. Facts supporting the claim are ☐ on reverse ☐ attached.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME AND TITLE) ▶ (SIGNATURE OF CLAIMANT)

INSTRUCTIONS TO CLAIMANT

A. On the reverse, itemize the claim and show the date the service was rendered or the debt incurred. Describe the item or service in detail, and indicate the amount claimed for each item. Do not include debts incurred after the date of death, except funeral claims.
B. If the claim is not due or contingent, or the amount is not yet ascertainable, state the facts supporting the claim.
C. If the claim is secured by a note or other written instrument, the original or a copy must be attached *(state why original is unavailable.)* If secured by mortgage, deed of trust, or other lien on property that is of record, it is sufficient to describe the security and refer to the date or volume and page, and county where recorded. *(See Prob. Code, § 9152.)*
D. Mail or take this original claim to the court clerk's office for filing. If mailed, use certified mail, with return receipt requested.
E. Mail or deliver a copy to the personal representative and his or her attorney. Complete the *Proof of Mailing or Personal Delivery* on the reverse.
F. The personal representative or his or her attorney will notify you when your claim is allowed or rejected.
G. Claims against the estate by the personal representative and the attorney for the personal representative must be filed within the claim period allowed in Probate Code section 9100. See the notice box above.

(Continued on reverse)

Print

ESTATE OF *(Name)*: DECEDENT	CASE NUMBER:

FACTS SUPPORTING THE CREDITOR'S CLAIM

☐ **See attachment** ***(if space is insufficient)***

Date of item	Item and supporting facts	Amount claimed
	TOTAL:	**$**

PROOF OF ☐ **MAILING** ☐ **PERSONAL DELIVERY** **TO PERSONAL REPRESENTATIVE**

(Be sure to mail or take the original to the court clerk's office for filing)

1. I am the creditor or a person acting on behalf of the creditor. At the time of mailing or delivery I was at least 18 years of age.
2. My residence or business address is *(specify)*:

3. I mailed or personally delivered a copy of this *Creditor's Claim* to the personal representative as follows *(check either a or b below):*
   a. ☐ **Mail**. I am a resident of or employed in the county where the mailing occurred.
      (1) I enclosed a copy in an envelope AND
         (a) ☐ **deposited** the sealed envelope with the United States Postal Service with the postage fully prepaid.
         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
      (2) The envelope was addressed and mailed first-class as follows:
         (a) Name of personal representative served:
         (b) Address on envelope:
         (c) Date of mailing:
         (d) Place of mailing *(city and state)*:
   b. ☐ **Personal delivery**. I personally delivered a copy of the claim to the personal representative as follows:
      (1) Name of personal representative served:
      (2) Address where delivered:
      (3) Date delivered:
      (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____

(TYPE OR PRINT NAME OF CLAIMANT) (SIGNATURE OF CLAIMANT)

Copies: Original (file with court clerk); copies for service (one for each defendant served with complaint); office

copies.

Comment: See §9.48.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/ D. Appointing Guardians Ad Litem/§9.88 1. Form: Petition for Appointment of Guardian Ad Litem for Plaintiff

D. Appointing Guardians Ad Litem

§9.88 1. Form: Petition for Appointment of Guardian Ad Litem for Plaintiff

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM FOR PLAINTIFF**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	[*In limited civil case, add: Amount demanded* _ _[*exceeds/does not exceed*]_ _ *$10,000*]

Petitioner, _ _[*name*]_ _**, declares:**

1. I am _ _[*a minor over age 14, born on* _ _[*date*]_ _*, and am the plaintiff in this action/identify petitioner, showing any relationship to ward*]_ _**.**

[*Add if petitioner is not plaintiff*]

2. Plaintiff, _ _[*name of ward*]_ _**, is** _ _[*e.g., a minor under age 14/a person with a disability as defined in Prob C §3603 who is unable, without assistance, to conduct this proceeding*]_ _**, born** _ _[*date*]_ _**.**

[*Continue*]

[3.] Plaintiff has a cause of action against defendant, _ _[*name*]_ _**, arising from** _ _[*briefly state facts giving rise to proceeding*]_ _**.**

[4.] No previous petition for appointment of a guardian ad litem has been filed in this matter.

[*Add if appropriate*]

_ _[*Name*]_ _ **was appointed** _ _[*guardian of the estate/conservator*]_ _ **for plaintiff by the Superior Court of** _ _ _ _ _ _ **County on** _ _[*date*]_ _**, but has** _ _[*declined/failed*]_ _ **to pursue this claim.**

[*Continue*]

[5.]_ _[*I am/Name of proposed guardian ad litem is*]_ _ **qualified to serve as guardian ad litem for plaintiff for**

the following reasons: _ _[*Specify*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

[*Add if ward is age 14 or older or is a person with a disability who is capable of consenting*]

I consent to the appointment of _ _[*name*]_ _ as my guardian ad litem in this proceeding.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

[*Add if proposed guardian ad litem is not petitioner*]

CONSENT

I consent to act as guardian ad litem for _ _[*name of minor or person with a disability*]_ _ in the above action.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (present to judge for signature of attached order, then file); ___ office copies.

Comment: See §9.64 on contents of petition and §9.65 on filing and service.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.89 2. Form: Petition for Appointment of Guardian Ad Litem for Defendant

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM FOR DEFENDANT**
_ _[*Name; see Comment*]_ _**,** **By** _ _[*name*]_ _**,** _ _[*his/her*]_ _ **guardian ad litem, et al.,** **Defendant(s)**	)	[*In limited civil case, add: Amount demanded* _ _[*exceeds/does not exceed*]_ _ *$10,000*]

Petitioner, _ _[*name*]_ _**, declares:**

1. I am _ _[*a minor over age 14, born* _ _[*date*]_ _*/identify petitioner, showing any relationship to ward*]_ _**.**

[*Add if petitioner is not defendant*]

2. Defendant, _ _[*name of ward*]_ _**, is** _ _[*e.g., a minor under age 14/a person with a disability who is unable, without assistance, to defend this proceeding*]_ _**, born** _ _[*date*]_ _**.**

[*Continue*]

[3.]_ _[*I have/Name of ward has*]_ _ **been named as a defendant in this action for** _ _[*briefly state nature of claim*]_ _**.**

[4.] No previous petition for appointment of a guardian ad litem has been filed in this matter.

[*Add if appropriate*]

_ _[*Name*]_ _ **was appointed as** _ _[*guardian of the estate/conservator*]_ _ **for defendant by the Superior Court of** _ _ _ _ _ _ **County on** _ _[*date*]_ _**, but has** _ _[*declined/failed*]_ _ **to defend this action.**

[*Continue*]

[5.]_ _[*I am/Name of proposed guardian ad litem is*]_ _ **qualified to serve as guardian ad litem for defendant for the following reasons:** _ _[*Specify*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

[*Add if ward is age 14 or older or is person with disability who is capable of consenting*]

I consent to the appointment of _ _[*name*]_ _ as my guardian ad litem in this proceeding.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

[*Add if proposed guardian ad litem is not petitioner*]

CONSENT

I consent to act as guardian ad litem for _ _[*name of minor or person with disability*]_ _ in the above action.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (present to judge for signature of attached order, then file); ___ office copies.

Comment: See §9.64 on contents of petition and §9.65 on filing and service. If a defendant other than the ward was named first in the complaint, that name should precede the ward's in the caption.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.90 3. Form: Order Appointing Guardian Ad Litem

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*See §§9.88-9.89*]_ _)	**No. _ _ _ _ _ _**
)	
)	**ORDER APPOINTING**
)	**GUARDIAN AD LITEM FOR**
_____)	_ _[*E.G., PLAINTIFF*]_ _

The petition of _ _[*name*]_ _ for appointment of a guardian ad litem for _ _[*name*]_ _ having been considered, satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*Name of proposed guardian ad litem*]_ _ be appointed guardian ad litem for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, in this _ _[*action/proceeding*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ office copies.

Comment: See §9.65 on obtaining order appointing guardian ad litem.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.91 4. Form: Petition by Guardian Ad Litem for Authorization to Employ Attorney and for Approval of Fee; Order

§9.91 4. Form: Petition by Guardian Ad Litem for Authorization to Employ Attorney and for Approval of Fee; Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*See §§9.88-9.89*]_ _	)	**No. _ _ _ _ _ _**
	)	
	)	**PETITION FOR**
	)	**AUTHORIZATION TO EMPLOY**
	)	**ATTORNEY AND FOR**
	)	**APPROVAL OF FEE; ORDER**
_____	)	

_ _[*Name*]_ _ **asks the Court to issue the order attached to this petition and declares:**

1. By order of this Court dated _ _[*specify*]_ _**, I was appointed guardian ad litem for** _ _[*e.g., plaintiff*]_ _, _ _[*name of ward*]_ _**. This order has not been revoked, and I am now acting as guardian ad litem.**

2. _ _[*I am informed and believe that* _ _[*name of ward*]_ _ *has a valid* _ _[*cause of action/defense*]_ _ *and that*]_ _ _ _[*it/lt*]_ _ **is necessary to employ an attorney to protect the interests of** _ _[*name of ward*]_ _ **in this proceeding.**

3. _ _[*Name of attorney*]_ _ **is a qualified attorney at law, is entitled to practice law in the courts of this state, and has agreed to represent** _ _[*name of ward*]_ _ **in this proceeding for the fee noted below.**

[*Add if appropriate*]

4. A reasonable fee for legal services in this action is $_ _ _ _ _ _. I have entered into a contract, subject to approval of this Court, for a reasonable attorney fee for legal services to be rendered by _ _[*name of attorney*]_ _ **in this action. A copy of this contract is attached to this petition, marked Exhibit _ _ and incorporated by reference.**

[*Continue*]

[5.]_ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Guardian ad Litem

ORDER

The Court, having considered the petition of _ _[*name*]_ _ as guardian ad litem for _ _[*name*]_ _, _ _[*a minor/a person with a disability*]_ _ and a _ _[*plaintiff/defendant*]_ _ in this action, for an order authorizing the employment of an attorney and for approval of that attorney fee, and good cause appearing,

IT IS ORDERED that:

1. Petitioner be authorized, as guardian ad litem for _ _[*name of ward*]_ _, to employ _ _[*name of attorney*]_ _ to represent _ _[*him/her*]_ _ in _ _[*pursuing/defending*]_ _ this action.

2. Petitioner be further authorized to pay to _ _[*name of attorney*]_ _ for _ _[*his/her*]_ _ legal services _ _[*e.g., the amount of $_ _ _ _ _ _/the fee provided for in the contract attached to the petition and incorporated in it by reference*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §9.67 on obtaining order authorizing employment of attorney and for approval of fee.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.92 5. Form: Petition for Order Authorizing Compromise of Claim

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff**	)	**No.** _ _ _ _ _ _
By _ _[*name*]_ _, _ _[*his/her*]_ _ **guardian ad litem**	)	**PETITION UNDER CCP §372 FOR ORDER AUTHORIZING COMPROMISE OF** _ _[*MINOR/ PERSON WITH DISABILITY*]_ _**'S CLAIM; ORDER**
vs	)	
_ _[*Name(s)*]_ _, **Defendant**	)	
	)	[*In limited civil case, add:*
	)	**Amount demanded**
	)	_ _[*exceeds/does not exceed*]_ _ **$10,000**]
_____	)	

_ _[*Name*]_ _ **declares:**

1. I am the regularly appointed guardian ad litem for plaintiff in this action, _ _[*name*]_ _, _ _[*a minor/ person with a disability*]_ _**.**

2. Plaintiff is a _ _**-year-old** _ _[*male/female*]_ _**, born** _ _[*date*]_ _**.**

3. Plaintiff has a claim for damages for _ _[*e.g., personal injury from an automobile accident that occurred on* _ _[*date*]_ _*, at* _ _[*location*]_ _]_ _**. As a result of these events, plaintiff has sustained injury and damages as follows:** _ _[*Specify nature of injuries and damages*]_ _**.**

4. Plaintiff received the following treatment for _ _[*his/her*]_ _ **injuries:** _ _[*List names of doctors and hospitals; briefly describe treatment*]_ _**. I am informed and believe that plaintiff has completely recovered from these injuries and that there is no permanent injury** _ _[*except as follows:* _ _[*Specify*]_ _]_ _**. A copy of the most recent medical report obtained from plaintiff's attending physician is attached to this petition, marked Exhibit** _ _ **and incorporated by reference.**

5. Defendant, _ _[*name*]_ _**, has offered to pay $**_ _ _ _ _ _ **in consideration of a dismissal with prejudice and a full release in this matter. I believe that this settlement is fair and reasonable and in plaintiff's best interests. I understand** _ _[*, and it has been explained to plaintiff,*]_ _ **that if the proposed settlement is approved plaintiff will be barred from seeking further compensation in the future** _ _[*even if* _ _[*his/her*]_ _ *injuries prove to be more serious than they are now thought to be*]_ _**.**

6. The following costs and fees have been incurred in this matter and should be paid from the proceeds of the settlement: _ _[*Itemize expenses paid or incurred and attorney fees*]_ _**. The balance of the settlement**

proceeds, $_ _ _ _ _ _, is to be _ _[*state requested disposition, e.g., deposited in the Union Central Bank, Main Street Branch, in the name of petitioner as trustee for plaintiff, and is not to be withdrawn without first obtaining a court order*]**_ _. It is requested that no bond be required of petitioner when serving as trustee.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Guardian ad Litem

Copies: Original (present to judge for signature, then file with signed order); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§9.69-9.72 on petitioning for approval of compromise. This form may be adapted for use when a minor or person with a disability is a defendant. The petition is heard ex parte (see chap 13). This form may also be used by a parent or guardian to settle a claim under Prob C §3500 for which suit has not been filed. The caption would read: "IN THE MATTER OF _ _[*NAME*]_ _, _ _[*A MINOR/A PERSON WITH A DISABILITY*]_ _." An initial filing fee would be payable on filing. The contents of the petition are the same as in a petition filed under CCP §372(a). See §9.70. On statutory requirements for distribution of settlement proceeds to a minor or person with a disability, see §9.72.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.93 6. Form: Order Approving Compromise of Claim of Minor or Person with a Disability

§9.93 6. Form: Order Approving Compromise of Claim of Minor or Person with a Disability

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff**	**No.** _ _ _ _ _ _
By _ _[*name*]_ _, _ _[*his/her*]_ _ **guardian ad litem**	**ORDER APPROVING COMPROMISE OF** _ _[*MINOR/ PERSON WITH DISABILITY*]_ _**'S CLAIM**
vs	
_ _[*Name(s)*]_ _, **Defendant**	

The petition of _ _[*name*]_ _**, as guardian ad litem for plaintiff,** _ _[*name*]_ _**,** _ _[*a minor/ a person with a disability*]_ _**, for an order approving the proposed compromise of plaintiff's claim against defendant,** _ _[*name*]_ _**, was heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. The compromise be approved.

2. On payment of $_ _ _ _ _ _ **in the manner provided below, defendant be fully released and discharged from all claims of plaintiff arising from the facts set forth in the petition.**

3. The proceeds of the settlement be disbursed as follows:

a. _ _[*Itemize payments authorized to be made from settlement proceeds, e.g., to Allen & Black, Attorneys-at-Law, for legal services rendered, $*_ _ _ _ _ _*, and for costs advanced, $*_ _ _ _ _ _*; to Dr. John Smith, for medical services rendered, $*_ _ _ _ _ _]_ _**.**

b. The balance of $_ _ _ _ _ _ **is to be** _ _[*state disposition, e.g., deposited in the Union Central Bank, Main Street Branch, in the name of petitioner as trustee for plaintiff, together with a certified copy of this order, and is not to be withdrawn without first obtaining a court order. Bond is hereby waived*]_ _**.**

4. On receipt of the full amount of the settlement, petitioner be authorized and directed to execute and deliver to defendant:

a. A complete final release and discharge of all claims of plaintiff arising from the facts set forth in the petition.

b. A properly executed dismissal of this action with prejudice.

5. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__

Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §9.72 on orders compromising wards' claims.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/9 Prelitigation Claims, Notices, and Petitions for Guardians Ad Litem/§9.94 7. Form: Petition for Order Terminating Appointment of Guardian Ad Litem

§9.94 7. Form: Petition for Order Terminating Appointment of Guardian Ad Litem

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*See §§9.88-9.89*]_ _)	**No.** _ _ _ _ _ _
)	
)	**PETITION FOR ORDER**
)	**TERMINATING APPOINTMENT**
)	**OF GUARDIAN AD LITEM;**
)	_ _[*ORDER*]_ _
_____)	

_ _[*Name*]_ _ **asks the Court to terminate** _ _[*the appointment of* _ _[*name*]_ _/_ _[*his/her*]_ _ *appointment as guardian ad litem*]_ _ _ _[*and to discharge* _ _[*him/her*]_ _ *from any further duty or obligation*]_ _ **and declares:**

1. I am _ _[*describe status, e.g., the plaintiff, defendant, guardian ad litem for plaintiff*]_ _ **in this action.**

2. This is an action for _ _[*state nature, e.g., personal injuries arising from an automobile accident that occurred on* _ _[*date*]_ _*, near* _ _[*location*]_ _]_ _**.**

3. The complaint in this action was filed on _ _[*date*]_ _**. At that time,** _ _[*e.g., I/plaintiff/defendant*]_ _ **was** _ _[*state facts showing incapacity, e.g., a* _ _*-year-old minor, born* _ _[*date*]_ _]_ _**.**

4. On _ _[*date*]_ _**, this Court appointed** _ _[*name*]_ _ **as guardian ad litem for** _ _[*e.g., me/the above-named minor*]_ _**.**

5. _ _[*State reasons termination is requested, e.g., I am now age 18/On* _ _[*date*]_ _**,** *plaintiff was declared mentally competent by court order. A copy of the order is attached to this petition and incorporated by reference.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (present to judge for signature, then file with signed order); ___ copies for service (one for each other party); ___ office copies.

Comment: See §9.73 on petitioning for termination of guardianship.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§9.95 8. Form: Order Terminating Appointment of Guardian Ad Litem

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]**_ _**

_ _[*See §§9.88-9.89*]**_ _**	**)**	**No. _ _ _ _ _ _**
	)	
	)	**ORDER TERMINATING**
	)	**APPOINTMENT OF**
_____	**)**	**GUARDIAN AD LITEM**

The petition of _ _[*name*]**_ _ for an order terminating the appointment of _ _**[*name*]**_ _ as guardian ad litem for _ _**[*e.g., plaintiff*]**_ _, _ _**[*name*]**_ _, was heard at the above date and time. Appearing as attorneys were: _ _**[*List names of attorneys and parties represented by each*]**_ _.**

Satisfactory proof having been made that _ _[*state reasons for termination, e.g., petitioner is now age 18/on _ _*[*date*]**_ _**, *plaintiff was declared mentally competent by court order, a copy of which is attached to this petition and incorporated by reference*]**_ _, and good cause appearing,**

IT IS ORDERED that:

1. _ _[*Name*]**_ _ be discharged from all obligations as guardian ad litem for _ _**[*e.g., plaintiff*]**_ _ in this action.**

2. _ _[*Name*]**_ _'s duty and authority to represent _ _**[*e.g., plaintiff*]**_ _ be terminated.**

3. _ _[*State any additional orders*]**_ _.**

Date: _ _ _ _ _ _ **__**[*Signature*]**__**
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §9.73 on orders terminating guardianships ad litem.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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10

Fee Waiver

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I. INTRODUCTION

§10.1 A. Scope of Chapter

This chapter discusses applications to waive court fees and costs when a litigant cannot afford them. It covers the nature of relief and the persons entitled (see §§10.9-10.8), and waiver at the trial level (see §§10.9-10.38). See forms in §§10.39-10.45. On waiver of fees and costs at the appellate level, see California Civil Appellate Practice, Chap 7 (3d ed Cal CEB 1996).

NOTE: Proceeding without paying court fees and costs is also known as proceeding "in forma pauperis" (in the manner of a poor person).

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§10.2 B. Governing Law

Fee waiver applications are governed by Govt C §§68630-68641. Applicants must use the procedures and forms specified by the Judicial Council for fee waiver applications. See Govt C §68633(a)-(c); Cal Rules of Ct 3.50-3.58. The forms are contained in Cal Rules of Ct App A.

California Rules of Court 3.55-3.58 specify several types of fees that must or may be waived. The list, however, is not exclusive, and a request for waiver of fees not specifically covered may be based on common law principles, on other statutory authorities, and on constitutional principles.

A number of other specific statutory sections afford relief to indigent litigants in particular contexts. See, *e.g.,* CCP §§995.240, 1029.5-1029.6 (codifying right to waiver of various bonds and undertakings); CCP §1094.5(a) (providing transcripts for indigents seeking review of agency decisions through administrative mandamus); Govt C §15421 (providing for appointment of appellate counsel to indigents in capital cases and specified noncapital appeals); Welf & I C §366.26(f)(2) (providing for appointment of counsel to indigents in proceedings to terminate parental rights). See also Bus & P C §§8030.2, 8031 (shorthand reporting services).

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II. NATURE OF RELIEF; PERSONS ENTITLED

§10.3 A. Persons Eligible for Fee Waiver

Under Govt C §68632, there are three ways in which an applicant is eligible for an initial fee waiver. See §§10.8-10.6. The standards apply at both the trial and appellate stages. The manner in which an applicant qualifies can affect the scope of relief available.

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§10.4 1. Receipt of Specified Government Benefits

The court must grant a fee waiver to an applicant who receives benefits under one of the following governmental programs:

- Supplemental Security Income (SSI) and State Supplemental Payments (SSP) programs (Welf & I C §§12200-12205);
- California Work Opportunity and Responsibility to Kids Act (CalWORKs) (Welf & I C §§11200-11526.5) (formerly AFDC);
- Federal Tribal Temporary Assistance for Needy Families (Tribal TANF) (Welf & I C §10553.2);
- Food Stamp program (7 USC §§2011-2029);
- California Food Assistance Program (Welf & I C §§18930-18935);
- County Relief, General Relief, or General Assistance programs (Welf & I C §§17000-17501);
- Cash Assistance Program for Aged, Blind, and Disabled Legal Immigrants (CAPI) (Welf & I C §§18937-18943);
- In-Home Supportive Services (IHSS) (Welf & I C §§12300-12317.2);
- Medi-Cal (Welf & I C §§14000-14029.5).

See Govt C §68632(a).

The above list of government benefit programs is exclusive; receipt of other types of aid, *e.g.*, retirement or disability social security income, and veterans benefits, does not automatically confer a right to fee waiver. Applicants receiving aid from programs other than those named above must qualify for fee waiver by meeting the criteria discussed in §§10.5-10.6.

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§10.5 2. Income Near Poverty Level

The court must also grant an initial fee waiver to an applicant whose income is no more than 125 percent of the current official poverty guidelines. Govt C §68632(b). The federal poverty guidelines, which are geared to family size and geographic location, are published annually in the Federal Register by the Department of Health and Human Services. The monthly equivalents of these annual guidelines are published by the Judicial Council on the Request to Waive Court Fees (Judicial Council Form FW-001), reproduced in §10.36.

PRACTICE TIP: Because Judicial Council revision and publication of the Request to Waive Court Fees (Judicial Council Form FW-001) sometimes lag behind changes in the federal guidelines, counsel should be sure that the form is both current and consistent with the latest federal guidelines.

The income levels reflected on the Request to Waive Court Fees (Judicial Council Form FW-001) refer to the combined monthly gross income of the family, not just the income of the individual applicant. Although "family" is not defined, it presumably refers only to residential family members sharing household expenses; the income of relatives not providing support to the applicant or the applicant's household should not affect the applicant's right to fee waiver. See current Department of Health and Human Services poverty guidelines in the Federal Register.

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§10.6 3. Common Necessaries of Life

The court must grant an initial fee waiver to a litigant who, as individually determined by the court, "cannot pay court fees without using moneys that normally would pay for the common necessaries of life for the applicant and the applicant's family." Govt C §68632(c). The applicant must complete a financial statement on the application form showing (Govt C §68633(c)(2)):

- Monthly income and expenses; and
- A summary of assets and liabilities.

For Request to Waive Court Fees (Judicial Council Form FW-001), see §10.39.

The applicant need not show that he or she is entirely destitute but must show more than that payment of the fee would be burdensome or inconvenient. *Ferguson v Keays* (1971) 4 C3d 649, 94 CR 398. The applicant is not required to save funds for a period of months, simply to pay the fees. *Earls v Superior Court* (1971) 6 C3d 109, 117, 98 CR 302.

PRACTICE TIP: If eligibility seems likely to be questioned, counsel should provide an attachment to the application, citing any relevant authorities to show the client's inability to pay costs without sacrificing some other necessity. Factors taken into account when establishing eligibility for free legal services or for governmental benefit programs may provide useful analogies for arguing indigency. See, *e.g.,* 45 CFR §1611.5.

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§10.7 B. Special Rules for State and County Inmates

A person sentenced to a state prison or confined in a county jail must pay the full amount of trial court filing fees and costs. Govt C §68635(b). Although inmates with the means to pay must do so, no inmate may be prohibited from filing or appealing a civil action because of the inability to pay the filing fee. Govt C §68635(h). He or she must follow the procedures designed to ensure that prison labor income is applied to waived court fees. Govt C §68635.

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§10.8 C. Indigent Litigant Suing on Behalf of Nonindigent Real Party in Interest

A representative indigent litigant, suing or defending for the benefit of a nonindigent real party in interest, *e.g.,* an executor or administrator suing on behalf of an estate or a guardian on behalf of a ward, is not allowed to waive fees. See *Isrin v Superior Court* (1965) 63 C2d 153, 156, 45 CR 320.

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§10.9 D. Waivable Fees and Costs

California Rules of Court 3.55 and 3.56 set forth two categories of costs that must or may be waived for litigants entitled to an initial fee waiver. These categories may be roughly characterized as:

- Those necessary for or incidental to early prosecution or defense of the action (Cal Rules of Ct 3.55); and
- Those incurred in bringing the action to trial (Cal Rules of Ct 3.56).

NOTE: The initial waiver of court fees and costs may be granted at any stage of the proceedings and includes the fees and costs specified in both Cal Rules of Ct 3.55 and 3.56. Govt C §68631; Cal Rules of Ct 3.50(b). The term "initial" fee waiver is used because this waiver may later be modified, withdrawn, or retroactively denied if the court determines that the applicant was not or is no longer eligible for a fee waiver. See Govt C §68631; Cal Rules of Ct 3.50(a).

Separate Judicial Council forms are provided for seeking waiver of each category of costs. Cal Rules of Ct 3.51. Requests for relief other than waiver of court costs and fees, such as waiver of a bond or appointment of counsel, are usually addressed by noticed motion.

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§10.10 1. Fees Waivable at Initial Application

To establish the right to initial fee waiver, a litigant must file an application on Request to Waive Court Fees (Judicial Council Form FW-001), reproduced in §10.39. Cal Rules of Ct 3.51. Granting the application automatically waives the following costs and fees (Cal Rules of Ct 3.55):

- Filing fees;
- Clerk's fees for reasonably necessary certifications and copying;
- Clerk's fees for issuance of process and certificates;
- Clerk's fees for transmittal of papers;
- Court-appointed interpreter's fees for parties in small claims actions;
- Sheriff's and marshal's fees as provided for in Govt C §§26720-26750, which include fees for service of process and levies;
- Reporter's fees for attendance at hearings and trials held within 60 days of the date of the order granting the application;
- Court fees for telephone appearances under Govt C §367.5; and
- Clerk's fees for preparing, copying, certifying, and transmitting clerk's transcript on appeal.

The list of fees in Cal Rules of Ct 3.55 is not exclusive. For example, in *Villa v Superior Court* (1981) 124 CA3d 1063, 177 CR 752, the court of appeal held that the portion of a filing fee representing a $7 library fee amounted to "clerk's fees for filing papers" and was within the class of fees and costs that was waivable. In addition, an indigent pursuing a mandamus action in superior court may be entitled to a free transcript of the administrative proceedings. *Board of Med. Quality Assur. v Superior Court* (1988) 203 CA3d 691, 250 CR 182.

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§10.11 2. Fees Waivable on Additional Application

If a waiver of fees and costs other than those provided for in Cal Rules of Ct 3.55 is needed, a Request to Waive Additional Court Fees (Superior Court) (Judicial Council Form FW-002), reproduced in §10.41, must be used. Cal Rules of Ct 3.51, 3.56. The additional fees and costs that may be waived under Cal Rules of Ct 3.56 include:

- Jury fees and expenses;
- Court-appointed interpreter's fees for witnesses;
- Witness fees for peace officers whose attendance is reasonably necessary;
- Reporter's fees for attendance at hearings and trials held more than 60 days after the date of the order granting the original application;
- Witness fees of court-appointed experts; and
- Other fees and expenses itemized in the application. Cal Rules of Ct 3.56.

The court has discretion under Cal Rules of Ct 3.56 to approve only the additional costs and fees it finds necessary. If the court has not previously granted an initial fee waiver, a Request to Waive Court Fees (Judicial Council Form FW-001) should be submitted along with the Request to Waive Additional Court Fees (Superior Court) (Judicial Council Form FW-002) to provide the court with the information necessary to determine the applicant's financial eligibility for waiver of costs and fees.

PRACTICE TIP: When preparing a Request to Waive Additional Court Fees, counsel may attach a memorandum to support waiver for extraordinary items.

Waiver of costs and fees covered by a Request to Waive Additional Court Fees (Superior Court) (Judicial Council Form FW-002) may be had even if the party has paid initial filing fees.

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§10.12 3. Bonds and Undertakings

A plaintiff who has been granted in forma pauperis status has the right to a waiver of an undertaking. *Alshafie v Lallande* (2009) 171 CA4th 421, 434, 89 CR3d 788. A bond requirement can be waived without a formal fee waiver application, even if the litigant is able to pay initial court fees. See *Conover v Hall* (1974) 11 C3d 842, 852, 114 CR 642 (preliminary injunction bond).

Relief from the requirement to post a bond is usually addressed in the context of a motion to require, or a hearing to set, the amount of the bond or undertaking. If an initial fee waiver has not already been granted, a Request to Waive Court Fees (Judicial Council Form FW-001) (see §10.39) should be submitted in connection with the motion proceedings requesting waiver of the bond so that the court may determine financial eligibility.

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§10.13 4. Appointed Counsel

In limited situations, due process may entitle an indigent civil litigant to appointed counsel. *Salas v Cortez* (1979) 24 C3d 22, 154 CR 529. When there is no statutory provision for payment of fees, some courts have held that counsel may be called on to serve without compensation. *County of Tulare v Ybarra* (1983) 143 CA3d 580, 192 CR 49; *County of Los Angeles v Superior Court* (1980) 102 CA3d 926, 162 CR 636; *County of Fresno v Superior Court* (1978) 82 CA3d 191, 196, 146 CR 880.

PRACTICE TIP: Judicial Council forms are not suited for requesting appointment of counsel, and the request should probably be made by way of a specially prepared ex parte application or motion. If initial fee waiver has not already been established, a Request to Waive Court Fees (Judicial Council Form FW-001), see §10.39, should be submitted with the request for appointment of counsel.

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§10.14 5. No Waiver of Third Party Fees

The right to fee waiver relieves a party only from "public exactions." *County of Sutter v Superior Court* (1966) 244 CA2d 770, 772, 53 CR 424. Private persons, *e.g.,* an opposing party or official court reporter, are not required to pay out their own money or its equivalent to provide free services. *Roberts v Superior Court* (1968) 264 CA2d 235, 239, 70 CR 226. Nor, in most cases, is the county required to pay third party fees. See *Rucker v Superior Court* (1930) 104 CA 683, 286 P 732.

In actions handled by qualified legal services projects or by a pro bono attorney whose client was referred by a qualified project, the client may qualify to be reimbursed from the statewide "Transcript Reimbursement Fund" for the cost of deposition and trial or appellate transcripts. Bus & P C §§8030.2-8031.

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III. PROCEDURE FOR APPLYING FOR FEE WAIVER

A. Applying for Waiver

§10.15 1. Mandatory Application Forms

A litigant must use the mandatory fee waiver application forms adopted by the Judicial Council. See Request to Waive Court Fees (Judicial Council Form FW-001), reproduced in §10.36; Request to Waive Additional Court Fees (Superior Court) (Judicial Council Form FW-002), reproduced in §10.41. The clerk must provide these forms to an applicant free of charge. Govt C §68633(d); Cal Rules of Ct 3.51. No applicant is required to complete any form as part of his or her application under Cal Rules of Ct 3.50-3.58 other than forms adopted by the Judicial Council (see Govt C §§68633(d)), except as authorized by Govt C §68635(c) (inmate's statement of account).

NOTE: At the time of application, the applicant is not required to provide documents proving income, dependents, or expenses. Govt C §68633(c)(2). The applicant is also not required to provide evidence of identity, to submit to interviews regarding financial circumstances, or to be physically present when filing the application. Govt C §68633(c)(2). The court may later require proof of benefits or financial information to verify eligibility. Govt C §68633(e).

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§10.16 2. Attorney Advancing Litigation Costs

If the applicant is represented by an attorney under an agreement that counsel will advance litigation costs, the applicant must indicate that agreement in the application. Govt C §68633(g). The court must set a hearing to determine whether or not the applicant is able to pay the court fees without using moneys that normally would pay for the common necessaries of life. Govt C §68633(g). Applicants represented by a qualified legal services project do not need to include this information in their application. Govt C §68633(g). The fact that the applicant is represented by counsel under a contingent fee contract is not a ground for denying relief. *Garcia v Santana* (2009) 174 CA4th 464, 471, 94 CR3d 299.

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§10.17 3. Attaching Order Form

When submitting either application for initial waiver, the applicant should also submit a proposed Order on Court Fee Waiver (Judicial Council Form FW-003), reproduced in §10.37. The caption and items 1-3, showing the name and address of the applicant, the applicant's lawyer, if the applicant has one, and the date on which the application was filed, should be filled in; the remainder will be filled in by the court when it acts on the application.

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§10.18 4. Confidentiality

The application and the information in it must be kept confidential; only specified court personnel and persons authorized by the applicant or by court order are given access to the form, and they may disclose information in it only as provided by law or court order. Govt C §68633(f); Cal Rules of Ct 3.54(a). Access may be sought by noticed motion supported by a declaration showing good cause for release of the confidential information. Cal Rules of Ct 3.54(b). A court order granting access may limit the persons who may access the information and the use of information after it has been released. Cal Rules of Ct 3.54(c).

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§10.19 B. When and Where to File

The application for initial fee waiver should be filed at the time, or before, the indigent's first pleading is filed at the superior court. The clerk must accept the application for initial fee waiver for filing; if the applicant submits an incomplete application, the clerk may request that the applicant supply the omitted information, but the clerk still must file the application. Govt C §68634(b). The clerk cannot request that the applicant furnish information that is not required on the application form, or provide documents to support the information other than those required under Govt C §68633. Govt C §68634(b). If the application is presented with the initial pleading, the clerk must file the pleading, without charging any fee. See Govt C §68634(c).

PRACTICE TIP: Because some clerks are unaware of these obligations, it is useful to take a copy of the court rules and statutory provisions when filing pleadings for which a fee waiver has been requested.

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§10.20 C. Court Review and Determination

The court may delegate to the clerk the authority to grant applications that meet the eligibility and application requirements of Govt C §§68632 and 68633, but the clerk may not deny or partially grant an application. Govt C §68634(d). The application must be considered and determined without regard to the substance of the pleadings filed. Govt C §68634(e). After reviewing the application, the court will issue an order granting or denying the request for initial fee waiver. Govt C §68634(e); Cal Rules of Ct 3.54.

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§10.21 1. Application Granted

The court must grant the application if the information provided establishes that the applicant meets the eligibility criteria and application requirements of Govt C §§68632 and 68633. Govt C 68634(e)(1); Cal Rules of Ct 3.52(1). The order granting an application must be made on Order on Court Fee Waiver (Superior Court) (Judicial Council Form FW-003) (see §10.42) (Cal Rules of Ct 3.52(2)) or, prior to January 1, 2013, on a substantially identical electronically generated court order (Cal Rules of Ct 3.52(6)). The order must be accompanied by a blank Notice of Improved Financial Situation or Settlement (Judicial Council Form FW-010), which is reproduced in §10.41 (see §10.30).

The application is deemed granted unless the court gives notice of action on the application within 5 days after it is filed. Govt C §68634(f); Cal Rules of Ct 3.53. If the application is deemed granted, the court clerk must prepare and serve a Notice: Waiver of Court Fees (Superior Court) (Judicial Council Form FW-005) (see form in §10.38) 5 court days after the application is filed. Cal Rules of Ct 3.53.

PRACTICE TIP: Once an initial fee waiver is granted, it is good practice to obtain certified copies of the order to present when filing subsequent pleadings, when requesting a sheriff or marshall to serve process, or when requesting subsequent relief. Having these copies in hand will eliminate the need to obtain the court file each time proof of fee waiver is in issue. The cost of a reasonable number of certified copies is waived by grant of the application. Cal Rules of Ct 3.55(2).

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§10.22 2. Partial Payments and Installments

After notice and an opportunity to be heard, the court may require an applicant seeking waiver of fees under the common necessaries of life to pay a portion of court fees, or to pay court fees over a period of time or under some other equitable arrangement. Govt C §68634(e)(5).

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§10.23 3. Application Denied

If the court denies the application in whole or in part, the applicant has 10 days after the date that notice is given by the clerk in which to pay fees and costs already incurred, unless the applicant submits a new application or requests a hearing within that time. Govt C §68634(g). If the applicant does not pay within 10 days, the clerk must void the papers that were filed without payment of the court fees and costs. Govt C §68634(g).

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§10.24 a. Application Is Incomplete

The court may deny the application if the application is incomplete. Govt C §68634(e)(2). The court must give the applicant notice of the specific reason for denial and a reasonable opportunity to submit a revised application. Govt C §68634(e)(2). The order denying an application must be made on Order on Court Fee Waiver (Superior Court) (Judicial Council Form FW-003) (see §10.42) (Cal Rules of Ct 3.52(2)) or, prior to January 1, 2013, on a substantially identical electronically generated court order (Cal Rules of Ct 3.52(6)).

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§10.25 b. Information Conclusively Establishes Applicant Is Ineligible for Fee Waiver

The court may deny the application if the information provided on the application conclusively establishes that the applicant is not eligible for an initial fee waiver under Govt C §68632 on the grounds requested. Govt C §68634(e)(3). The court must give the applicant notice of the specific reason for denial and a reasonable opportunity to request a hearing. Govt C §68634(e)(3). See *Cruz v Superior Court* (2004) 120 CA4th 175, 14 CR3d 917 (trial court must hold hearing before denying applicant's fee waiver request when there is substantial evidentiary conflict). The order (see form in §10.42) must be accompanied by a blank Request for Hearing About Fee Waiver Order (Superior Court) (Judicial Council Form FW-006), reproduced in §10.44. Cal Rules of Ct 3.52(5). The applicant may submit additional information at the hearing. Govt C §68634(e)(3).

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§10.26 4. Eligibility Hearings

The court may set an eligibility hearing to determine whether the applicant may receive a fee waiver. At an eligibility hearing the court cannot require information unrelated to the eligibility criteria or application requirements in Govt C §§68632 and 68633. Govt C §68634(e).

The court must give a written statement of reasons if it denies an application in whole or in part. Govt C §68634(e)(5).

An order determining an application after a hearing must be made on Order on Court Fee Waiver After Hearing (Superior Court) (Judicial Council Form FW-008), reproduced in §10.40. Cal Rules of Ct 3.52(3).

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§10.27 a. Veracity of Statements in Application

The court may set an eligibility hearing if it has good reason to doubt the veracity of the factual statements in the application. Govt C §68634(e)(4). The court must give the applicant 10 days notice of the hearing and the specific reason that it doubts the veracity of the factual statements. Govt C §68634(e)(4). The court may require that the applicant provide specified, reasonably available, additional information concerning the truthfulness of the factual statements in the application. Govt C §68634(e)(4).

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§10.28 b. Information Does Not Conclusively Establish Applicant Is Eligible for Fee Waiver

The court may also set an eligibility hearing if the information provided on the application does not establish that the applicant meets the requirements but that information does not conclusively establish that the applicant is *not* eligible for an initial fee waiver on the grounds requested. Govt C §68634(e)(5). The court must give the applicant 10 days notice of the hearing and the specific reason why the court has not granted the application. Govt C §68634(e)(5). The court may require that the applicant provide specified, reasonably available, additional information. Govt C §68634(e)(5).

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§10.29 5. Applicant Request for Hearing

If an application is denied in whole or in part, the applicant may request a hearing under Govt C §68634(e). Govt C §68634(g). An applicant who wishes to challenge an adverse ruling or who has additional information bearing on the grounds for denial may seek reconsideration of the application from the judge or commissioner who made the order. A final order denying fee waiver relief is not appealable but may be reviewed by writ of mandate. *Haglund v Superior Court* (1982) 139 CA3d 256, 188 CR 627. See CCP §1085.

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§10.30 IV. CHANGED CIRCUMSTANCES

A litigant who received an initial fee waiver relief must notify the court within 5 days of any changes in financial condition, including receipt or the promised payment of moneys in settlement, that affect his or her ability to pay costs and fees that were initially waived. Govt C §68636(a). See Notice to Court of Improved Financial Situation or Settlement (Judicial Council Form FW-010), reproduced in §10.41.

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§10.31 A. Before Final Disposition of the Case

If before final disposition of the case the court obtains information suggesting that the litigant is not entitled or is no longer entitled to a fee waiver, the court may order the person to appear for an eligibility hearing. Govt C §68636(b). The court must provide the litigant 10 days written notice of the hearing and the specific reasons why the initial fee waiver might be reconsidered. Govt C §68636(b). See Notice to Appear for Reconsideration of Fee Waiver (Judicial Council Form FW-011), reproduced in §10.48. The court may require the litigant to provide reasonably available evidence, including financial information, to support his or her eligibility for the fee waiver, but it cannot require information unrelated to the eligibility criteria. Govt C §68636(b). The court can only conduct such a hearing once every 6 months. Govt C §68636(b).

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§10.32 B. At Final Disposition of the Case

At the time of final disposition of the case, the court may give notice that a litigant whose fees and costs were initially waived is required to appear at a court hearing by giving the applicant no less than 10 days written notice of the hearing. Govt C §68636(c). See Notice to Appear for Reconsideration of Fee Waiver (Judicial Council Form FW-011), reproduced in §10.48. The court may require the litigant to provide reasonably available evidence, including financial information, to support his or her eligibility for the fee waiver, but it cannot require information unrelated to the eligibility criteria. Govt C §68636(c).

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§10.33 C. Retrospective Application of Fees

If the court determines that the litigant was not entitled to the initial fee waiver at the time it was granted, the court may order the waiver withdrawn retroactively. Govt C §68636(d). The court may order the litigant to pay to the court immediately, or over a period of time, all or part of the fees that were initially waived. Govt C §68636(d). The court must give the litigant at least 10 court days to begin paying the fees. Govt C §68636(d). See Order on Court Fee Waiver After Reconsideration Hearing (Superior Court) (Judicial Council Form FW-012), reproduced in §10.49.

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§10.34 D. Prospective Application of Fees

If the court determines that the litigant's financial circumstances have changed since the grant of the initial fee waiver or partial initial fee waiver, the court may order the fee waiver withdrawn prospectively from the time that the litigant no longer was eligible for a fee waiver. Govt C §68636(e). The court may also order the litigant to pay to the court immediately, or over a period of time, all or part of the fees that were waived since the time that the litigant was no longer eligible for a fee waiver. Govt C §68636(e). The court may order the litigant to begin paying all or part of the court fees assessed for future activities in the case. Govt C §68636(e). The court must give the litigant at least 10 court days to begin paying the fees. Govt C §68636(e). See Order on Court Fee Waiver After Reconsideration Hearing (Superior Court) (Judicial Council Form FW-012), reproduced in §10.49.

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§10.35 E. Bad Faith

If the court obtains information that suggests that a litigant whose fees and costs were initially waived is obtaining court services in bad faith, for an improper purpose (*e.g.,* harassment), or to needlessly increase the costs of litigation, the court may give notice that the litigant is required to appear at a court hearing to consider whether limitations should be placed on court services for which fees were initially waived. Govt C §68636(f). See Notice to Appear for Reconsideration of Fee Waiver (Judicial Council Form FW-011), reproduced in §10.42; Order on Court Fee Waiver After Reconsideration Hearing (Superior Court) (Judicial Council Form FW-012), reproduced in §10.49.

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V. REIMBURSEMENT OF FEE WAIVER

§10.36 A. Judgment in Favor of Party Granted Waiver

If a party granted a waiver is the prevailing party under CCP §1032, the court must issue an order that the party against whom the judgment or dismissal is entered is required to pay to the court the amount of the waived fees and costs. Govt C §68637(b)(1). A satisfaction of judgment may not be obtained until the order has been satisfied. Govt C §68637(b)(1). This rule does not apply to unlawful detainer or certain family law cases, or if the nonprevailing party was also initially awarded a fee waiver. Govt C §68637(b)(3).

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§10.37 B. Settlement Recovery of $10,000 or More

If the party granted a waiver recovers $10,000 or more from a settlement, compromise, mediation, arbitration award, or other recovery, the waived fees and costs must be paid to the court out of the recovery. Govt C §68637(c). The court has a lien on the recovery in the amount of the waived fees and costs. Govt C §68637(c)(1). The party must first pay the waived fees and costs to the court before the party receives anything of value out of the recovery. Govt C §68637(c)(2). The court may refuse to enter a petition for dismissal in the case until the lien is satisfied. Govt C §68637(c)(4).

An initial fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case. Govt C §68639.

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§10.38 VI. Sanctions and Costs Against Party Granted Waiver

Fee waiver litigants are held to the same standard of conduct as are other litigants and may be sanctioned for discovery abuses or frivolous litigation. *Midwife v Bernal* (1988) 203 CA3d 57, 249 CR 708.

An indigent who has had fees waived is liable for costs as a nonindigent. See *Fuller v State* (1969) 1 CA3d 664, 670, 82 CR 78 (dictum); *County of Sutter v Superior Court* (1966) 244 CA2d 770, 772, 53 CR 424 (dictum).

PRACTICE TIP: Counsel may ask the court not to assess costs against an indigent party. It appears to be the practice of some courts in some situations not to do so.

In a trial de novo held after arbitration, costs may be awarded against an indigent only as an offset to awarded damages. CCP §1141.21(b), (c). When appropriate, counsel may object to imposition of costs on a fee waiver litigant through a motion to tax costs.

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/ VII. FORMS/§10.39 A. Form: Request to Waive Court Fees (Judicial Council Form FW-001)

VII. FORMS

§10.39 A. Form: Request to Waive Court Fees (Judicial Council Form FW-001)

FW-001 Request to Waive Court Fees

CONFIDENTIAL

Clerk stamps date here when form is filed.

Fill in court name and street address:

Fill in case number and name:

Case Number:

Case Name:

If you are getting public benefits, are a low-income person, or do not have enough income to pay for household's basic needs and your court fees, you may use this form to ask the court to waive all or part of your court fees. The court may order you to answer questions about your finances. If the court waives the fees, you may still have to pay later if:

- You cannot give the court proof of your eligibility,
- Your financial situation improves during this case, or
- You settle your civil case for **$10,000** or more. The trial court that waives your fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge you any collection costs.

(1) **Your Information** *(person asking the court to waive the fees):*

Name: _____

Street or mailing address: _____

City: _____ State: _____ Zip: _____

Phone number: _____

(2) **Your Job,** if you have one *(job title):* _____

Name of employer: _____

Employer's address: _____

(3) **Your lawyer,** if you have one *(name, firm or affiliation, address, phone number, and State Bar number):*

_____

_____

a. The lawyer has agreed to advance all or a portion of your fees or costs *(check one):* Yes ☐ No ☐

b. *(If yes, your lawyer must sign here)* Lawyer's signature: _____

If your lawyer is not providing legal-aid type services based on your low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

(4) **What court's fees or costs are you asking to be waived?**

☐ Superior Court (See *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO).)

☐ Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See *Information Sheet on Waiver of Appellate Court Fees and Costs* (form APP-015/FW-015-INFO).)

(5) **Why are you asking the court to waive your court fees?**

a. ☐ I receive *(check all that apply):* ☐ Medi-Cal ☐ Food Stamps ☐ SSI ☐ SSP ☐ County Relief/General Assistance ☐ IHSS (In-Home Supportive Services) ☐ CalWORKS or Tribal TANF (Tribal Temporary Assistance for Needy Families) ☐ CAPI (Cash Assistance Program for Aged, Blind and Disabled)

b. ☐ My gross monthly household income (before deductions for taxes) is less than the amount listed below. *(If you check 5b you must fill out 7, 8 and 9 on page 2 of this form.)*

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	*If more than 6 people at home, add $375 for each extra person.*
1	$1,083.54	3	$1,888.34	5	$2,583.34	
2	$1,458.34	4	$2,208.34	6	$2,958.34	

c. ☐ I do not have enough income to pay for my household's basic needs *and* the court fees. I ask the court to *(check one):* ☐ waive all court fees ☐ waive some of the court fees ☐ let me make payments over time (*Explain*): _____ *(If you check 5c, you must fill out page 2.)*

(6) ☐ Check here if you asked the court to waive your court fees for this case in the last six months. (*If your previous request is reasonably available, please attach it to this form and check here:* ☐)

I declare under penalty of perjury under the laws of the State of California that the information I have provided on this form and all attachments is true and correct.

Date: _____

_____ ▶ _____

Print your name here *Sign here*

Print

Your name: _____

Case Number:

*If you checked 5a on page 1, do not fill out below. If you checked 5b, fill out questions 7, 8, and 9 only. If you checked 5c, you **must** fill out this entire page. If you need more space, attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.*

7 ☐ Check here if your income changes a lot from month to month. Fill out below based on your average income for the past 12 months.

8 Your Monthly Income

a. Gross monthly income *(before deductions)*: $ _____
List each payroll deduction and amount below:
(1) _____ $ _____
(2) _____ $ _____
(3) _____ $ _____
(4) _____ $ _____

b. Total deductions *(add 8a (1)-(4) above)*: $ _____

c. Total monthly take-home pay *(8a minus 8b)*: $ _____

d. List the source and amount of <u>any</u> other income you get each month, including: spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.
(1) _____ $ _____
(2) _____ $ _____
(3) _____ $ _____
(4) _____ $ _____

e. **Your total monthly income is** *(8c plus 8d)*: $ _____

9 Household Income

a. List all other persons living in your home and their income; include only your spouse and all individuals who depend in whole or in part on you for support, or on whom you depend in whole or in part for support.

	Name	Age	Relationship	Gross Monthly Income
(1)				$
(2)				$
(3)				$
(4)				$

b. **Total monthly income of persons above:** $ _____

Total monthly income *and* household income *(8e plus 9b)*: $ _____

To list any other facts you want the court to know, such as unusual medical expenses, family emergencies, etc., attach form MC-025. Or attach a sheet of paper, and write Financial Information and your name and case number at the top. Check here if you attach another page. ☐

***Important!* If your financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010.**

10 Your Money and Property

a. Cash ---------- $ _____

b. All financial accounts *(List bank name and amount)*:
(1) _____ $ _____
(2) _____ $ _____
(3) _____ $ _____
(4) _____ $ _____

c. Cars, boats, and other vehicles

	Make / Year	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$
(3)		$	$

d. Real estate

	Address	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$
(3)		$	$

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

	Describe	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$
(3)		$	$

11 Your Monthly Expenses

(Do not include payroll deductions you already listed in 8b.)

a. Rent or house payment & maintenance $ _____
b. Food and household supplies $ _____
c. Utilities and telephone $ _____
d. Clothing $ _____
e. Laundry and cleaning $ _____
f. Medical and dental expenses $ _____
g. Insurance (life, health, accident, etc.) $ _____
h. School, child care $ _____
i. Child, spousal support (another marriage) $ _____
j. Transportation, gas, auto repair and insurance $ _____
k. Installment payments (list each below):
Paid to:
(1) _____ $ _____
(2) _____ $ _____
(3) _____ $ _____
l. Wages/earnings withheld by court order $ _____
m. Any other monthly expenses *(list each below)*:

	Paid to:	How Much?
(1)		$
(2)		$
(3)		$

Total monthly expenses *(add 11a –11m above)*: $ _____

Comment: The numbers in the boxes in item 5b are changed yearly. Check California Judicial Council Forms Manual Form FW-001 (Cal CEB 1981) for the latest figures.

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.40 B. Form: Information Sheet on Waiver of Superior Court Fees and Costs (Judicial Council Form FW-001-INFO)

§10.40 B. Form: Information Sheet on Waiver of Superior Court Fees and Costs (Judicial Council Form FW-001-INFO)

INFORMATION SHEET ON WAIVER OF SUPERIOR COURT FEES AND COSTS

If you have been sued or if you wish to sue someone, or if you are filing or have received a family law petition, and if you cannot afford to pay court fees and costs, you may not have to pay them in order to go to court. If you are getting public benefits, are a low-income person, or do not have enough income to pay for your household's basic needs *and* your court fees, you may ask the court to waive all or part of your court fees.

1. To make a request to the court to waive your fees in superior court, complete the *Request to Waive Court Fees* (form FW-001). If you qualify, the court will waive all or part of its fees for the following:
   - Filing papers in superior court (other than for an appeal in a case with a value of over $25,000)
   - Making and certifying copies
   - Sheriff's fee to give notice
   - Court fees for telephone hearings
   - Giving notice and certificates
   - Sending papers to another court department
   - Having a court-appointed interpreter in small claims court
   - Reporter's daily fee *(for up to 60 days after the grant of the fee waiver, at the court-approved daily rate)*
   - Preparing, certifying, copying, and sending the clerk's transcript on appeal.

2. You may ask the court to waive other court fees during your case in superior court as well. To do that, complete a *Request to Waive Additional Court Fees (Superior Court)* (form FW-002). The court will consider waiving fees for items such as the following, or other court services you need for your case:
   - Jury fees and expenses
   - Fees for court-appointed experts
   - Reporter's daily fees (*beyond the 60-day period after the grant of the fee waiver, at the court-approved daily rate)*
   - Fees for a peace officer to testify in court
   - Court-appointed interpreter fees for a witness
   - Other necessary court fees

3. If you want the Appellate Division of Superior Court or the Court of Appeal to review an order or judgment against you and you want the court fees waived, ask for and follow the instructions on *Information Sheet on Waiver of Appellate Court Fees, Supreme Court, Court of Appeal, Appellate Division* (form APP-015/FW-015-INFO).

IMPORTANT INFORMATION!

- **You are signing your request under penalty of perjury. Please answer truthfully, accurately, and completely.**
- **The court may ask you for information and evidence.** You may be ordered to go to court to answer questions about your ability to pay court fees and costs and to provide proof of eligibility. Any initial fee waiver you are granted may be ended if you do not go to court when asked. You may be ordered to repay amounts that were waived if the court finds you were not eligible for the fee waiver.
- **If you receive a fee waiver, you must tell the court if there is a change in your finances.** You must tell the court within five days if your finances improve or if you become able to pay court fees or costs during this case. (File *Notice to Court of Improved Financial Situation or Settlement* (form FW-010) with the court.) You may be ordered to repay any amounts that were waived after your eligibility came to an end.
- **If you receive a judgment or support order in a family law matter:** You may be ordered to pay all or part of your waived fees and costs if the court finds your circumstances have changed so that you can afford to pay. You will have the opportunity to ask the court for a hearing if the court makes such a decision.
- **If you win your case in the trial court:** In most circumstances the other side will be ordered to pay your waived fees and costs to the court. The court will not enter a satisfaction of judgment until the court is paid. (This does not apply in unlawful detainer cases. Special rules apply in family law cases. (Government Code, section 68637(d), (e).)
- **If you settle your civil case for $10,000 or more:** Any trial court waived fees and costs must first be paid to the court out of the settlement. **The court will have a lien on the settlement in the amount of the waived fees and costs.** The court may refuse to dismiss the case until the lien is satisfied. A request to dismiss the case (use form CIV-110) must have a declaration under penalty of perjury that the waived fees and costs have been paid. Special rules apply to family law cases.
- **The court can collect fees and costs due to the court.** If waived fees and costs are ordered paid to the trial court, the court can start collection proceedings and add a $25 fee plus any additional costs of collection to the other fees and costs owed to the court.
- **The fee waiver ends.** The fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case or earlier if a court finds that you are not eligible for a fee waiver.
- **If you are in jail or state prison:** Prisoners may be required to pay the full cost of the filing fee in the trial court but may be allowed to do so over time.

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.41 C. Form: Request to Waive Additional Court Fees (Superior Court) (Judicial Council Form FW-002)

§10.41 C. Form: Request to Waive Additional Court Fees (Superior Court) (Judicial Council Form FW-002)

FW-002 Request to Waive Additional Court Fees (Superior Court)

CONFIDENTIAL

Clerk stamps date here when form is filed.

This form asks the court to waive *additional* court fees that are not covered in a current order. If you have not already received an order that waived or reduced your court fees, you must complete and file a *Request to Waive Court Fees (Superior Court),* form FW-001, along with this form.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and case name:

Case Number:

Case Name:

1 Your Information *(person asking the court to waive the fees):*

Name: _____

Street or mailing address: _____

City: _____ State: _____ Zip: _____

Phone number: _____

2 Your lawyer, if you have one *(name, firm or affiliation, address, phone number, and State Bar number):* _____

a. The lawyer has agreed to advance all or a portion of your fees or costs *(check one)*: ☐ Yes ☐ No

b. *(If yes, your lawyer must sign here):*

Lawyer's signature: _____

If your lawyer is not providing legal-aid type services based on your low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

3 Date your *last* court fee waiver order, if any, was granted: _____

4 Has your financial situation improved since your last *Request to Waive Court Fees?* ☐ No ☐ Yes *(If yes, you must fill out a new* Request to Waive Court Fees, *form FW-001, and attach it to this form.)*

5 What other fees do you want your court fee waiver order to cover? *(Check all that apply):*

a. ☐ Jury fees and expenses
b. ☐ Court-appointed interpreter fees for a witness
c. ☐ Fees for a peace officer to testify in court
d. ☐ Reporter's daily fees *(beyond 60-days after grant of a fee waiver, at court-approved daily rate)*
e. ☐ Fees for court-appointed experts
f. ☐ Other *(specify):* _____

6 Why do you need these other services? *(Explain):* _____

Notice: The court may order you to answer questions about your finances and later order you to pay back the waived fees. If this happens and you do not pay, the court can make you pay the fees and also charge you collection fees. If there is a change in your financial circumstances during this case that increases your ability to pay fees and costs, you must notify the trial court within five days. (Use form FW-010.) If you win your case, the trial court may order the other side to pay the fees. If you settle your civil case for **$10,000** or more, the trial court will have a lien on the settlement in the amount of the waived fees. The trial court may not dismiss the case until the lien is paid.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Print your name here *Sign here*

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.42 D. Form: Order on Court Fee Waiver (Superior Court) (Judicial Council Form FW-003)

§10.42 D. Form: Order on Court Fee Waiver (Superior Court) (Judicial Council Form FW-003)

Print

FW-003 **Order on Court Fee Waiver (Superior Court)**

Clerk stamps date here when form is filed.

(1) **Person who asked the court to waive court fees:**

Name: _____

Street or mailing address: _____

City: _____ State: _____ Zip: _____

(2) **Lawyer, if person in (1) has one** *(name, address, phone number, e-mail, and State Bar number):* _____

(3) A request to waive court fees was filed on *(date):* _____

☐ The court made a previous fee waiver order in this case on *(date):* _____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and case name:

Case Number:

Case Name:

Read this form carefully. All checked boxes ☑ are court orders.

Notice: The court may order you to answer questions about your finances and later order you to pay back the waived fees. If this happens and you do not pay, the court can make you pay the fees and also charge you collection fees. If there is a change in your financial circumstances during this case that increases your ability to pay fees and costs, you must notify the trial court within five days. (Use form FW-010.) If you win your case, the trial court may order the other side to pay the fees. If you settle your civil case for **$10,000** or more, the trial court will have a lien on the settlement in the amount of the waived fees. The trial court may not dismiss the case until the lien is paid.

(4) After reviewing your *(check one):* ☐ *Request to Waive Court Fees* ☐ *Request to Waive Additional Court Fees* **the court makes the following orders:**

a. ☐ The court **grants** your request, as follows:

(1) ☐ **Fee Waiver.** The court grants your request and waives your court fees and costs listed below. *(Cal. Rules of Court, rule 3.55.)* You do not have to pay the court fees for the following:

- Filing papers in Superior Court
- Making copies and certifying copies
- Sheriff 's fee to give notice
- Giving notice and certificates
- Sending papers to another court department
- Court-appointed interpreter in small claims court
- Reporter's daily fee *(for up to 60 days following the fee waiver order at the court-approved daily rate)*
- Preparing and certifying the clerk's transcript on appeal
- Court fees for phone hearings

(2) ☐ **Additional Fee Waiver.** The court grants your request and waives your additional superior court fees and costs that are checked below. *(Cal. Rules of Court, rule 3.56.)* You do not have to pay for the checked items.

☐ Jury fees and expenses
☐ Fees for court-appointed experts
☐ Fees for a peace officer to testify in court
☐ Court-appointed interpreter fees for a witness
☐ Reporter's daily fees *(beyond the 60-day period following the fee waiver order)*
☐ Other *(specify):* _____

(3) ☐ **Fee Waiver for Appeal.** The court grants your request and waives the fees and costs checked below, for your appeal. *(Cal. Rules of Court, rules 3.55, 3.56, 8.26, and 8.818.)* You do not have to pay for the checked items.

☐ Preparing and certifying clerk's transcript for appeal
☐ Other *(specify):* _____

Print

Case Number:

Your name: _____

b. ☐ The court **denies** your request, as follows:

Warning! If you miss the deadline below, the court cannot process your request for hearing or the court papers you filed with your original request. If the papers were a notice of appeal, the appeal may be dismissed.

(1) ☐ The court **denies** your request because it is incomplete. You have **10 days** after the clerk gives notice of this order (see date below) to:
- Pay your fees and costs, or
- File a new revised request that includes the items listed below *(specify incomplete items):*

_____

(2) ☐ The court **denies** your request because the information you provided on the request shows that you are not eligible for the fee waiver you requested *(specify reasons):* _____

_____

The court has enclosed a blank *Request for Hearing About Court Fee Waiver Order (Superior Court)*, form FW-006. You have **10 days** after the clerk gives notice of this order (see date below) to:
- Pay your fees and costs, or
- Ask for a hearing in order to show the court more information. *(Use form FW-006 to request hearing.)*

c. ☐ The court needs more information to decide whether to grant your request. You must go to court on the date below. The hearing will be about *(specify questions regarding eligibility):* _____

_____

_____

☐ Bring the following proof to support your request if reasonably available: _____

_____

Hearing Date → Date: _____ Time: _____ Name and address of court if different from page 1: _____

Dept.: _____ Rm.: _____ _____

Warning! If item c is checked, and you do not go to court on your hearing date, the judge will deny your request to waive court fees, and you will have 10 days to pay your fees. If you miss that deadline, the court cannot process the court papers you filed with your request. If the papers were a notice of appeal, the appeal may be dismissed.

Date: _____ _____

Signature of (check one): ☐ *Judicial Officer* ☐ *Clerk, Deputy*

Request for Accommodations. Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before your hearing. Contact the clerk's office for *Request for Accommodation,* Form MC-410. (Civil Code, § 54.8.)

Clerk's Certificate of Service

I certify that I am not involved in this case and *(check one):* ☐ A certificate of mailing is attached.

☐ I handed a copy of this order to the party and attorney, if any, listed in ① and ②, at the court, on the date below.

☐ This order was mailed first class, postage paid, to the party and attorney, if any, at the addresses listed in ① and ②, from *(city)*: _____, California on the date below.

Date: _____ Clerk, by _____, Deputy

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.43 E. Form: Notice: Waiver of Court Fees (Superior Court) (Judicial Council Form FW-005)

§10.43 E. Form: Notice: Waiver of Court Fees (Superior Court) (Judicial Council Form FW-005)

Print

FW-005 **Notice: Waiver of Court Fees (Superior Court)**

Clerk stamps date here when form is filed.

(1) **Person who asked the court to waive court fees:**
Name: _____
Mailing address: _____
City: _____ State _____ Zip _____
Phone number: _____

(2) **Lawyer,** if person in (1) has one: *(name, address, phone number, e-mail, and State Bar number):* _____
_____
_____
_____

Fill in court name and street address:
Superior Court of California, County of

(3) Your *Request to Waive Court Fees* was filed on *(date):* _____

Fill in case number and case name:
Case Number:
Case Name:

(4) Your request is **granted** by operation of law because no court action was taken within five days after it was filed. A fee waiver is granted for the following court fees and costs *(Cal. Rules of Court, rule 3.55):*

- Filing papers
- Giving notice and certificates
- Sending papers to another court department
- Reporter's daily fee *(for up to 60 days after the date of this notice, at the court-approved daily rate)*
- Court fee for phone hearing
- Preparing, certifying, copying, and sending the clerk's transcript on appeal.
- Making copies and certifying copies
- Sheriff's fee to give notice
- Court-appointed interpreter in small claims court

Date: _____ Clerk, by _____, Deputy

Notice: The court may order you to answer questions about your finances and later order you to pay back the waived fees. If this happens and you do not pay, the court can make you pay the fees and also charge you collection fees. If there is a change in your financial circumstances during this case that increases your ability to pay fees and costs, you must notify the trial court within five days. (Use form FW-010.) If you win your case, the trial court may order the other side to pay the fees. If you settle your civil case for **$10,000** or more, the trial court will have a lien on the settlement in the amount of the waived fees. The trial court may not dismiss the case until the lien is paid.

Clerk's Certificate of Service

I certify that I am not involved in this case and *(check one):* ☐ A certificate of mailing is attached.

☐ I handed a copy of this notice to the party and attorney, if any, listed in (1) and (2), at the court, on the date below.

☐ This notice was mailed first class, postage paid, to the party and attorney, if any, at the addresses listed in (1) and (2), from *(city):* _____, California on the date below.

Date: _____ Clerk, by _____, Deputy

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.44 F. Form: Request for Hearing About Court Fee Waiver Order (Superior Court) (Judicial Council Form FW-006)

§10.44 F. Form: Request for Hearing About Court Fee Waiver Order (Superior Court) (Judicial Council Form FW-006)

FW-006 Request for Hearing About Court Fee Waiver Order (Superior Court)

CONFIDENTIAL

Clerk stamps date here when form is filed

1 **Your Information** *(person who asked the court to waive court fees):*
Name: _____
Street or mailing address: _____
City: _____ State: _____ Zip: _____
Phone number: _____

2 **Your lawyer,** if you have one *(name, address, phone number, e-mail, and State Bar number):* _____
_____
_____
_____

3 **Date of order** denying your request to waive court fees *(month/day/year):* _____

☐ *(Check here if you have a copy of the order denying your request, and attach it to this form.)*

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and case name:

Case Number:

Case Name:

4 I ask the court for a hearing on my fee waiver request so that I can bring more information about my financial situation.

5 ☐ The additional facts that support my request for a fee waiver are *(describe):*
(Use this space if you want to tell the court in advance what facts you want considered at the hearing. If the space below is not enough, attach form MC-025. Or attach a sheet of paper and write Additional Facts and your name and case number at the top. You may also attach copies of documents you want the court to look at.)

_____
_____
_____
_____
_____
_____
_____

Date: _____

_____ ▶ _____
Print your name here

Request for Accommodations. Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before your hearing. Contact the clerk's office for *Request for Accommodation,* form MC-410.

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.45 G. Form: Notice on Hearing About Court Fees (Judicial Council Form FW-007)

§10.45 G. Form: Notice on Hearing About Court Fees (Judicial Council Form FW-007)

Print

FW-007 Notice on Hearing About Court Fees

CONFIDENTIAL

Clerk stamps date here when form is filed.

(1) **Person who asked for the hearing:**
Name: _____
Street or mailing address: _____
City: _____ State: _____ Zip: _____
Phone number: _____

(2) **Lawyer,** if person in (1) has one *(name, address, phone number, e-mail, and State Bar number):* _____

Fill out court name and street address:
Superior Court of California, County of

(3) The court received your request for a hearing about your court fees on *(date):* _____

Fill in case number and case name:
Case Number:
Case Name:

Read this form carefully. All checked boxes ☑ are court orders.

(4) ☐ The court grants your request for a hearing on your eligibility for a fee waiver. **Go to your court hearing** on the date below. You may bring information about your financial situation to the hearing.

Hearing Date → Date: _____ Time: _____ Name and address of court if different from above: _____
Dept.: _____ Rm.: _____ _____

(5) ☐ The court **denies** your request for a hearing because *(check all that apply):*
a. ☐ The hearing request was not filed within ten days after the clerk gave notice of the denial of the request for a fee waiver. (Government Code section 68634(g).)
b. ☐ No request to waive fees has been denied by the court in your action.
c. ☐ Other *(explain):* _____

Date _____ _____
Signature of (check one): ☐ *Judicial Officer* ☐ *Clerk, Deputy*

Request for Accommodations: Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before your hearing. Contact the clerk's office for *Request for Accommodation,* Form MC-410.

Clerk's Certificate of Service

I certify that I am not involved in this case and *(check one):* ☐ A certificate of mailing is attached.
☐ I handed a copy of this notice to the party and attorney, if any, listed in (1) and (2), at the court, on the date below.
☐ This notice was mailed first class, postage paid, to the party and attorney, if any, at the addresses listed in (1) and (2), from *(city):* _____, California on the date below.

Date: _____ Clerk, by _____, Deputy

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.46 H. Form: Order on Court Fee Waiver After Hearing (Superior Court) (Judicial Council Form FW-008)

§10.46 H. Form: Order on Court Fee Waiver After Hearing (Superior Court) (Judicial Council Form FW-008)

FW-008 Order on Court Fee Waiver After Hearing (Superior Court)

CONFIDENTIAL

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:

Case Name:

1 Person who asked the court to waive court fees:

Name: _____

Street or mailing address: _____

City: _____ State: _____ Zip: _____

2 Lawyer, if person in 1 has one *(name, address, phone number, e-mail, and State Bar number):* _____

_____

_____

3 A request to waive court fees was filed *(date):* _____

4 There was a hearing on *(date):* _____

at *(time):* _____ in *(Department):* _____

The following people were at the hearing *(check all that apply):*

☐ Person in 1 ☐ Lawyer in 2

☐ Others *(names):* _____

_____

Read this form carefully. All checked boxes ☑ are court orders.

Notice: The court may order you to answer questions about your finances and later order you to pay back the waived fees. If this happens and you do not pay, the court can make you pay the fees and also charge you collection fees. If there is a change in your financial circumstances during this case that increases your ability to pay fees and costs, you must notify the trial court within five days. (Use form FW-010.) If you win your case, the trial court may order the other side to pay the fees. If you settle your civil case for **$10,000** or more, the trial court will have a lien on the settlement in the amount of the waived fees. The trial court may not dismiss the case until the lien is paid.

5 After reviewing your *(check one):* ☐ *Request to Waive Court Fees* ☐ *Request to Waive Additional Court Fees* **the court makes the following order:**

a. ☐ The court **grants** your request and waives your court fees and costs as follows:

(1) ☐ **Fee Waiver.** The court **grants** your request and waives your court fees and costs listed below *(Cal. Rules of Court, rule 3.55.)* You do not have to pay the court fees for the following:

- Filing papers in superior court
- Making copies and certifying copies
- Sheriff's fee to give notice
- Giving notice and certificates
- Sending papers to another court department
- Court-appointed interpreter in small claims court
- Reporter's daily fee *(for up to 60 days after the grant of the fee waiver, at the court-approved daily rate)*
- Preparing and certifying the clerk's transcript on appeal
- Court fees for phone hearing

(2) ☐ **Additional Fee Waiver.** The court **grants** your request and waives your additional superior court fees and costs that are checked below. *(Cal. Rules of Court, rule 3.56.)* You do not have to pay for the checked items.

☐ Jury fees and expenses
☐ Fees for court-appointed experts
☐ Fees for a peace officer to testify in court
☐ Court-appointed interpreter fees for a witness
☐ Reporter's daily fees *(beyond the 60-day period after grant of the fee waiver, at court-approved daily rate)*
☐ Other *(specify):* _____

(3) ☐ **Fee Waiver for Appeal.** The court **grants** your request and waives the fees and costs checked below, for your appeal. *(Cal. Rules of Court, rules 8.26 and 8.818.)* You do not have to pay for the checked items.

☐ Preparing and certifying clerk's transcript for appeal
☐ Other *(specify):* _____

Print

Case Name:	Case Number:

b. ☐ The court **denies** your request and **will not waive or reduce** your fees and costs.

(1) The reason for this denial is as follows:

(a) ☐ Your request is incomplete, and you did not provide the information that the court requested *(specify items missing):* _____

(b) ☐ You did not go to court on the hearing date to provide the information the court needed to make a decision.

(c) ☐ The information you provide shows that you are not eligible for the fee waiver you requested because *(check all that apply):*

i. ☐ Your income is too high.

ii. ☐ Other *(explain):* _____

(d) ☐ There is not enough evidence to support a fee waiver.

(e) ☐ Other *(state reasons):* _____

_____

(2) ☐ You may pay some court fees and costs over time. You may make monthly payments of $ _____ beginning *(date):* _____ and then payable on the 1st of each month after that, until the fees checked below are paid in full:

(a) ☐ Filing fees.

(b) ☐ Other *(describe):* _____

You must pay all other court fees and costs as they are due.

c. ☐ The court **partially grants** your request so you can pay court fees without using money you need to pay for your household's basic needs. You are ordered to pay a portion of your fees, **as checked below.** The court only partially grants the request because *(state reasons for partial denial):*

_____

_____

(1) ☐ You must pay _____ % of your court fees.

(2) ☐ The court waives some fees. The fees checked below are waived. You must pay all other court fees.

- ☐ Filing papers at superior court
- ☐ Sheriff's fee to give notice
- ☐ Court-appointed interpreter
- ☐ Reporter's daily fee up to 60 days after order
- ☐ Jury fees and expenses
- ☐ Court-appointed experts' fees
- ☐ Making certified copies
- ☐ Other *(describe):* _____
- ☐ Giving notice and certificates
- ☐ Sending papers to another court department
- ☐ Court-appointed interpreter fees for a witness
- ☐ Reporter's daily fees beyond the 60 days after initial order
- ☐ Fees for a peace officer to testify in court
- ☐ Court fees for telephone hearings

(3) ☐ Other *(specify):* _____

Warning! If b or c above are checked: You have **10 days** after the clerk gives notice of this order (see date below) to pay your fees as ordered, unless there is a later date for beginning payments in item b(2). If you do not pay, your court papers will not be processed. If the papers are a notice of appeal, your appeal may be dismissed.

Date: _____ ▶ _____

Signature of Judicial Officer

Clerk's Certificate of Service

I certify that I am not involved in this case and *(check one):* ☐ A certificate of mailing is attached.

☐ I handed a copy of this order to the party and attorney, if any, listed in ① and ②, at the court, on the date below.

☐ This order was mailed first class, postage paid, to the party and attorney, if any, at the addresses listed in ① and ②, from *(city):* _____, California on the date below.

Date: _____ Clerk, by _____, Deputy

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.47 I. Form: Notice to Court of Improved Financial Situation or Settlement (Judicial Council Form FW-010)

§10.47 I. Form: Notice to Court of Improved Financial Situation or Settlement (Judicial Council Form FW-010)

FW-010 Notice to Court of Improved Financial Situation or Settlement

CONFIDENTIAL

Clerk stamps date here when form is filed.

Fill out court name and street address:

Superior Court of California, County of

Fill out case number and case name:

Case Number:

Case Name:

1 **Your Information** *(person with a fee waiver):*

Name: _____

Street or mailing address: _____

City: _____ State: _____ Zip: _____

Phone number: _____

2 **Your lawyer,** if you have one *(name, address, phone number, e-mail, and State Bar number:* _____

_____

_____

3 Date of your **last** court fee waiver order in this case:

(date) _____

Notice: The court may order you to answer questions about your finances and later order you to pay back the waived fees. If this happens and you do not pay, the court can make you pay the fees and also charge you collection fees. If there is a change in your financial circumstances during this case that increases your ability to pay fees and costs, you must notify the trial court within five days. (Use form FW-010.) If you win your case, the trial court may order the other side to pay the fees. If you settle your civil case for **$10,000** or more, the trial court will have a lien on the settlement in the amount of the waived fees. The trial court may not dismiss the case until the lien is paid.

4 ☐ My financial situation has changed since the date of the last court fee waiver order in a way that improves my ability to pay fees. I ask the court to do one of the following:

a. ☐ **End** my fee waiver because my financial situation has improved and I am able to pay my court fees and costs that are due after *(date)*: _____ .

b. ☐ **Review** my updated financial information in the attached *Request to Waive Court Fees*. I believe I am still eligible for a fee waiver. *(Complete form FW-001 and attach to this form.)*

5 ☐ My case has settled for *(check one)* ☐ less than $10,000 ☐ $10,000 or more *(if so, complete a and b below.)*

a. I *(check one)* ☐ have ☐ have not received the proceeds of the settlement.

b. The name and address of the party who has agreed to pay the settlement:

_____

_____

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ _____

Print your name here *Sign here*

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.48 J. Form: Notice to Appear for Reconsideration of Fee Waiver (Judicial Council Form FW-011)

§10.48 J. Form: Notice to Appear for Reconsideration of Fee Waiver (Judicial Council Form FW-011)

Print

FW-011 Notice to Appear for Reconsideration of Fee Waiver

Clerk stamps date here when form is filed.

Warning: If you do not go to the hearing on the date and time below, the court may cancel your fee waiver.

(1) **Name of person who asked the court to waive court fees:**

Street or mailing address: _____

City: _____ State: _____ Zip: _____

(2) **Lawyer, if person in (1) has one:** *(Name, address, phone number, e-mail, and State Bar number):* _____

Fill in court name and street address:

Superior Court of California, County of

(3) The court has information that *(check all that apply):*

a. ☐ Your financial situation may have changed, or you may no longer be eligible for a fee waiver because *(explain):* _____

b. ☐ You may be increasing the costs of your case unnecessarily. The fee waiver for the court services you are using may be limited because *(explain):* _____

c. ☐ Your case is coming to an end, and the court requires some information about your eligibility to have your court fees waived.

Fill in case number and name:

Case Number:

Case Name:

(4) **You must go to court on the date below:**

Hearing Date → Date: _____ Time: _____ Name and address of court if different from above: _____

Dept.: _____ Rm.: _____ _____

☐ Bring the following information if reasonably available: _____

Date: _____ _____

Signature of (check one): ☐ *Judicial Officer* ☐ *Clerk, Deputy*

Request for Accommodations. Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before your hearing. Contact the clerk's office for *Request for Accommodation,* form MC-410. (Civil Code, § 54.8.)

Clerk's Certificate of Service

I certify that I am not involved in this case and *(check one):* ☐ A certificate of mailing is attached.

☐ I handed a copy of this notice to the party and attorney, if any, listed in (1) and (2), at the court, on the date below.

☐ This notice was mailed first class, postage paid, to the party and attorney, if any, at the addresses listed in (1) and (2), from *(city):* _____, California on the date below.

Date: _____ Clerk, by _____, Deputy

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Source: Civil Litigation/California Civil Procedure Before Trial/10 Fee Waiver/§10.49 K. Form: Order on Court Fee Waiver After Reconsideration Hearing (Superior Court) (Judicial Council Form FW-012)

§10.49 K. Form: Order on Court Fee Waiver After Reconsideration Hearing (Superior Court) (Judicial Council Form FW-012)

FW-012 Order on Court Fee Waiver After Reconsideration Hearing (Superior Court)

Clerk stamps date here when form is filed.

(1) **Name of person who asked the court to waive court fees:**

Street or mailing address: _____

City: _____ State: _____ Zip: _____

(2) **Name of lawyer**, if person in (1) has one *(name, address, phone number, e-mail, and State Bar number)*: _____

Fill in court name and street address:

Superior Court of California, County of

(3) The court made a previous fee waiver order in this case on *(date)*:

(4) The court sent you a notice to go to court about your fee waiver on *(date)*:

Fill in case number and case name:

Case Number:

Case Name:

Read this form carefully. All checked ☑ boxes are court orders.

(5) There was a hearing on *(date)*: _____
at *(time)*: _____ in *(Department)*: _____
The following people were at the hearing *(check all that apply)*:
☐ Person in (1) ☐ Lawyer in (2)
☐ Others *(names)*: _____

(6) After considering the information provided at the hearing, **the court makes the following order:**

a. ☐ **No Change to Fee Waiver.** The *Order on Court Fee Waiver* issued by this court on *(date)*: _____ remains in effect. No change is made at this time.

b. ☐ **Fee Waiver Is Ended as of *(date)*:** _____. The court finds that beginning on that date you were no longer eligible for a fee waiver because: _____

(1) You must pay all court fees in this case from the date of this order.
(2) ☐ You must also pay the court $ _____ for fees that were initially waived after you were no longer eligible.
(a) ☐ You must pay that amount within 10 days of this order.
(b) ☐ You may pay that amount in monthly payments of $_____ beginning *(date)*: _____ and payable on the 1st of each month after that until paid in full.

c. ☐ **Fee Waiver Is Retroactively Withdrawn.** The court finds that you were never entitled to a fee waiver in this case because: _____

(1) You must pay all court fees in this case from the date of this order.
(2) ☐ You must also pay the court $_____ for fees that the court initially waived.
(a) ☐ You must pay that amount within 10 days of this order.
(b) ☐ You may pay that amount in monthly payments of $_____ beginning *(date)*: _____ and payable on the 1st of each month after that until paid in full.

Print

Your name: _____ Case Number:

6 d. ☐ **Fee Waiver Is Modified.** The court finds that you obtained the initial fee waiver in bad faith, for an improper purpose, or to needlessly increase the costs of litigation. The court places the following limitations on the fee waiver that was granted to you:

(1) ☐ You must pay all court fees in this case from the date of this order.

(2) ☐ From the date of this order, only the following court fees will be waived *(court to check all that apply)*. **You must pay for all court fees that are not checked below:**

- ☐ Filing papers at superior court
- ☐ Making certified copies
- ☐ Giving notice and certificates
- ☐ Sheriff's fee to give notice
- ☐ Sending papers to another court department
- ☐ Court-appointed interpreter
- ☐ Court-appointed interpreter fees for a witness
- ☐ Reporter's daily fee *(up to 60 days after date of fee waiver)*
- ☐ Reporter's daily fees *(beyond 60 days after the fee waiver)*
- ☐ Jury fees and expenses
- ☐ Fees for a peace officer to testify in court
- ☐ Court-appointed expert's fees
- ☐ Court fees for telephone hearings
- ☐ Other *(specify)*: _____

(3) ☐ Other modification: _____

_____

e. ☐ **Other Order:** _____

_____

_____

_____

Date: _____

▶ _____

Signature of Judge or Judicial Officer

Clerk's Certificate of Service

I certify that I am not involved in this case and *(check one)*: ☐ A certificate of mailing is attached.

☐ I handed a copy of this order to the party and attorney, if any, listed in 1 and 2, at the court, on the date below.

☐ This order was mailed first class, postage paid, to the party and attorney, if any, at the addresses listed in 1 and 2, from *(city)*: _____, California on the date below.

Date: _____ Clerk, by _____, Deputy

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11

Pleadings and Court Papers

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I. INTRODUCTION

§11.1 A. Scope of Chapter

This chapter covers the form and formatting requirements for court papers, *i.e.,* written documents that are to be filed in a trial court in connection with a lawsuit. "Form" in this context refers to the physical properties of the paper; "format" refers to the arrangement of statements and entries that appear on the pages of the paper. These form and format requirements are discussed in §§11.6-11.26. Preprinted and local forms are discussed in §§11.27-11.32. Responding to the clerk's refusal to file is discussed in §11.33. A checklist of procedure for preparing court papers is set forth in §11.34, and a sample first-page format of a court paper is in §11.35.

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§11.2 B. Governing Rules

Form and format requirements, set forth in Cal Rules of Ct 2.100-2.119, apply generally to all court papers, unless specified otherwise. See Cal Rules of Ct 2.2. Additional content and format requirements that apply to particular kinds of papers (*e.g.,* complaints and answers, demurrers, motions, petitions) are discussed in the chapters covering the specific papers or pleadings, or the proceedings in which such papers are used. See, *e.g.,* chap 12 on noticed motions.

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§11.3 C. Role of Judicial Council; Local Rule Preemption

The Judicial Council, an appointive body headed by the Chief Justice and composed of judges, members of the bar, and legislators, is entrusted under the California Constitution with the authority to make rules "for court administration, practice, and procedure." Cal Const art VI, §6. The Judicial Council has carried out this mandate by adopting the California Rules of Court. Although the Rules of Court may "not be inconsistent with statute" (Cal Const, art VI, §6), they have the force of law once adopted. See Cal Rules of Ct, Introductory Statement.

The Judicial Council has preempted the rule-making authority for all California courts in the following areas (Cal Rules of Ct 3.20):

- Pleadings;
- Demurrers;
- Ex parte applications;
- Motions;
- Discovery;
- Provisional remedies; and
- Form and format of papers.

Rule 3.20(a) provides that

> No trial court, or any division or branch of a trial court, may enact or enforce any local rule concerning these fields. All local rules concerning these fields are null and void unless otherwise permitted or required by a statute or a rule in the California Rules of Court.

The preemption does not apply in the following specific areas (Cal Rules of Ct 3.20(b)):

- Trial and posttrial proceedings (including in limine motions);
- Certain requests for restraining orders and injunctive relief (see CCP §§527.6-527.8);
- Matters governed by the Probate Code, the Family Code, or the Welfare and Institutions Code;
- Criminal matters;
- Eminent domain proceedings; and
- Local rules adopted under the Trial Court Delay Reduction Act (Govt C §§68600-68620; see chap 40).

California Rules of Court 10.900 provides that each court must adopt a case management and calendaring system for general civil cases that will advance the goals set forth in Cal Rules of Ct, Standards of J Admin 2.1 (Judicial Administration).

For further discussion of Cal Rules of Ct 3.20, see chapters on specific subjects covered by the rule (*e.g.,* chap 12 (motions); chaps 32-34 (provisional remedies)).

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§11.4 D. Trial Court Unification

The superior court has subject matter jurisdiction over civil matters formerly within the municipal court's jurisdiction that are classified as "limited civil cases." CCP §§85-85.1 (defining "limited civil cases" as all actions or special proceedings in which the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000). See also CCP §88 (unlimited civil cases). Except for procedures specifically designed to lower litigation costs in limited civil cases, the rules of procedure generally applicable to civil actions also apply to limited civil cases. CCP §90. See, *e.g.,* Cal Rules of Ct 2.100-2.119 (form and format of papers), 3.1100-3.1312 (civil law and motion rules). Rules 2.100-2.119 govern the form of papers filed in limited civil cases in the unified superior court. For further discussion of trial court unification, see chap 6.

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§11.5 E. Electronic Access to Court Records

The Rules of Court provide for electronic access to trial courts' electronic records. Cal Rules of Ct 2.500-2.506. "Electronic access" means computer access to court records available to the public through both public terminals at the courthouse and remotely, unless otherwise specified in the Rules of Court. Cal Rules of Ct 2.502(d). An "electronic record" is a computerized court record, regardless of the manner in which it has been computerized. It includes a document that has been filed electronically and an electronic copy or version of a record that was filed in paper form. The term does not include a court record that is maintained only on microfiche, paper, or any other medium that can be read without the use of an electronic device. Cal Rules of Ct 2.502(b).

All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except those that are sealed by court order or are made confidential by law. Cal Rules of Ct 2.503(a). A court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse to the extent it is feasible to do so (Cal Rules of Ct 2.503(b)):

- Register of actions (as defined in Govt C §69845), calendars, and indexes in all cases (Cal Rules of Ct 2.503(b)(1)); and
- All records in civil cases, except those listed in Cal Rules of Ct 2.503(c)(1)-(8) (courthouse access only) (Cal Rules of Ct 2.503(b)(2)).

A court that maintains the following records in electronic form must provide electronic access to them at the courthouse, to the extent feasible to do so, but may provide remote electronic access only to the records governed by Cal Rules of Ct 2.503(b) (Cal Rules of Ct 2.503(c)):

- Any proceeding under the Family Code, including, but not limited to, dissolution, legal separation, and nullity of marriage proceedings; child and spousal support proceedings; and child custody proceedings;
- Any record in a juvenile court proceeding;
- Any record in a guardianship or conservatorship proceeding;
- Any record in a mental health proceeding;
- Any record in a criminal proceeding;
- Any record in a civil harassment proceeding under CCP §527.6;
- Any record in a workplace violence prevention proceeding under CCP §527.8; and
- Any record in an elder or dependent adult abuse prevention proceeding under Welf & I C §15657.03.

The requirement that the court provide electronic access to its electronic records "to the extent it is feasible to do so" means that a court must provide electronic access to the extent it has the resources and technical capacity to do so. Cal Rules of Ct 2.503(d). A court may grant electronic access to an electronic record when the record is identified by the case number, the caption of the case, or the name of a party, and only on a case-by-case basis. This case-by-case limitation does not apply to a calendar register, actions, or index. Cal Rules of Ct 2.503(f).

Unless electronically certified by the court, a trial court record available by electronic access does not constitute the official record of the court. Cal Rules of Ct 2.504(b). Additionally, the rules provide that the court may impose fees for the cost of providing public access to its electronic records. See Cal Rules of Ct 2.506.

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Source: Civil Litigation/California Civil Procedure Before Trial/11 Pleadings and Court Papers/§11.6 II. FORM AND FORMAT

§11.6 II. FORM AND FORMAT

California Rules of Court 2.100-2.119 prescribe the form and format of papers filed in California trial courts in minute detail, from the size of type that can be used to the weight of the paper. Complying with its requirements is important: Cal Rules of Ct 2.118(a) directs court clerks not to file or accept for filing any paper that does not comply, except the clerk must not reject a paper for filing solely on the ground that

- It is handwritten or hand printed or that the handwriting or hand printing is in a color other than blue-black or black (Cal Rules of Ct 2.118(a)); or
- The party's or attorney's fax or e-mail address is not listed on the first page (Cal Rules of Ct 2.118(b)).

For good cause shown, the court may permit the filing of papers that do not comply with Rules 2.100-2.119 (Cal Rules of Ct 2.118(c)).

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A. Physical Form

§11.7 1. Paper: Quality, Weight, and Size

Documents to be filed in the trial court must be on opaque, unglazed, standard quality, white or unbleached paper. The paper must be at least 20-pound weight, and 8½ by 11 inches in size (letter size). Cal Rules of Ct 2.103.

Recycled paper is required for:

- All original papers and forms filed with the court, and all copies of papers, documents, and exhibits, whether filed with the court or served on other parties; and
- The original record on appeal from a limited civil case, any brief filed with the court in a matter to be heard in the appellate division, and all copies of such documents, whether filed with the court or served on other parties.

Cal Rules of Ct 2.101(a)(1)-(2). Whenever the use of recycled paper is required by the California Rules of Court, the attorney, party, or other person filing or serving a document certifies, by the act of filing or service, that the document was produced on paper purchased as recycled. Cal Rules of Ct 2.101(b).

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§11.8 2. Font; Printed Copies

Papers presented for filing must be typewritten, printed, or prepared by a photocopying or other duplication process that produces clear and permanent copies "equally legible to printing." Cal Rules of Ct 2.104. The print must be black or blue-black (Cal Rules of Ct 2.106) and the typeface the equivalent of Courier, Times Roman, or Helvetica (Cal Rules of Ct 2.105) and in a type not smaller than 12 points (Cal Rules of Ct 2.104).

NOTE: Some law offices save clerical time by photocopying, printing, or otherwise duplicating frequently used court papers, leaving blank spaces and blank lines so that particulars can be typed in when the paper is prepared. The completed forms are accepted for filing as original pages if each signature is an original.

Papers prepared on electronic equipment should be printed on a letter-quality or laser printer. A court clerk may reject papers printed on some ink jet printers if the typeface is not as legible as that produced by a letter quality or laser printer.

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§11.9 3. Lines: Spacing, Numbering

The information typed or printed on court papers must be either double spaced or one-and-one-half spaced, and the lines must be numbered consecutively, except that (Cal Rules of Ct 2.108):

- Descriptions of real property may be single spaced; and
- Footnotes, quotations, and printed forms of corporate surety bonds and undertakings may be single spaced, and lines need not be numbered if they comply generally with the space requirements for first-page format.

Although one-and-one-half spacing permits more lines per page, it does not leave room for interlineation if the typist misses a word or phrase, and it is more difficult to read. See §11.12.

Line numbers must be placed at the left margin and separated from the text of the paper by a vertical column of space at least one-fifth inch in width or a single or double vertical line. Cal Rules of Ct 2.108(4). Each line number must be aligned with a line of type, or the line numbers must be evenly spaced vertically on the page. Line numbers must be consecutively numbered beginning with the number 1 on each page. There must be at least three line numbers in each vertical inch on the page. Cal Rules of Ct 2.108(4).

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§11.10 4. Pages: One-Sided, Margins

Only one side of each page may be used. Cal Rules of Ct 2.102. There must be at least a one-inch left margin and at least a half-inch right margin. Because Rule 2.107 specifies that line numbers must be placed at the left margin, separated from the text by a vertical line or a vertical column of space (see §11.9), each line of text actually begins more than an inch from the left edge of the page.

Although Rules 2.100-2.119 do not specify top and bottom margins, Rule 2.111 states that, at least for the first page, the first line of typing or printing must begin one inch from the top of the page with line number 1. The last numbered line might be a similar distance from the bottom, leaving room for the page number and the footer containing the paper's title below the page number. See Cal Rules of Ct 2.109-2.110; §11.11.

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§11.11 5. Pages: Numbering, Footer, Fastening, Prepunched Holes

The pages of the paper presented for filing must be numbered consecutively at the bottom. Cal Rules of Ct 2.109. All pages of a paper must be full-size original pages without riders. Cal Rules of Ct 2.113.

Except for exhibits, each paper filed with the court must bear a footer in the bottom margin of each page, below the page number and divided from the rest of the page by a printed line. The footer must contain the title of the paper (*e.g.,* "Complaint," "XYZ Corp.'s Motion for Summary Judgment") or some clear and concise abbreviation, printed in at least 10-point type. Cal Rules of Ct 2.1110. See sample from in §11.35.

The pages of a paper must be "firmly bound together at the top." Cal Rules of Ct 2.113. Each paper presented for filing must contain two "pre-punched normal-sized" holes, centered 2½ inches apart, 5/8 of an inch from the top of the paper. Cal Rules of Ct 2.1115.

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Source: Civil Litigation/California Civil Procedure Before Trial/11 Pleadings and Court Papers/§11.12 6. Corrections and Changes

§11.12 6. Corrections and Changes

Additions, deletions, or interlineations must be initialed by the clerk or judge at the time of filing. All copies served must conform to the original filed version, including the numbering of lines, pagination, additions, deletions, and interlineations. Cal Rules of Ct 2.1116.

WARNING: The court clerk has authority under Cal Rules of Ct 2.1118 to reject the whole paper that does not comply with Cal Rules of Ct 2.100-2.119.

After a pleading (*i.e.,* complaint, answer, demurrer, cross-complaint; see CCP §422.10) has been filed, a court may permit it to be corrected or amended by alterations on its face. Cal Rules of Ct 3.1324(d).

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§11.13 7. Unused Lines

The rules do not require that all the numbered lines of a page be used. Some may be left blank. For example, the last line of a typed page may be left blank to start a new paragraph on the next page, or a space on a printed form may be left blank when the material to be inserted does not fill the blank provided for it.

NOTE: Many attorneys insert asterisks, a pair of front slashes, or other marks to show that the line was purposely not used and to prevent unwanted information from being inserted.

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8. Exhibits

§11.14 a. Attaching; Numbering

Exhibits such as contracts, declarations, or memorandums can be attached to pleadings and other papers. If the exhibit is smaller or larger than the pages of the court paper, it should be fastened to 8½ by 11 inch sheets. If the exhibit was prepared by a machine-copying process, it must be equal to typewritten material in legibility and permanency of image. Cal Rules of Ct 2.1114. If an attached exhibit is illegible, the attorney should also attach a double-spaced typed version. Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter. Cal Rules of Ct 3.1110(g).

Each exhibit must be separated by a hard 8½ by 11 inch sheet with hard paper or plastic tabs that extend below the bottom of the page and that identify the exhibit. An index to the exhibits must be provided. Cal Rules of Ct 3.1110(f). Exhibits are usually identified by letter (*e.g.,* EXHIBIT A) and pages by number (*e.g.,* EXHIBIT A, page 8 or A-8). Pages from a single deposition and associated exhibits must be designated as a single exhibit. Cal Rules of Ct 3.1110(f).

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§11.15 b. Incorporation by Reference: Form of Allegation

A statement in a paper that an attached document is incorporated by reference makes that document a part of the pleading or paper as if it were written out in full ("pleaded in haec verba") in the paper. See *Holly Sugar Corp. v Johnson* (1941) 18 C2d 218, 225, 115 P2d 8. The document must be attached to the paper if practicable; mere reference to it and prayer that it be incorporated do not make it part of the paper. *Legg v United Benefit Life Ins. Co.* (1960) 182 CA2d 573, 578, 6 CR 73. If a paper refers to an exhibit that cannot practicably be attached because of its physical nature or bulk, that fact should be stated in the paper. This is required when the paper is a complaint for infringement of a literary, artistic, or intellectual production and the production or alleged infringing production is not attached. CCP §429.30(b).

The reference and incorporation clause should directly and clearly show that recitals in the document are part of the allegations of the pleading or paper. See *Holly Sugar Corp. v Johnson, supra*; 4 Witkin, California Procedure, *Pleading* §428 (5th ed 2008). For example:

On _ _[*date*]_ _, plaintiff and defendant entered into a written agreement, a copy of which is attached as Exhibit A and incorporated by reference.

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§11.16 9. Copies

Usually, the original of each court paper is filed by the court clerk in the folder maintained for the case, a copy is served on each other party or his or her attorney of record, and at least one copy is kept by the person or office that prepared the paper.

All copies served must conform to the original that is filed, including the numbering of lines, pagination, additions, deletions, and interlineations. Cal Rules of Ct 2.1117.

NOTE: Although electronic word-processing equipment can produce numerous duplicates, each looking like an original, possible error and confusion may be avoided by producing one easily recognizable original from which photocopies can be made. Some attorneys stamp or attach a "stick-on" on the front page of each document designating whether it is an original or a copy.

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B. First-Page Format

§11.17 1. Name, State Bar Number, Address, Telephone Number, Fax, and E-mail; Representation

The first page of a court paper must show the name, address, and telephone number and State Bar number of the attorney for the party in whose behalf the paper is presented, or the name, address, and telephone number of the party if he or she appears in propria persona. The attorney's address must be the office address or, if the attorney has none, the residence address. Cal Rules of Ct 2.111(1). This information must appear in the space beginning on the first numbered line, one inch from the top of the page and to the left of the center of the page. Cal Rules of Ct 2.111(1).

The attorney may also provide a fax number and/or an e-mail address. Their inclusion is optional and does not constitute consent to service by fax or e-mail, unless otherwise provided by law. Cal Rules of Ct 2.111(1).

NOTE: Parties may file documents by fax in any court that has adopted a local rule permitting fax filing. Cal Rules of Ct 2.304. In addition, parties may agree in writing to accept service by fax. Cal Rules of Ct 2.306(a). For discussion of filing and serving documents by fax, see chap 18.

Below the attorney identification lines is a line identifying the person or entity that the attorney represents.

A party who will appear in person without an attorney can be advised to add words such as "In Propria Persona," "In Pro. Per.," or "For Himself" or "For Herself" after his or her name or on a line below the telephone number.

Typing or print on lines one through seven must be kept to the left of the center of the page, leaving the space on the right for the clerk's use. Cal Rules of Ct 2.111(2). See sample form in §11.35.

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§11.18 a. Firm Names; Law Corporations

For each paper filed, Cal Rules of Ct 2.111(1) requires the name "of the attorney" for the party on whose behalf the paper is presented and the attorney's State Bar membership number to be specified in the upper-left corner of the first page. This wording seems to preclude the former practice of listing only a firm name without the name of an individual attorney. However, when a law firm name is printed on the first page, in addition to an individual attorney's name and State Bar number, the court will then permit any attorney from that firm (who is a California State Bar member) to appear for the named client without the need to file a form of association or substitution of attorneys. See chap 4.

If the law firm is a professional corporation, the first page of the paper should state the name and State Bar number of an individual attorney who is

- A member of the corporation;
- Admitted to the bar of the court; and
- Principally charged with the litigation's conduct.

The firm name should be followed by words such as "A Professional Corporation," or some other designation that indicates its incorporated status. For example:

Jan E. Austin, State Bar No. 765432
Alber & Barker, APC
2222 Main Street
Center, CA 99999
Telephone: (123) 987-7890
Fax: (123) 987-7899

E-mail: jaustin@ceb.com

Attorney for Plaintiff

XYZ Company, Inc.

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Source: Civil Litigation/California Civil Procedure Before Trial/11 Pleadings and Court Papers/§11.19 b. Several Attorneys; Several Parties

§11.19 b. Several Attorneys; Several Parties

If attorneys from different offices are associated in representing the party in whose behalf the paper is presented, all names can be listed beginning on the first line of the first page so that it is clear that all can appear for the party. The first name listed, and the address and telephone number given, should be those of the attorney who is to receive papers served on the party and who can answer inquiries about the case. For example:

C. Baker Able, State Bar No. 654321,
Hadley Baxendale, State Bar No. 543210, and
Ales and Ryan
1111 Main Street
Center, CA 99999
Telephone: (123) 987-7890
Fax: (123) 987-7899

E-mail: cbakerable@ceb.com

Attorneys for Plaintiff

Black and White Co.

If a single paper is presented on behalf of several parties and not all parties are represented by the same attorney or attorneys, the name, number, address, and telephone number of the attorney for each party should be stated, followed by a line stating whom he or she represents. For example:

C. Baker Able, State Bar No. 654321
1111 Main Street
Center, CA 99999
Telephone: (123) 987-7890
Fax: (123) 987-7899
E-mail: cbakerable@ceb.com
Attorney for Defendant Pat Wilson

Jan E. Austin, State Bar No. 765432
Alber, Barker, Cade & Dodge
2222 Main Street
Center, CA 99999
Telephone: (123) 987-7890
Fax: (123) 987-7899

E-mail: jaustin@ceb.com

Attorneys for Defendants L.L. Bane and Bane Products, Inc.

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§11.20 2. Caption

Code of Civil Procedure §422.30 requires every *pleading* (*i.e.,* every complaint, cross-complaint, answer, or demurrer; see CCP §422.10) to contain a caption setting forth

- The name of the court and county in which the action is brought; and
- The title of the action.

CCP §422.30(a). California Rules of Court 2.111 requires this information to be included on the first page of every *paper* presented for filing, along with the number of the case, the nature of the paper, and (if the paper is a complaint or petition) the character of the action or proceeding. In a limited civil case, the caption must state that the case is a limited civil case, and the clerk must classify the case accordingly. CCP §422.30(b). See Cal Rules of Ct 2.111(9); sample form in §11.35.

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§11.21 a. Name of Court

The name or title of the court must be placed no higher than line eight on the first page (no higher than three and one-third inches from the top). Cal Rules of Ct 2.111(3). The title of the court is usually centered on the page in capital letters.

No statute or statewide rule requires the title or the name of the superior court to be stated in any particular style. A defect in naming the court will be disregarded in every stage of the action unless it affects a substantial right of a party. CCP §475; *Ex parte Fil Ki* (1889) 79 C 584, 21 P 974 ("Supreme Court … for the County of Yuba").

California Judicial Council printed forms use the following format:

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

An example of a more concise style is:

ALAMEDA COUNTY SUPERIOR COURT

San Francisco lawyers customarily refer to their court as the "Superior Court for the City and County of San Francisco," but "San Francisco County Superior Court" is sufficient.

A Judicial Council form (see §11.27) that is preprinted with the name and address of one court, or with the name of that court's clerk, may be used in another court if the new name is legibly substituted for the old (*e.g.,* by crossing out the old name and typing or printing the new one above it). Such a modification is not a ground for refusal to file the form. Cal Rules of Ct 1.42.

Every pleading filed in a limited civil case must state in the caption that the case is a limited civil case as in the example below. Cal Rules of Ct 2.111(9)-(10). See §11.27 and sample form in §11.35.

ALAMEDA COUNTY SUPERIOR COURT

LIMITED CIVIL CASE

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§11.22 b. Title of Action (Names of Parties)

The title of the case must be placed below the title of the court and to the left of the center of the page. In the title of the case on each initial complaint or cross-complaint, the name of each party must commence on a separate line beginning at the left margin of the page. On any subsequent pleading or paper, it is sufficient in the title of the case to state:

- The name of the first party on each side, with appropriate indication of other parties; and
- That a cross-action is, or cross-actions are, involved, if applicable.

Cal Rules of Ct 2.111(4). For a typical arrangement, see sample form in §11.35.

In the complaint, the names of all parties must be included in the title of the action. In subsequent papers, only the name of the first party on each side need be stated, followed by an appropriate indication of other parties, *e.g.,* "et al." or "and others." CCP §422.40. A cross-complaint should show both the abbreviated title of the action as originally filed and the names of all parties to the cross-action. See chap 26.

The names used should be sufficiently correct and complete to distinguish the parties named from other people whose names may be listed in plaintiff and defendant indexes, and to permit service under the names given. First names and middle initials are customarily stated, if known; if the party's name is common, his or her full middle name may be given. See chap 15 on the effect of misnaming parties in complaints, and chap 14 on stating names of particular types of parties.

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§11.23 c. Number of Case

The number of the case must be placed to the right of and opposite the title of the case. Cal Rules of Ct 2.111(5). On the first paper presented for filing in the action, only "No." is typed on the paper with a blank space left for the clerk to stamp or write in the number assigned to the case. See sample form in §11.35. That number is then entered on all subsequent papers.

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§11.24 d. Nature of Paper and Character of Action; Judge's Name and Department

The nature of the paper and, on all complaints and petitions, the character of the action or proceeding must be set forth in the space immediately below the number of the case. Cal Rules of Ct 2.111(6). The rules do not define "nature of the paper" or "character of action," but the requirement is satisfied by key words, *e.g.,* "STIPULATION EXTENDING TIME TO ANSWER; ORDER"; "COMPLAINT FOR DAMAGES—PERSONAL INJURY." See sample form in §11.35.

If the case includes multiple parties, any answer, response, or opposition must specifically identify the complaining, propounding, or moving party and the complaint, motion, or other matter being answered or opposed, *e.g.,* "DEFENDANT ABC's OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL FURTHER ANSWERS TO INTERROGATORIES." Cal Rules of Ct 2.111(6).

NOTE: The title of the paper must also appear as a footer at the bottom of each page, printed in at least 10-point type. Cal Rules of Ct 2.1110. See §11.11. In a limited civil case, whether or not the amount demanded exceeds $10,000 must appear below the words indicating the character of the action. See §11.27 and sample form in §11.35.

The first pages of each paper must also include, below the nature of the paper or the character of the action or proceeding, the name of the judge and department, if any, to which the case is assigned. Cal Rules of Ct 2.111(7).

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§11.25 e. Referee's Name

If the paper is to be filed in a case pending before a referee appointed under CCP §§638-639, below the nature of the paper or the character of the action or proceeding, the word "Referee," followed by the name of the referee, must be included. Cal Rules of Ct 2.111(8).

NOTE: A file-stamped copy of the paper (which was filed with the court clerk) must also be provided by the filing party to the referee (or to the private judge). Cal Rules of Ct 2.400(b). See chap 45 on use of referees and private judges.

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Source: Civil Litigation/California Civil Procedure Before Trial/11 Pleadings and Court Papers/§11.26 f. Limited Civil Case

§11.26 f. Limited Civil Case

Every pleading and every other paper filed in a limited civil case must state in the caption that the case is a limited civil case as required by CCP §422.30(b). Cal Rules of Ct 2.111(10). See CCP §422.10(b) (pleadings in civil actions are complaints, demurrers, answers, and cross-complaints). As a practical matter, attorneys may carry over to the first page of subsequent court papers the caption that appeared on their initial pleadings.

The complaint, petition, or application in a limited civil case must state, immediately below the words indicating the character of the action or proceeding (see §11.24), the amount demanded as follows: "Amount demanded exceeds $10,000" or "Amount demanded does not exceed $10,000," as required by Govt C §70613 (filing fees for first paper in limited civil case). Cal Rules of Ct 2.111(9). This amount must be specified because it affects the amount of the filing fee. See Govt C §70613.

Section 70613 sets the fee for filing a first paper in a civil case. Thus, the information on the amount demanded may be required only in a complaint, petition, or application that is the *first* paper in a limited civil case, so that the clerk can set the appropriate amount of fees. At the time of this printing, the fee for the first paper in a limited civil case is $330, but is lowered to $205 when the amount demanded, excluding attorney fees and costs, is $10,000 or less. See Govt C §70613. It then follows that the requirement that one state the "amount demanded" does not appear to apply to captions for papers that are not the first paper in a civil case, such as declarations, stipulations, or orders.

See also the example of the name of the court in §11.21 and the sample form in §11.35.

ALAMEDA COUNTY SUPERIOR COURT
LIMITED CIVIL CASE

John Henry Smith, Helen B. Smith,	**)**	**No. _ _ _ _ _ _**
Plaintiffs,	**)**	**COMPLAINT**
	)	**Personal Injuries**
vs.	**)**	**Judge Jane Jones**
	)	**Dept. 2A**
Walter A. Johnson, Good Products, Inc., Doe 1 through Doe 100,	**)**	**(Amount demanded exceeds $10,000)**
Defendants	**)**	
_____	**)**	

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under CCP §403.020 (reclassification by filing amended complaint or other initial pleading) or §403.030 (reclassification by filing cross complaint), the caption must indicate that the action or proceeding is reclassified by this pleading. If a case is reclassified by stipulation under CCP §403.050, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or words to that effect. Cal Rules of Ct 2.111(10). For discussion of reclassification, see chap 6.

ALAMEDA COUNTY SUPERIOR COURT
LIMITED CIVIL CASE RECLASSIFIED TO UNLIMITED CIVIL CASE

John Henry Smith, Helen B. Smith,	**)**	**No. _ _ _ _ _ _**
Plaintiffs,	**)**	**AMENDED COMPLAINT**
	)	**Personal Injuries**
vs.	**)**	**Judge Jane Jones**
	)	**Dept. 2A**
Walter A. Johnson, Good	**)**	

Products, Inc., Doe 1 through)
Doe 100,)
Defendants)
_____)

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III. PREPRINTED FORMS

A. Judicial Council Forms

§11.27 1. Mandatory and Optional Forms

The Judicial Council has provided preprinted fill-in forms for many commonly used court papers. See Govt C §68511 (authorizing Judicial Council to "prescribe" certain forms). Some Judicial Council forms are mandatory; others are optional. Each mandatory form has the phrase "Form Adopted for Mandatory Use" or "Mandatory Form" in the lower left corner of the first page. Whenever applicable, they must be used by all parties and must be accepted for filing by all the courts. Cal Rules of Ct 1.31.

Optional forms bear the words "Form Approved for Optional Use" or "Optional Form" in the lower left corner of the first page. See Cal Rules of Ct 1.35. The court may not require the use of an altered optional form in place of the Judicial Council form. Cal Rules of Ct 1.35(e).

The court may not require that any mandatory or optional Judicial Council form be printed on any other color paper other than white. Cal Rules of Ct 1.31(f), 1.35(f).

The list of Judicial Council legal forms is published in an appendix to the California Rules of Court. See Cal Rules of Ct App A (list of forms; mandatory forms are indicated by asterisks). Cal Rules of Ct 1.31(b), 1.35(b). It is also available at the Judicial Council's website at www.courtinfo.ca.gov/forms. Cal Rules of Ct 1.31(b), 1.35(b).

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§11.28 2. Contents of Form; Requirements

The references to statutes and rules on the lower right corner of Judicial Council forms are advisory only. The presence or absence of a particular reference is not a ground for rejecting a form otherwise applicable in the action or proceeding for the purpose presented. Cal Rules of Ct 1.40.

Proofs of service are included on some Judicial Council forms solely for the convenience of the parties. A party may use an included proof of service or any other proper proof of service. Cal Rules of Ct 1.41.

If a Judicial Council form is longer than one page, the form may be filed on sheets printed on only one side even if the original form has two printed sides to a sheet. If a form is filed on a sheet printed on two sides, the reverse side must be rotated 180 degrees (printed head to foot). Cal Rules of Ct 2.134(a)-(b).

Any Judicial Council form filed must be a true copy of the original form and must be as legible as a printed form. Cal Rules of Ct 1.43.

A party or attorney may file a duplicate of a Judicial Council form produced by a computer and a printer or similar device with a resolution of at least 300 dots per inch. The device must print, in a contrasting typestyle equivalent to that produced by a typewriter, text that otherwise would have been entered by a typewriter or word processor. Cal Rules of Ct 1.44.

A party or attorney who files a Judicial Council form certifies by filing the form that it is a true and correct copy of the form. Cal Rules of Ct 2.132.

All forms and copies of forms filed with the court must use recycled paper as defined in Cal Rules of Ct 1.6. Cal Rules of Ct 2.131.

All forms presented for filing must be firmly bound at the top and must contain two prepunched normal-sized holes, centered 2½ inches apart and 5/8 inch from the top of the form. Cal Rules of Ct 2.133.

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§11.29 3. Pleading Forms

The forms listed under the "Pleading" heading on the list of Judicial Council forms in Cal Rules of Ct App A are approved by the Judicial Council. Cal Rules of Ct 1.45(a).

Any approved cause of action form may be attached to any approved form of complaint or cross-complaint. Cal Rules of Ct 1.45(b).

A cause of action for which no form has been approved may be prepared in the format prescribed by Cal Rules of Ct in Ch 1 of Div 2 of Title 2 and attached to any approved form of complaint or cross-complaint. Each paragraph within a cause of action must be numbered consecutively, beginning with 1. Each paragraph number must be preceded with one or more identifying letters derived from the title of the cause of action. Cal Rules of Ct 1.45(c).

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Source: Civil Litigation/California Civil Procedure Before Trial/11 Pleadings and Court Papers/§11.30 4. Filing

§11.30 4. Filing

A court must not reject for filing a Judicial Council form for any of the following reasons (Cal Rules of Ct 1.42):

- The form lacks the preprinted title and address of the court or the clerk's preprinted name;
- The form is printed by a publisher or another court;
- The preprinted title and address of another court or its clerk's name is legibly modified;
- The form lacks the name of the clerk;
- The form lacks the court's local form number;
- The form lacks any other material added by a court, unless the material is required by the Judicial Council;
- The form is imprinted with the name or symbol of the publisher, unless the name or symbol replaces or obscures any material on the printed form; or
- The form is legibly and obviously modified to correct a code section number or to comply with the law under which the form is filed.

The clerk must not reject for filing or refuse to file any Judicial Council or local court form solely on the ground that it is completed in handwritten or hand-printed characters or that the handwriting or hand printing is in a color other than blue-black or black. Cal Rules of Ct 2.135.

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§11.31 5. Obtaining Forms

Judicial Council forms can also be found on the Internet sites of the Judicial Council (www.courtinfo.ca.gov/forms) and many courts, and may be printed from those websites. Although the forms cannot be completed on screen at the Judicial Council's web page, software is available from commercial providers, such as CEB's SmartLaserä CD-ROM, which allows the user to view, print, and save the forms electronically. See Cal Rules of Ct Appendix A (introduction to list of forms).

The attorney who subscribes to a service that reproduces and updates Judicial Council forms (such as California Judicial Council Forms Manual (Cal CEB 1981)) may photocopy the forms included in the manual.

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§11.32 B. Local Court Forms

Many individual courts have adopted, and furnish, preprinted versions of commonly used court papers that have not been adopted or approved by the Judicial Council. See Cal Rules of Ct 2.119, 10.614. Clerks in these courts have sometimes insisted that the local preprinted form be used and refuse to accept a typed version of the paper or a preprinted form from another county. Many of these local practices may disappear as a result of the adoption of Cal Rules of Ct 3.20, 2.100(a), preempting local rules in many areas of procedure. See §11.3. See also Cal Rules of Ct 1.42 (prohibits rejection for Judicial Council forms for various listed reasons).

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§11.33 IV. RESPONDING TO CLERK'S REFUSAL TO FILE

If a court clerk has rejected a paper submitted for filing, asserting that it does not comply with court rules, the wisest course in most situations is to redraft the paper. This is true even when the clerk's objection to filing the paper seems overly technical or a misinterpretation of the applicable rule or when counsel believes the court's local requirements conflict with provisions of the California Rules of Court. See Cal Rules of Ct 3.20(a) (Judicial Council rules of court preempt local rules relating to form and format of papers and other specified matters), discussed in §11.3. See also Cal Rules of Ct 1.35 (court may not require use of altered optional Judicial Council form in place of Judicial Council form), 1.42 (court clerk may not reject Judicial Council form because, *e.g.,* it lacks preprinted title or address of court or is printed by publisher or another court), discussed in §11.33, and *Carlson v State Dep't of Fish & Game* (1998) 68 CA4th 1268, 80 CR2d 601 (superior court clerk may not reject complaint that complies with state requirements on ground that it does not comply with local rules).

A complaint is not filed if it is rejected by the clerk's office and the clerk's rejection of a filing does not operate to extend the time limit for filing papers. *Liang v San Francisco Residential Rent Stabilization & Arbitration Bd.* (2004) 124 CA4th 775, 21 CR3d 715; *Duran v St. Luke's Hosp.* (2003) 114 CA4th 457, 8 CR3d 1 (complaint properly dismissed because plaintiffs did not submit full amount of filing fee before statute of limitations had run).

NOTE: It is usually no service to the client to battle with the court on issues that are unimportant to the litigation.

Occasionally, however, circumstances may arise in which it is difficult or impossible to comply with the rules in the first instance or to redraft a paper that was rejected. The rules of court permit a judge to order the clerk to file a document that does not comply with the rules of court "for good cause shown." Cal Rules of Ct 2.118(c). Good cause might exist, *e.g.,* when the need to file the paper arises unexpectedly when the attorney is away from the office, when the attorney discovers in the clerk's office that the offered paper is not in compliance, when it is impractical to have the paper redone *and* the deviation will not seriously inconvenience the court or another party.

PRACTICE TIP: The request to a judge for an order directing the clerk to file a paper may be made ex parte, even orally, in emergency situations.

See §11.12 on correcting defects by handwritten changes.

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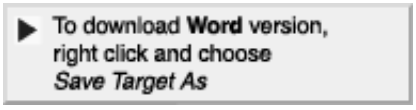
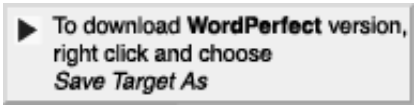
§11.34 V. CHECKLIST: PROCEDURE FOR PREPARING COURT PAPERS





- Identify nature of paper (see §11.24)
- Determine whether preprinted form (Judicial Council, local court, or other) is available

For mandatory preprinted Judicial Council form

- Obtain copy from court clerk, download from Judicial Council's website (www.courtinfo.ca.gov/forms), or photocopy from California Judicial Council Forms Manual (Cal CEB 1981), and
- Enter necessary information and signatures, or
- Draft form using electronic form drafting software, such as CEB's SmartLaserä CD-ROM, and high-quality printer

For optional preprinted Judicial Council form

- Decide whether to obtain and fill out preprinted form (see above) or to prepare paper on pleading paper (see below)

To prepare form on pleading paper

- Ascertain whether court has adopted local form or format requirements for all papers or for particular paper
- Follow Rules of Court for format of paper, such as Cal Rules of Ct 2.100-2.119
- Type form on pleading paper, or use computer and printer to produce paper that conforms to form and format requirements discussed in §§11.6-11.26.

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Source: Civil Litigation/California Civil Procedure Before Trial/11 Pleadings and Court Papers/§11.35 VI. SAMPLE: FIRST-PAGE FORMAT OF COURT PAPER

§11.35 VI. SAMPLE: FIRST-PAGE FORMAT OF COURT PAPER

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1111 Main Street
Center, CA 99999

Telephone: (123) 456-7890
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Email: cba@ceb.com

Attorney for Plaintiff
George Herman Ruth

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
_ _[*Limited Civil Case*]_ _

George Herman Ruth, Plaintiff)	No. _ _ _ _ _ _
vs	COMPLAINT FOR DAMAGES
	Breach of Contract
Joseph D. Medwick,	Judge Jane Jones
Andrew Barlow,	Dept. 2A
Doe 1 through Doe 10, Defendants)	[*If approriate, add:* Limited Civil Case
	Amount demanded _ _[*exceeds/ does not exceed*]_ _ $10,000]

Plaintiff alleges:

FIRST CAUSE OF ACTION

1. Plaintiff does not know the true names of the defendants sued as Doe 1 through Doe 10.

2. On July 1, 2002, plaintiff entered into a contract with defendants Joseph D. Medwick, Andrew Barlow, and Does 1 through 5 under which these defendants agreed to supply plaintiff with 8,000 switches on the first day of each month to be used as components in products manufactured and sold by plaintiff. A copy of this contract, marked Exhibit A, is attached to and made a part of this complaint.

3. Under the contract, these switches were to have a failure rate not to exceed one per thousand.

Copies: The originals of pleadings (*i.e.,* complaint, cross-complaint, answer, and demurrer; see CCP §422.10) and the originals of papers in law and motion matters are filed with the court clerk. One copy of each document filed with

the clerk must be served on each party in the litigation. Counsel should retain a file-stamped copy of the papers for the case file. See chaps 17 (service of process) and 18 (service of papers).

Comment: A format similar to the one illustrated here may be used for all court papers for which the Judicial Council has not adopted a mandatory form. Note that, in addition to its mandatory forms, the Judicial Council has approved optional forms for many commonly-used court papers. See §11.27.

All court papers must be on pleading paper with consecutive line numbers at the left margin of each page. Cal Rules of Ct 2.108(4). See §11.9. A footer, showing the title of the paper in at least 10-point type, divided from the rest of the page by a printed line, must appear on each page below the page number. Cal Rules of Ct 2.110. See §11.11.

For additional requirements, see Cal Rules of Ct 2.100-2.119. For example, the title of the court must appear on line 8 as shown. Cal Rules of Ct 2.111. See §11.21.

As illustrated, all pleadings and every other paper filed in limited civil cases must contain the words "Limited Civil Case" in the caption. Every complaint, petition, or application filed in a limited civil case must indicate whether the amount demanded is greater or less than $10,000. See Cal Rules of Ct 2.111(9)-(10); §11.26.

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12

Noticed Motions

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I. INTRODUCTION

§12.1 A. Scope of Chapter

This chapter covers general aspects of the noticed motion procedure. Specific format and timing requirements applicable to particular motions are noted in the other chapters of this book that discuss those motions. This chapter discusses tactical objectives and client consultation (see §§12.5-12.6), the notice of motion (see §§12.7-12.29), supporting documents (see §§12.30-12.59), time for making motion and shortening and extension of time (see §§12.60-12.68), service and filing (see §§12.69-12.77), opposing the motion (see §§12.78-12.94), the reply (see §§12.95-12.96), hearings (see §§12.97-12.103), rulings and orders (see §§12.104-12.120), sanctions (see §12.121), sealing of court records (§§12.122-12.139), and forms (see §§12.140-12.153).

Chapter 13 discusses ex parte applications for orders. Summary judgment motions are discussed in chap 36. Motions to disqualify a judge under CCP §170.6 are discussed in California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995). Motions regarding discovery are discussed in California Civil Discovery Practice (4th ed Cal CEB 2006).

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B. Governing Law

§12.2 1. Statutes

Motions, notices of motion, and orders in general are governed by CCP §§1003-1020.

- Definitions: CCP §1003.
- Court in which motion should be made: CCP §§1004 and 166.
- Motions requiring written notice; time periods for making or opposing written motions: CCP §1005.
- When motion deemed made: CCP §1005.5.
- Transfer to another judge: CCP §1006.
- Appearance of counsel by telephone: CCP §367.5.
- Motions to reconsider: CCP §1008.
- Content of the notice of motion: CCP §1010.
- Filing and service: CCP §§1011-1020.
- Rules governing filing by facsimile: CCP §1010.5.
- Local rules re electronic filing and service: CCP §1010.6.
- Method and place of service: CCP §1011.
- Service by mail: CCP §§1012-1013a.
- Appearance by answer, demurrer, or written notice: CCP §1014.
- Service on party without attorney or on nonresident appearing by attorney: CCP §1015.
- Provisions not applicable to service of summons: CCP §1016.
- Service by telegraph: CCP §1017.
- Print size of notice or publications: CCP §1019.
- Service of notice of court's decision: CCP §1019.5.
- Service of notice by registered mail: CCP §1020.

A number of additional sections of the California Code of Civil Procedure deal with specific types of motions. For example, discovery motions are governed by several specific procedures and requirements set out in CCP §§2016.010-2036.050.

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§12.3 2. California Rules of Court

The Civil Law and Motion Rules are set forth in Cal Rules of Ct 3.1100-3.1312. They comprise a comprehensive set of rules that apply to all civil law and motion proceedings. Cal Rules of Ct 3.1100.

- Format and filing of papers: Cal Rules of Ct 3.1100-3.1302.
- General format: Cal Rules of Ct 3.1110.
- Motions and other pleadings: Cal Rules of Ct 2.111(4)-(6), 3.1112-3.1113, 3.1324.
- Memorandum in support of motion. Cal Rules of Ct 3.1113.
- Miscellaneous papers: Cal Rules of Ct 3.1115.
- Deposition testimony: Cal Rules of Ct 3.1116.
- Time for filing and service of motion: Cal Rules of Ct 3.1300.
- Place and manner of filing: Cal Rules of Ct 3.1302.
- Hearings: Cal Rules of Ct 3.1304-3.1310.
- Time of hearing: Cal Rules of Ct 3.1394.
- Oral testimony and judicial notice: Cal Rules of Ct 3.1306.
- Tentative ruling procedures: Cal Rules of Ct 3.1308.
- Reporting of proceedings: Cal Rules of Ct 3.1310.
- Particular motions: Cal Rules of Ct 3.1320-3.1384.
- Miscellaneous provisions: Cal Rules of Ct 3.1200-3.1207, 3.1130-3.1312.

Rules adopted by the Judicial Council may not be inconsistent with statute. Cal Const art VI, §6. To comply with the requirement of consistency, a rule of court may not conflict with the intent of a statute. *People v Hall* (1994) 8 C4th 950, 35 CR2d 432; *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 70 CR2d 449. See also *California Court Reporters Ass'n v Judicial Council* (1997) 59 CA4th 959, 69 CR2d 529.

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§12.4 3. Local Court Rules and Policies

The Judicial Council has adopted Cal Rules of Ct 3.20, which preempts local court rules relating to "pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and the form and format of papers." Cal Rules of Ct 3.20(a). It does not, however, apply to certain proceedings, such as those in family law, probate, or criminal proceedings, and it does not preempt local rules adopted under the Trial Court Delay Reduction Act (Govt C §§68600-68620). Cal Rules of Ct 3.20(b). See also *Volkswagen v Superior Court* (2001) 94 CA4th 695, 703, 114 CR2d 541 (local rules that manage complex litigation are not preempted). On preemption of local rules generally, see §11.2.

PRACTICE TIP: Because trial courts still have authority to make rules in areas that potentially affect motion practice (*e.g.,* management of fast-track cases), counsel should continue to check local rules before filing a motion. See, *e.g.,* Los Angeles Ct R 7.12(h) (counsel should attempt to resolve issue with opponent before filing motion). In addition, some courts also have policy or procedure manuals on motions and particular kinds of proceedings, and occasionally individual judges or departments issue policy statements. Although Cal Rules of Ct 3.20 preempts local rule-making, it does not specifically mention local policies and guidelines. Thus, it is unclear what impact it will have. But see *Lokeijak v City of Irvine* (1998) 65 CA4th 341, 76 CR2d 429 (trial court's "guideline" on summary judgment motions invalidated; guideline was actually rule that conflicted with CCP §437c).

Many law libraries maintain collections of local rules and policy manuals from their own and other counties, and selected court rules are published by some legal newspapers. It is also sometimes advisable to consult with the local court clerk to locate applicable court rules. Local rules can also be found on the court's website. For a listing of local rules websites, see www.courtinfo.ca.gov/rules/localrules.htm.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.5 C. Tactical Objectives

§12.5 C. Tactical Objectives

Motions are tactical tools, and the attorney's decision to seek an order should be made in the context of the party's overall litigation plan. Making a motion entails time, effort, and expense for the moving party.

An attorney deciding whether to make a motion, or what motion to make, may engage in a kind of "cost-benefit" analysis: Does the anticipated benefit (after being discounted for the possibility of losing the motion and the disadvantage of educating the adversary) outweigh the expense (in time and money) of making the motion? How does that differential compare with those produced by a similar analysis of alternatives to the motion?

Factors to be evaluated include:

- The significance of a successful motion to the ultimate outcome of the case.
- The likelihood of success.
- The danger of alerting the adversary to issues that may not have surfaced until later.

EXAMPLE: There may be an advantage to taking a deposition before making a motion. In some cases, an early motion may save the moving party effort and expense. In others, it is better to delay filing a motion until after investigation and discovery or after an adversary is committed to a position. Some motions can be postponed until it is too late for the adverse party to correct the defect that the motion exposes.

- The favorable and permitted time to make the motion. Delay may create the risk that adversaries will oppose the motion on grounds of laches (see *Benjamin v Dalmo Mfg. Co.* (1948) 31 C2d 523, 531, 190 P2d 593; *Corcoran v City of Los Angeles* (1957) 153 CA2d 852, 856, 315 P2d 439), or that the judge who rules on the motion will see the delay as intended to gain an advantage or create an inequity.
- The degree to which the motion will help or interfere with settlement possibilities.
- The cost of making the motion, in terms of money, effort, time, and continued amicability among counsel.
- Less costly measures that might achieve an acceptable result. For example, the objective might be achieved by simply discussing the matter with, and obtaining the agreement of, opposing counsel.

  NOTE: Many local court rules require the parties to "meet and confer" to try to resolve disputes before making a motion. See Cal Rules of Ct 3.724; Los Angeles Ct R 7.9(b)(1).

- The overall effect of the motion on the judge's view of the case. If the case is assigned to a single judge, the view of a case that a particular judge receives from hearing and ruling on a series of motions can affect that judge's overall perception of the merits or lack of merits of the case as a whole.

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§12.6 D. Consultation With Client

It is usually good practice, and often good protection for counsel, to discuss with the client the possibility of making a motion. Some factors to be evaluated in deciding whether to make a motion or what motion to make involve matters that are not strictly legal evaluations about which the client may have strong feelings, *e.g.,* the costs involved. See generally §12.5. In any event, the client who is involved in the litigation decision-making process is more likely to feel well represented.

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II. NOTICE OF MOTION

§12.7 A. Motion Defined; OSC Compared

A motion is an "application for an order," which is a direction of a court or judge, made or entered in writing and not included in a judgment. CCP §1003. "Making a motion" is the process of applying for an order. A motion is deemed to have been made, and to be pending before the court, on all the grounds stated in the notice of motion on due service and filing of the notice of motion. CCP §1005.5. In some circumstances, custom or statute may dictate that the order to show cause procedure be used (see chap 13), but the effect of these two procedures is the same. See *Marriage of Nadkarni* (2009) 173 CA4th 1483, 1499, 93 CR3d 723 (order to show cause constitutes notice of motion).

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§12.8 B. Necessary Papers

The motion papers to be served and filed include a notice of motion, a supporting memorandum, and, if appropriate, the presentation of evidence by declarations (or affidavits) or other means. See Cal Rules of Ct 3.1112. These papers may be filed as separate documents or combined in one or more documents. If items are combined, they must be listed separately in the caption. See, *e.g.*, form in §12.140.

Certain motions may require additional papers. See, *e.g.,* CCP §437c(b)(1) (summary judgment or summary adjudication motions).

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§12.9 C. Notice of Motion

The notice of motion is the formal statement that identifies the time, date, and place of the hearing, the nature of the order being sought, the grounds for the motion, and the documents and other items that support the motion. CCP §1010.

NOTE: Under Cal Rules of Ct 3.1112, a "motion" that is largely duplicative of the notice of motion must be filed in addition to the notice of motion, even though CCP §1005.5 provides that a motion is deemed made on serving and filing of the notice of motion, and many of the specific statutes authorizing the filing of a motion only require the filing of a notice of motion. See, *e.g.*, CCP §418.10 (defendant may file "notice of motion" to quash service of summons or to stay or dismiss action on inconvenient forum ground) and CCP §435 (any party may file "notice of motion" to strike pleading). It therefore appears that the notice of motion and motion may be combined in a single document titled "Notice of Motion and Motion."

The "Notice of Motion and Motion" must conform to the general form and format requirement that apply to all court papers. See chap 11.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.10 1. Paper, Print, Spacing, and Margins

§12.10 1. Paper, Print, Spacing, and Margins

California Rules of Ct 2.100-2.119 generally sets for the format rules for forms. The paper must be recycled (Cal Rules of Ct 2.101(a), and opaque, unglazed, white or unbleached (Cal Rules of Ct 2.103). Only one side of the paper may be used. Cal Rules of Ct 2.102.

The type must be 12-point with typeface equivalent to Courier, Times Roman, or Helvetica, and the color of print must be blue-black or black. Cal Rules of Ct 2.104.

The lines must be one and one-half spaced or double spaced and numbered consecutively. Cal Rules of Ct 2.108(1), (4). The left margin must be at least one inch and right margin must be at least ½ inch. Cal Rules of Ct 2.107.

Additions, deletions, or interlineations must be initialed by the clerk or judge at the time of filing. All copies served must conform to the original filed, including the numbering of lines, pagination, additions, deletions, and interlineations. Cal Rules of Ct 2.110.

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§12.11 2. Binding

The pages of each document and exhibit must be attached at the top in a way that allows the pages to be turned easily and the entire page to be read. Cal Rules of Ct 3.1110(e). The pages must be top-punched and firmly bound together at the top. Cal Rules of Ct 2.113, 2.115.

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§12.12 3. Footer

Documents bound together must be consecutively paginated. Cal Rules of Ct 3.1110(c). Pages must be consecutively numbered at bottom. Cal Rules of Ct 2.109. Except for exhibits, each paper filed with the court must bear a footer, printed in at least 10-point type, in the bottom margin of each page, below the page number and divided from the rest of the page by a printed line, that contains the title of the paper (*e.g.,* "Defendant ABC Corp.'s Motion for Summary Judgment") or some clear and concise abbreviation. Cal Rules of Ct 2.110.

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§12.13 4. Attorney Information

The first page of the notice must state the name, address, telephone number, fax number (optional), e-mail address (optional), and State Bar number of the attorney or of the party if he or she is appearing in propria persona. Cal Rules of Ct 2.111(1).

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§12.14 5. Title of Court

The attorney information should be followed by the title of the court. Cal Rules of Ct 2.111(3). Below the title of the court, the caption in every pleading in a limited civil case must state "Limited Civil Case." See Cal Rules of Ct 2.111(9).

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§12.15 6. Telephone Appearance

The line "Telephone Appearance" should be added below the title of the moving papers by a moving party who wishes to attend the hearing by telephone. Cal Rules of Ct 3.670(g)(a). See CCP §367.5. Counsel generally has the option of appearing by telephone in any hearing or conference at which witnesses are not expected to be called to testify. Cal Rules of Ct 3.670(b)-(c) (rule applicable to general civil cases, unlawful detainer cases, and probate proceedings). See also Cal Rules of Ct 3.670(d) (exceptions). Local rules may provide procedures for appearance by telephone. See Cal Rules of Ct, Standards of J Admin 3.1(d).

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7. Caption

§12.16 a. Title of Case

Below the title of the court, in the space to the left, the motion should state the title of the case. Cal Rules of Ct 2.111(4). Motion papers may include the "short caption" of the case, *i.e.*, the name of the first party on each side. See Cal Rules of Ct 2.111(4), 2.111(4).

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§12.17 b. Nature of Paper

To the right of the case name, the caption should include a statement of the nature of the paper, *i.e.,* a brief description of the nature of the order sought, *e.g.,* "Notice of Motion and Motion for Judgment on the Pleadings." Cal Rules of Ct 2.111(6).

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§12.18 c. Date, Time, Location of Hearing

Below the identification of the document, the caption should show the date, time, and location (if ascertainable) of any scheduled hearing, the name of the hearing judge (if ascertainable), the date of filing of the action, and the trial date, if one is set. Cal Rules of Ct 3.1110(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.19 (1) Date and Time

§12.19 (1) Date and Time

The notice of motion must state "when" the motion will be made. CCP §1010. The date set for hearing the motion and the time when the hearing calendar for that day will be called must be included in the caption. Cal Rules of Ct 3.1110(b). Failure to specify a date and time renders the notice ineffective. *Bohn v Bohn* (1913) 164 C 532, 536, 129 P 981.

PRACTICE TIP: When drafting a notice of motion, counsel can determine the hearing date to specify in it by (1) deciding when the notice will be served (*i.e.,* the date of delivery or mailing to adverse counsel); (2) computing the minimum notice time required (unless an order shortening time is obtained) and any maximum time; and (3) if appropriate or necessary, telephoning the court clerk or law and motion calendar clerk to learn the first available convenient calendar date within the period. See §12.60-12.62 on computing notice time, and §§12.63-12.68 on shortening and extending time.

Local rules should also be consulted for determining the days and times for hearings.

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§12.20 (2) Location

"Location" is shown by specifying the department in which the hearing is to take place in the caption. See Cal Rules of Ct 3.1110(b). It is unclear whether "location" also means the address of the courthouse or building where the motion will be heard. Attorneys may add the address at the end of the first paragraph of the notice.

Motions must be made in the court in which the action is pending. CCP §1004. The place for the hearing is usually either (1) the courtroom of the judge assigned to the case if the case is subject to the Trial Court Delay Reduction Act (Govt C §§68600-68620) or (2) the law and motion or other department or division established for such hearings. If there is any doubt as to where a motion should be noticed for hearing, counsel should review the local rules or consult the appropriate court clerk. See, *e.g.,* San Francisco Ct R 8.2 (law and motion calendar).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.21 d. Name of Hearing Judge

§12.21 d. Name of Hearing Judge

The notice of motion, immediately below the case number, must specify the name of the hearing judge, if that is ascertainable. Cal Rules of Ct 2.111(7), 3.1110(b).

PRACTICE TIP: When law and motion matters are assigned to a particular department, the notice of motion should specify the name of the judge who normally sits in that department. If the case has been assigned to one judge for all purposes, that judge's name should be specified.

The notice of motion should also note whether the proceeding is pending before a referee appointed under CCP §638 or §639. Cal Rules of Ct 2.111(9).

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§12.22 e. Attachments

The first page, immediately below the number of the case, must also state the nature of any attached document, other than an exhibit. Cal Rules of Ct 3.1110(b). When other papers, *e.g.,* a memorandum or declarations, are attached to the notice of motion, these papers should be named in the caption. Cal Rules of Ct 3.1110(b).

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§12.23 8. Body of Motion

The motion must identify the party bringing the motion, name the parties to whom it is addressed, briefly state the basis for the motion and the relief sought, and if a pleading is being challenged, the portion being challenged must be specified. Cal Rules of Ct 3.1112(d).

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§12.24 a. Introductory Line

No statute or rule requires an introductory line, but attorneys sometimes place below the caption of a notice of motion, *e.g.,* "To each of the parties herein and to their attorneys of record," or "To each party and attorney."

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§12.25 b. Nature of Order Sought

The opening paragraph of the notice must state the nature of the order being sought. Cal Rules of Ct 3.1110(a), 3.1112(d). If monetary sanctions are sought, whether against the party or a party and its counsel, the notice of motion must identify every person, party, and attorney against whom the sanction is sought. See, *e.g., Blumenthal v Superior Court* (1980) 103 CA3d 317, 163 CR 39 (case predated CCP §2023.040 but is probably still applicable under present statutes). See also Cal Rules of Ct 3.1112(d).

PRACTICE TIP: It is sometimes useful to begin the process of motion drafting by starting with a draft of the order being sought, which may help focus the research and drafting of the other motion papers.

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§12.26 c. Grounds for Issuance of Order

The opening paragraph of the notice of motion must state the grounds on which the motion is made. CCP §1010; Cal Rules of Ct 3.1110(a), 3.1112(d). The statement should define the issues for the adverse party and the court. *Hernandez v National Dairy Prods. Co.* (1954) 126 CA2d 490, 493, 272 P2d 799. It is good practice to specify the code section or rule that provides for the order sought.

A failure to state grounds for the motion may lead the judge to deny the motion or an appellate court to vacate an order granting the motion. See *Traders' Credit Corp. v Superior Court* (1931) 111 CA 663, 665, 296 P 99 (dismissal vacated). Some courts, however, have granted motions, or upheld orders, even though no grounds were stated in the notice of motion, if the grounds clearly appeared from other papers filed with the notice. See §12.27.

Courts also differ on whether grounds not stated in the notice of motion will be considered in support of the motion. Compare *Taliaferro v Riddle* (1959) 167 CA2d 567, 570, 334 P2d 950 (reversal of order not supported by either ground specified in notice), *Hernandez v National Dairy Prods. Co., supra* (if new matter could be argued at hearing, purpose of notice of motion would be only to advise time and place), and *Westphal v Westphal* (1943) 61 CA2d 544, 550, 143 P2d 405 (when motion made on ground that case should be dismissed under mandatory 5-year dismissal statute, party cannot argue on appeal that court properly exercised discretion to dismiss for lack of diligent prosecution), with *Tarman v Sherwin* (1961) 189 CA2d 49, 51, 10 CR 787 (affidavits, supporting memorandums, and other documents in court file, when referred to in the Notice, can be considered in amplification of grounds). See also *Josephson v Superior Court* (1963) 219 CA2d 354, 362, 33 CR 196 (statements in affidavits disregarded; leave needed to base motion on grounds not enumerated).

These disparate holdings can be reconciled, as at least one court has done, by stating that

> As a general rule, the trial court may consider only the grounds stated in the notice of motion. [Citations.] An omission may be overlooked if the supporting papers make clear the grounds for relief sought. [Citations.] The purpose of these requirements is to cause the moving party to "sufficiently define the issues for the information and the attention of the adverse party and the court." [Citation.]

Luri v Greenwald (2003) 107 CA4th 1119, 1125, 132 CR2d 680.

PRACTICE TIP: The best practice is to state the grounds in the notice of motion.

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§12.27 9. Supporting Papers

A notice of motion must state the papers, if any, on which it is to be based. CCP §1010. It is customary to also state that the motion will be based on "all pleadings, papers, and records filed in the action." This statement may persuade the judge at the hearing to consider a document in the case file, the significance of which was not recognized when the motion papers were filed. However, if counsel knows that part of a pleading or other paper supports the motion, or provides basis for argument, it is good practice to identify that part in the memorandum or declaration accompanying the notice, or to attach a copy to the moving papers as an exhibit.

It is routine to refer to the attached "memorandum in support of the motion" that must be filed with the motion. See Cal Rules of Ct 3.1112. See §§12.30-12.42. Similarly, the evidence on which a motion is based is usually presented to the judge in the form of affidavits or declarations (see §§12.43-12.53) and the notice of motion should refer to each such document. For example: "the attached affidavit of Walter Johnson," or "the attached declarations of Walter Johnson, Charles Able, and George Smith." When a declaration in support of a motion is required by statute or rule, the notice should refer to the attached declaration. See, *e.g.,* CCP §1008(b) (when similar motion has been made, declaration must state what motion was made before) and CCP §2025.480(b) (discovery motion). To the extent practicable, all supporting memorandums, declarations, and affidavits must be attached to the notice of motion. Cal Rules of Ct 3.1113(j).

Reference to papers previously filed with the court must be by date of execution and title. Cal Rules of Ct 3.1110(d). All references to exhibits or declarations in supporting or opposing papers must refer to the number or letter of the exhibit, the specific page, and if applicable, the paragraph or line number. Cal Rules of Ct 3.1113(k).

WARNING: Some attorneys also routinely conclude the listing of papers on which a motion is based with a clause such as "and such oral and documentary evidence as may be presented at the hearing on this motion." This reference may aid a later argument that testimony or a new exhibit should be admitted. However, most judges resist taking new evidence at the hearing. See §12.103. The court must be notified of a need to present evidence at the hearing by a written statement setting forth the nature and extent of the proposed evidence. Cal Rules of Ct 3.1306(a). Any request for leave to present evidence should be supported by a declaration of facts and reasons. If the need is known at the time the notice of motion is filed, the nature of the evidence should be specified in the notice and the reasons for its introduction stated in the attached declarations and memorandum. The notice or statement should also state how much hearing time presentation of the evidence will require. See Cal Rules of Ct 3.1306(a).

If the notice of motion mentions a paper that has not yet been served on adverse parties, a copy of that paper must be served and filed with the notice. CCP §1010.

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§12.28 10. Date; Signature

The date that a notice of motion is served is normally shown on an attached proof of service form. See §§12.69-12.73. Thus, although customary, it is not necessary to type a date on the notice. If the notice is served by mail, and is not accompanied by a certificate of mailing, the date and place of mailing must be typed or written on the notice of motion itself. CCP §1013(b).

A notice of motion should be signed by the party's attorney of record, not the party. See *Jansson v National S.S. Co.* (1917) 34 CA 483, 486, 168 P 151. A subscription by the attorney's associate or office is normally sufficient. See *Caldwell v Geldreich* (1955) 137 CA2d 78, 82, 289 P2d 832 (vacationing attorney's name signed by associate). See also *Buell v Buell* (1891) 92 C 393, 396, 28 P 443 (newly employed attorney signed notice; no general statute or rule requires that notices of motion be signed; absence of signature does not ordinarily vitiate notice).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.29 D. Checklist: Procedures for Motions and Hearings

§12.29 D. Checklist: Procedures for Motions and Hearings

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Moving party

- Consult statute or rule that authorizes motion for information on:
- Procedure required or permitted
- Time limits for service or filing
- Evidentiary showing required
- Compute first and last day for service or filing (see §§12.60-12.62)
- If the period has passed, check statute or rule for late filing procedures
- Determine and comply with any "meet and confer" requirements. See Cal Rules of Ct 3.724; §40.51.
- Check with court clerk, if appropriate, for availability of hearing dates, and for any local rules or customs relating to particular motion
- Prepare moving papers:
- Notice of motion (see §§12.9-12.28)
- Memorandum in support of motion (see §§12.30-12.42)
- Declarations or affidavits, if needed (see §§12.43-12.53)
- Exhibits, *i.e.,* documents or papers not yet on file in action that bear on motion, if needed (see §§12.54-12.58)
- Requests that court take judicial notice, if needed (see §12.59)
- Proposed order, if needed (see §12.107)
- Application for order extending or shortening time, if needed (see §§12.60-12.68)
- Any other required papers
- Proof of service (see §§12.69-12.77)
- Serve and file moving papers (see §§12.69-12.77)
- Review opposition papers and serve and file reply or supplementary papers, if needed (see §12.95)
- Check with court for tentative ruling if one has been made
- Prepare for and attend hearing, and present the oral argument (and evidence, if permitted) in favor of motion (see §§12.97-12.103)
- If favorable ruling is obtained, prepare notice of ruling or form of order, if needed (see §12.108)
- Serve and file notice of ruling or signed order (unless done by court or otherwise unnecessary) (see §12.110)

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III. SUPPORTING DOCUMENTS; JUDICIAL NOTICE

A. Memorandum in Support of Motion

§12.30 1. When Memorandum Required

All motions and demurrers must be supported by a memorandum that complies with Cal Rules of Ct 3.1113. Cal Rules of Ct 3.1112(a), 3.1113. A demurrer or written notice of motion under CCP §1005, except for a motion listed in Cal Rules of Ct 3.1114 (applications, motions, and petitions not requiring a memorandum), must be accompanied by supporting memorandum. Cal Rules of Ct 3.1113(a). The absence of the memorandum may be construed by the court as an admission that the motion or special demurrer is not meritorious and cause for its denial and, in the case of a demurrer, as a waiver of all grounds not supported. Cal Rules of Ct 3.1113(a).

PRACTICE TIP: The supporting memorandum is used to convince the judge who hears the motion that the law and facts support issuance of the order sought. Persuasion is the object of the memorandum. Even though counsel may have a chance to present argument and cite authorities at the hearing on the motion (see §§12.102-12.103), some courts issue a tentative ruling based on the motion and response papers alone (see §§12.104-12.110), and in other courts the judge will come to the hearing with a ruling already in mind. The written memorandum should be the best argument for the motion that can be made; only in rare and unusual situations should a persuasive argument or point be held back for later use.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.31 2. Memorandum Not Required

§12.31 2. Memorandum Not Required

Civil motions, applications, and petitions filed on Judicial Council forms that do not require a supporting memorandum include the following (Cal Rules of Ct 3.1114(a)):

- Application for appointment of guardian ad litem in a civil case;
- Application for an order extending time to serve pleading;
- Motion to be relieved as counsel;
- Motion filed in small claims case;
- Petition for change of name or gender;
- Petition for declaration of emancipation of minor;
- Petition for injunction prohibiting harassment;
- Petition for protective order to prevent elder or dependent adult abuse;
- Petition of employer for injunction prohibiting workplace violence;
- Petition for order prohibiting abuse (transitional housing);
- Petition to approve compromise of a claim of a minor or an incompetent person; and
- Petition for withdrawal of funds from a blocked account.

Despite Cal Rules of Ct 3.1114(a), if it would further the interests of justice, a party may submit, or the court may order the submission of, a memorandum in support of any motion, application, or petition. The memorandum must comply with Cal Rules of Ct 3.1113. Cal Rules of Ct 3.1114(b).

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§12.32 3. Contents of Memorandum

A memorandum must contain (Cal Rules of Ct 3.1113(b)):

- A statement of facts;
- A concise statement of the law;
- The evidence and argument relied on; and
- A discussion of the statutes, cases, and textbooks cited in support of the position being advanced.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.33 4. Organization of Memorandum

§12.33 4. Organization of Memorandum

The typical organization of a supporting memorandum begins with an introductory section, includes one or more separate sections focusing on particular aspects of the motion, and ends with a concluding summary. The function of each of these portions of the memorandum is discussed separately in §§12.37-12.41.

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§12.34 5. Format and Style

A case citation must include the official report volume and page number and year of decision. No other citations may be required. Cal Rules of Ct 3.1113(c).

The style used in a memorandum shall be that set forth in the *California Style Manual*, or that stated in the most recent edition of *The Bluebook: Uniform System of Citation*, at the option of the party filing the document. The same style shall be used consistently throughout the memorandum. Cal Rules of Ct 1.200.

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§12.35 6. Length of Memorandum

An opening or responding memorandum may not exceed 15 pages, except in a summary judgment or a summary adjudication motion, where they are limited to 20 pages. Cal Rules of Ct 3.1113(d). A reply may not exceed 10 pages. Cal Rules of Ct 3.1113(d). The page limit does not include exhibits, declarations, attachments, a table of contents, a table of authorities, or the proof of service. Cal Rules of Ct 3.1113(d).

Permission to file memorandums of greater than the specified number of pages can be sought by ex parte application at least 24 hours before the memorandum is due. Cal Rules of Ct 3.1113(e). The application must state the reasons the argument cannot be made within the page limits. Cal Rules of Ct 3.1113(e).

PRACTICE TIP: Some judges require that the memorandum be al ready prepared and presented to the court at the ex parte hearing so that the court can assess the true "need." Applications for permission to file memorandums exceeding the specified number of pages may be granted by a judge, but rarely as a matter of course.

The memorandum should be concise and not unduly detailed or repetitive. Most judges hearing motions have very limited time available for reading papers and they appreciate well-written, to-the-point papers.

A memorandum that exceeds the page limits of Rule 3.1113(d) is filed and treated the same as a late-filed paper. Cal Rules of Ct 3.1113(g).

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§12.36 7. Table of Contents; Table of Authorities

If the memorandum exceeds 10 pages, it must include a table of contents and a table of authorities. If it exceeds 15 pages, it must also include an opening summary of argument. Cal Rules of Ct 3.1113(f). See §12.38.

If the memorandum includes a table of contents and table of authorities, the caption page or pages must not be numbered; the pages of the tables must be numbered consecutively, using lower-case Roman numerals starting on the first page of the tables; and the pages of the text must be numbered consecutively using Arabic numerals starting on the first page of the text. Cal Rules of Ct 3.1113(h).

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§12.37 8. Introductory Statement; Introduction

After the case caption, the memorandum usually begins with an introductory sentence that identifies the moving party or parties and the motion being supported. This can be done with a statement such as:

Defendant Pan-Pacific Machinery and Foundry, Inc., hereafter "Pan-Pacific," submits the following memorandum in support of its motion requiring Plaintiff Kimberly Wilson to furnish security for costs.

This is often an easy way to establish the shorthand reference to the moving party or parties used later in the memorandum (*e.g.,* as "Plaintiff," "Defendant," or by a last name or abbreviated name).

PRACTICE TIP: It is generally good practice to include, following the introductory statement, a section labeled "Introduction," whose purpose is to very briefly define the nature of the motion being made and its context. Doing so usually requires a brief description of the lawsuit and of the motion and its purpose. This introduction should be succinct and should convey to the judge reading the motion the importance of the motion to the case. If a separate summary of the argument is not included (see §12.38), the introductory section can also briefly summarize or state why the motion should be granted.

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9. Argument

§12.38 a. Summary of Argument

Any memorandum that exceeds 15 pages must contain an "opening summary of argument." Cal Rules of Ct 3.1113(f). This is rare, because memorandums may not usually exceed 15 pages. See Cal Rules of Ct 3.1113(d). If appropriate, the summary of argument should be relatively short, and it is best to have a separate heading identifying it as a summary of the argument.

NOTE: For the footer requirements, see Cal Rules of Ct 2.110 and §12.12.

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§12.39 b. Concise and Persuasive Argument

After the introductory section or sections, the memorandum should include one or more separate sections dealing with the specifics of the arguments being made. The arguments should be divided into separate sections, with captions, each dealing with a specific issue or point. Each section should be relatively short. If the argument on one topic must be lengthy, it is often good practice to divide it into subsections with subheadings. Separate sections and separate subheadings allow for the judge reading the motion to more easily follow the arguments and points being made and also to more easily return to a specific argument if the judge wishes to reread a particular point.

The captions or subcaptions for separate argument sections should be descriptive, and accurately identify the argument being made, and be as brief and concise as possible. Phrase the captions and subcaptions in an argumentative manner, *i.e.,* as an assertion in favor of the moving party (*e.g.,* "The facts demonstrate that there was no privity between plaintiff and defendant" rather than simply "Privity" or "Lack of privity"). Sometimes, however, especially with subheadings, short subject matter captions are sufficient.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.40 c. Applicable Statutes and Cases

§12.40 c. Applicable Statutes and Cases

The memorandum must contain both a concise statement of the law and a discussion of the applicable statutes and cases. As a rule, counsel should look first to the statutes applicable to the legal issue involved in the motion. Those may include statutes defining the standards or requirements for the motion (*e.g.,* CCP §437c for summary judgments) or the substantive legal standards involved in the case itself (*e.g.,* the applicable statute of limitations).

Next, counsel should research the applicable case law, both for the legal point or issue addressed in the motion and for the standards applicable for the type of motion being made.

Each point or statement should be supported by citation to a statute, court rule, or reported decision. If these are not available, other authority may include textbooks or law review articles. Generally, it is more effective to cite one statute or case, and point out its specific applicability, than to support a point with "string" citations. A California Supreme Court opinion carries more weight than a court of appeal opinion unless the latter is more on point or more recent. Often, one Supreme Court citation and the latest court of appeal case provide all the support needed for a point unless it is important to show how a rule has been applied in a variety of factual settings. On citation format, see §12.34.

JUDICIAL PERSPECTIVE: The supporting memorandum should clearly identify the important controlling cases and separate them from cases cited for preliminary or foundational matters. Cases believed to bear strongly on the particular matter should be discussed at length, commencing with California cases.

It is better practice to set forth a brief summary or quotation of the relevant substance of the cited authority and to point out in what way it bears on the matter before the court than to provide a plethora of citations. A single case in point may be sufficient. The value of points made and the legal authorities supporting them lies in their current relevancy and not in their quantity. Each case cited for other than preliminary or elementary matters should be discussed in terms of its relationship to the case at bar.

Counsel may not misquote authorities or cite statutes that have been repealed or held unconstitutional or cases that have been overruled. Cal Rules of Prof Cond 5-200.

When cases from jurisdictions outside California or federal cases are cited, a copy must be attached to the papers and tabbed as an exhibit. Cal Rules of Ct 3.1113(i). See §12.56. If a California case is cited before it is published in the advance sheets, a copy also must be attached and tabbed. Cal Rules of Ct 3.1113(i).

PRACTICE TIP: Short quotations from governing authorities are often useful.

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§12.41 10. Conclusion

A concluding section that summarizes the major points and arguments made and states the nature of the order or relief sought in the motion is customarily included. This type of section should be brief, and not a verbatim repetition of the points already made.

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§12.42 11. Subscription

There is no general requirement that a supporting memorandum be dated or signed. Most attorneys do date and sign them, and a common subscription form is shown in §12.141.

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B. Declarations

§12.43 1. Declaration Compared With Affidavit

Declarations and affidavits are written statements used to present facts to the judge who will rule on the motion. Declarations are made and signed under penalty of perjury (CCP §2015.5; see also §12.52), and affidavits are made under oath and attested to, ordinarily by a notary public (CCP §2003). "Declaration" is used generally in this book to cover both a declaration under penalty of perjury and an affidavit. CCP §2015.5. In California, the declaration form, which need not be notarized, is more widely used than the affidavit form. A declaration in the form prescribed by CCP §2015.5 is as valid and effective in support of a motion as an affidavit. See §12.44 and form in §12.142.

Whichever form is used, it is important that it conform strictly to content and execution requirements. A judge may disregard an improperly phrased or executed statement. See, *e.g., Palm Springs Alpine Estates, Inc. v Superior Court* (1967) 255 CA2d 883, 888, 63 CR 618.

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§12.44 2. Declaration as Substitute for Oral Testimony

Written declarations are used in motion proceedings as a substitute for sworn oral testimony. See, *e.g.,* Evid C §§135, 225; Cal Rules of Ct 3.1306(a). Code of Civil Procedure §1005 requires that a written notice of motion be accompanied by supporting declarations.

Motions are usually made and determined on declarations alone. See Cal Rules of Ct 3.1306(a); *Beckett v Kaynar Mfg. Co.* (1958) 49 C2d 695, 698 n3, 321 P2d 749. Declarations are used both to provide factual matters for the decision on the motion and as a means for stating facts in a direct and logical order, sparing the judge the need to ferret them out of the case record. Some motions can be granted, of course, even though not supported by a declaration. See, *e.g., Black Bros. Co. v Superior Court* (1968) 265 CA2d 501, 507, 71 CR 344, disapproved on other grounds in *Denham v Superior Court* (1970) 2 C3d 557, 86 CR 65. Other motions require that a declaration be submitted. See, *e.g.,* CCP §§2023.010(i), 2023.020 (discovery motions); CCP §1008(b) (when prior similar motions have been made); Cal Rules of Ct 3.770 (request for dismissal of class action); Cal Rules of Ct 3.1342(a) (dismissal for failure to prosecute); Cal Rules of Ct 3.1360 (motion for lien on a cause of action or judgment).

In exercising its power to exclude or permit oral testimony, the trial follows the principal that constitutional due process entitles the parties to notice and hearing appropriate to the case. See *Marriage of Nadkarni* (2009) 173 CA4th 1483, 1499, 93 CR3d 723 (because application for restraining order under Domestic Violence Prevention Act was facially sufficient, dismissal reversed and case remanded for hearing on merits).

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3. Selecting Declarant

§12.45 a. Tactical Considerations

The attorney must make tactical decisions in determining who should submit a declaration in support of a motion or how many declarations to submit. If a factual point needs to be established, it must, of course, be established by someone with sufficient personal knowledge that the declaration statements are competent evidence. See §12.49. The declarant who is in a position to verify or present the fact will probably be the most persuasive, and if several facts are to be presented, it is usually advantageous and more efficient to have those facts addressed by as few witnesses as possible.

There are, however, significant differences between trial testimony and fact-finding through declarations. Declarations may be carefully drafted by counsel, whereas trial testimony tends to be spontaneous in its wording and depends on the witness's particular personality, linguistic skills, and state of mind. Furthermore, a declarant in a written declaration will not ordinarily be able to be cross-examined on what is included in the declaration prior to the hearing on the motion.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.46 b. Attorney as Declarant

§12.46 b. Attorney as Declarant

Whether counsel should act as a declarant depends on the nature of the facts to be presented and the necessity of using the lawyer for that purpose. The most common situations in which counsel presents his or her own declaration are:

- When the declaration addresses communication between counsel;
- If the declaration presents copies of pleadings or discovery material (*e.g.,* copies of documents produced, interrogatory answers, deposition transcripts);
- If a particular statute calls for a certificate that could be appropriately provided only by counsel (see, *e.g.,* CCP §1008(b)); or
- If the facts presented involve the activities of counsel in the litigation (*e.g.,* time spent and the cost of preparing or defending a motion when sanctions are sought).

When it is contemplated that counsel would go beyond these areas of testimony and present factual matter directly supporting or contradicting pleading allegations, counsel should determine whether providing such a declaration will risk waiving any applicable attorney-client or work-product privileges. Further, the California Rules of Professional Conduct preclude counsel from acting as an advocate for a party before a jury when counsel will also testify on substantive matters, at least without the client's informed, written consent (Cal Rules of Prof Cond 5-210). Even without jury involvement, when counsel is expected to be a witness at trial (a conclusion of concern if counsel is the best person to submit a substantive declaration as to facts), consideration should be given as to whether it is in the client's best interests to have counsel act in both capacities. On limitations of counsel acting as a witness, see §4.34.

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§12.47 4. Caption: Introduction

A declaration is usually drafted as a separate paper, with the caption prescribed for court papers by Cal Rules of Ct 2.100-2.119, even though it is attached to a notice of motion. A defect in the title of the action does not render the paper invalid or ineffectual if it intelligibly refers to the action. CCP §1046. The caption of a declaration must identify the name of the declarant (or affiant) and identify the motion or proceeding that it supports (or opposes). Cal Rules of Ct 3.1115(a). For example, a caption could read: "Declaration of John Jones in Support of Plaintiff's Motion for Summary Judgment."

NOTE: The requirement in Cal Rules of Ct 3.1110(b) that the date and time of hearing, the number or designation of the department or division to which it is assigned, the name of the hearing judge (if ascertainable), the date of filing of the action, and the trial date be stated (see §12.18) may apply to declarations as well as to the notices of motion to which they are attached. See Cal Rules of Ct 2.3(2).

In an affidavit, it is customary to follow the caption with a line stating the "venue," the state and county (or other subdivision) where the affidavit was executed and notarized. However, failure of the affidavit to show where the oath or affirmation of the affiant was administered does not by itself invalidate the affidavit. See *County Bank v Jack* (1906) 148 C 437, 440, 83 P 705 (venue line omitted). The venue line or lines may, with equal effect, be placed at the beginning of the jurat or notary's certification.

For the footer requirements, see Cal Rules of Ct 2.110 and §12.12.

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§12.48 5. Identity of Declarant

The first paragraph of the body of a declaration usually identifies the declarant by stating his or her title or relationship to the lawsuit. For example:

1. I am the plaintiff, _ _[*name*]_ _, in this action.

1. I am an attorney of record for defendant, _ _[*name*]_ _.

1. I am, and have been since _ _[*date*]_ _, the Vice-President in charge of marketing for defendant, _ _[*name of, e.g., corporation*]_ _.

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§12.49 6. Competence of Declarant

Generally, anyone who would be competent to testify as a witness about a matter is competent to make a declaration. See *McLellan v McLellan* (1972) 23 CA3d 343, 359, 100 CR 258. In this context, "competent" usually means that the declarant has personal knowledge of the subject matter of the declaration (see Evid C §702) or that the declarant qualifies as an expert on the subject matter of the declaration (see Evid C §§720, 801). On admissibility of matter stated, see §12.50.

A declarant, like a witness (see Evid C §702), should normally state only facts personally known to him or her. The statute authorizing the order sought may also specify that matter in declarations must be based on personal knowledge. See, *e.g.,* CCP §437c (declarations on motion for summary judgment). Thus, a statement made "on information and belief" may be disregarded (*Franklin v Nat C. Goldstone Agency* (1949) 33 C2d 628, 631, 204 P2d 37; *Judd v Superior Court* (1976) 60 CA3d 38, 43, 131 CR 246) unless the fact stated is one that by its nature could not be known directly and positively (*e.g.,* another's intent). See *Brown v Happy Valley Fruit Growers, Inc.* (1929) 206 C 515, 520, 274 P 977; *Fielder v Superior Court* (1963) 213 CA2d 60, 28 CR 597. Statements made in declarations are presumed to be made on personal knowledge unless it is stated that they are made on information and belief. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 106, 95 CR 516.

Many attorneys drafting declarations routinely include a statement attesting to the declarant's personal knowledge, such as:

2. I have personal knowledge of all facts stated in this declaration, and if called as a witness I could and would testify competently to them under oath.

Such a statement is a conclusion that may be disregarded by a judge who feels that personal knowledge must be shown by factual statements. See *Fisher v Cheeseman* (1968) 260 CA2d 503, 506, 67 CR 258 ("[t]hat which is required is not a sworn statement that the affiant would so testify but a showing that he can competently do so"). Thus, the above statement is not a substitute for the inclusion of facts showing that the declarant has personal knowledge of the facts being sworn to. For example:

3. I was at the corner of Fourth and Main Streets on _ _[*date*]_ _, and saw _ _[*specify*]_ _.

3. On _ _[*date*]_ _, I received a letter by _ _[*name*]_ _, a true and complete copy of which is attached as Exhibit A.

3. I am the custodian of records for Mercy Hospital.

A declaration based on expert opinion should include information about the expert's qualifications to make a showing that the declarant is competent to express an opinion about the subject matter of the declaration.

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§12.50 7. Admissibility of Matters Stated

The body of a declaration is a series of statements, usually set out in separately numbered paragraphs. The judge hearing the motion may decline to consider statements in a declaration on the same grounds that a trial judge would sustain an objection to proffered testimony. See *McLellan v McLellan* (1972) 23 CA3d 343, 359, 100 CR 258; *Mayo v Beber* (1960) 177 CA2d 544, 551, 2 CR 405. Filing a declaration in support of a motion is normally the equivalent of offering it in evidence; it need not be offered formally in evidence at the hearing. See *Waller v Waller* (1970) 3 CA3d 456, 465, 83 CR 533.

Declarations should state evidentiary facts rather than ultimate facts or legal conclusions. *Ware v Stafford* (1962) 206 CA2d 232, 237, 24 CR 153. The facts should be set forth positively; a declaration that states only the conclusions or opinions of the declarant is insufficient. See *Tri-State Mfg. Co. v Superior Court* (1964) 224 CA2d 442, 445, 36 CR 750. One test for whether a statement in a declaration should be considered is whether a perjury prosecution could be based on the statement if it were false. See *Mack v Superior Court* (1968) 259 CA2d 7, 10, 66 CR 280.

Opinions stated in a declaration are sometimes considered when the declaration shows that

- The opinion is rationally based on the declarant's perception and is helpful to a clear understanding of his or her testimony (Evid C §800); or
- The declarant is qualified to testify as an expert on the subject (Evid C §801).

Hearsay statements may be disregarded unless admissible under an exception to the hearsay rule. See *Pacific Air Lines, Inc. v Superior Court* (1965) 231 CA2d 587, 42 CR 68. See also *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 106, 95 CR 516 (although declarant's statement might have been based on hearsay, it might also have been based on observation and could thus be considered under the presumption that it was made on personal knowledge).

PRACTICE TIP: An attorney drafting a declaration should consider not only the admissibility and persuasiveness of what is said, but also that the declaration may be used to cross-examine the declarant at a later deposition or at trial. The declaration must state enough factual matter to be persuasive in support of the motion, but it should not be repetitive or contain unnecessary detail.

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§12.51 8. Subscription

The proper subscription for a declaration or affidavit is important because an incorrectly executed declaration or affidavit will not be considered.

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§12.52 a. Declaration

A declaration under penalty of perjury must be signed by the declarant and certified or declared to be true "under penalty of perjury." CCP §2015.5. It is improper for an attorney to sign declarations under penalty of perjury on behalf of his or her clients or witnesses, even in family law court. *Marriage of Reese & Guy* (1999) 73 CA4th 1214, 1222, 87 CR2d 339. The certification or declaration may be in substantially the following form (CCP §2015.5):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

PRACTICE TIP: Either "certify" or "declare" can be used, but not both. See CCP §2015.5. Most lawyers use "declare" unless a particular statute calls for a certification or the paper is called a certificate. Other lawyers use "certify" when the declaration is signed by an attorney or court official. The phrase "under the laws of the State of California" can be omitted if the declaration is executed within California and the place of execution is stated.

This statement is normally placed at the end of the declaration. See *People v Pierce* (1967) 66 C2d 53, 59, 56 CR 817 (end is preferred, not required). A statement declared to be made "under penalty of perjury" is acceptable even though "true and correct" have been omitted. See *Pacific Air Lines, Inc. v Superior Court* (1965) 231 CA2d 587, 42 CR 68. See also *People v Pacific Land Research Co.* (1977) 20 C3d 10, 21 n11, 141 CR 20 (declaration did not state place of execution or that it was made under penalty of perjury; address and signature sufficient to constitute compliance); *People v Resolute Ins. Co.* (1975) 46 CA3d 249, 256, 120 CR 17 (declaration missing date and place of execution sufficient when attached document contained date and place of execution).

Additionally, the statement must be in writing, because "subscribe" as used in CCP §2015.5 means to sign with one's own hand. Thus, when a transcript of a telephone conversation with various witnesses was submitted, even though the witnesses said that their statements were true and correct under penalty of perjury, there was no compliance with §2015.5, and the transcripts were inadmissible as evidence. *Stockinger v Feather River Community College* (2003) 111 CA4th 1014, 1026, 4 CR3d 385.

The date of execution must be stated. CCP §2015.5; *People v United Bonding Ins. Co.* (1969) 272 CA2d 441, 444, 77 CR 310. The court must disregard a declaration that lacks the required formalities (*Baron v Mare* (1975) 47 CA3d 304, 308, 120 CR 675), or when it is patently untrue (*Krueger v Superior Court* (1979) 89 CA3d 934, 939, 152 CR 870 (declaration predated matter verified)).

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§12.53 b. Affidavit

An affidavit is a written declaration under oath, made without notice to the adverse party. CCP §2003. It is customary for the affiant to sign an affidavit, but an affidavit with a proper jurat is sufficient without the affiant's signature unless a particular statute or rule requires a signed affidavit. *City of Petaluma v White* (1907) 152 C 190, 195, 92 P 177; *Dodge v Free* (1973) 32 CA3d 436, 443, 108 CR 311.

The jurat of an affidavit is a certificate stating when, where, and before whom the affidavit was sworn or affirmed. See CCP §§2093-2094. A statement without a jurat is not sufficient to serve as an affidavit. *People v United Bonding Ins. Co.* (1969) 272 CA2d 441, 443, 77 CR 310. The jurat may take different forms in other states or if made by an officer other than a notary public. Code of Civil Procedure §§2012-2015 specify the persons and officers in California ("any officer authorized to administer oaths") and elsewhere who may certify affidavits.

A notary's seal stamped near his or her signature should indicate the county in which the notary's oath of office is filed, the county in which the notary's bond is filed, and the date on which the notary's commission expires. See Govt C §8207. However, an otherwise sufficient affidavit is valid without the seal. See *Reclamation Dist. v Snowball* (1911) 160 C 695, 117 P 905.

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§12.54 C. Pleadings and Papers on File

Pleadings and papers on file in the action are before the judge (at least if referred to in the notice of motion) and may be referred to in the memorandum and declarations. Even though the clerk's file of the case will be given to the judge hearing the motion, a copy of the pertinent papers can be attached to the motion papers for the convenience of the judge. Any paper previously filed must be referred to by title and date of execution. See Cal Rules of Ct 3.1110(d).

That a matter is stated in a pleading or paper in this court file does not, by itself, necessarily satisfy applicable evidentiary requirements. For instance, if the intent is to prove the truth of a fact included in the allegations of a pleading, the pleading must have been verified and the allegations must be in the form of evidentiary facts rather than ultimate facts or conclusions. See *Continental Baking Co. v Katz* (1968) 68 C2d 512, 532, 67 CR 761.

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§12.55 D. Contracts, Letters, Business Records

Contracts, letters, business records, and other documents can be used to support a motion. Counsel should either

- Obtain the agreement of adverse counsel that the document (or a copy) may be used; or
- Include in supporting declarations authenticating statements that permit the document's admission in evidence over objections to authentication (Evid C §1400), secondary evidence (Evid C §1521), and hearsay (Evid C §1200).

See *Dugar v Happy Tiger Records, Inc.* (1974) 41 CA3d 811, 815, 116 CR 412. The declaration that authenticates a document may also incorporate it by reference. For example:

On _ _[*date*]_ _, I entered into a written agreement with _ _[*name*]_ _. A true and correct copy of that agreement, marked Exhibit A, is attached to this declaration and incorporated by reference.

If a document is offered to prove the truth of matters stated in it, the document is hearsay evidence (see Evid C §1200) and the declaration that accompanies it should contain statements that establish its admissibility under one of the exceptions to the hearsay rule (see Evid C §§1220-1350). A document offered only to show its existence and terms is not subject to a hearsay objection.

Some motions must be accompanied by particular filings, as specified by statute or the Rules of Court. For example, certain discovery motions must be accompanied by a separate paper listing the discovery requests, responses, and reasons for compelling further response. Other documents relied on must be summarized. Cal Rules of Ct 3.1020.

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§12.56 E. Exhibits

Exhibits must be separated by a hard 8½ by 11 inch sheet with tabs bearing the exhibit designation that extend below the bottom of the page. Pages from a single deposition and any associated exhibits must be designated as a single exhibit. An index to the exhibits must be included. Cal Rules of Ct 3.1110(f).

Exhibits may be fastened to pages of the specified size and, when prepared by a machine copying process, must be equal to typewritten material in legibility and permanency of image. Cal Rules of Ct 2.114.

All references to exhibits or declarations in supporting or opposing papers must reference the number or letter of the exhibit, and, if appropriate, the paragraph or line number. Cal Rules of Ct 3.1113(k).

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§12.57 F. Materials Lodged With Clerk

Materials lodged with the clerk should be accompanied by a return envelope (addressed and stamped) so that the material can be mailed back after the motion is decided. Cal Rules of Ct 3.1302(b). Some local rules provide for the use of attorney pick up services for lodged materials, instead of providing a return envelope. See, *e.g.*, Los Angeles Ct R 9.0(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.58 G. Use of Copies

§12.58 G. Use of Copies

The "secondary evidence rule" provides that the content of a writing may be proved by otherwise admissible secondary evidence unless:

- A genuine dispute exists regarding material terms of the writing and justice requires exclusion; or
- Admission would be unfair.

Evid C §1521. See also Evid C §§1270-1272. The secondary evidence rule applies to evidence offered in motion proceedings.

Counsel should also remember that if the existence of the document, rather than the truth of its contents, is what is being proven, there is not a hearsay problem as to the contents. See, *e.g.,* Evid C §1200.

PRACTICE TIP: If an original document is required, copies of the documents may be used and identified in declarations, and the originals brought to court at the time of the hearing.

If the original is needed and if the document is in the hands of an adverse party, a notice or subpoena directing its production at the hearing can be served with the motion papers. CCP §1987(b)-(c).

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§12.59 H. Requests for Judicial Notice

A moving party may ask that judicial notice be taken of facts that support a motion. See *Parker v Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181, 89 CR 737 (motion for summary judgment). Judicial notice of the matters specified in Evid C §451 is mandatory; although judicial notice of the matters listed in Evid C §452 is designated "permissive," Evid C §453 states that the court "shall take judicial notice" of matters listed in §452 if a party requests it. A request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with Cal Rules of Ct 3.1306(c) and Evid C §453. See Cal Rules of Ct 3.1113(*l*). Local court rules may also prescribe procedures for requesting judicial notice. See, *e.g.,* Los Angeles Ct R 9.2. On judicial notice generally, see California Trial Practice: Civil Procedure During Trial, chap 14 (3d ed Cal CEB 1995).

PRACTICE TIP: It is good practice to submit a request for judicial notice under Evid C §453 as to both the "mandatory" matters listed in Evid C §451 and the "permissive" matters listed in Evid C §452.

Copies of the records or documents to be noticed must be provided to the court and to each party and should be attached to the request. Cal Rules of Ct 3.1306(c). If the material is part of the court file, the moving party must specify in writing the part of the court file of which notice is requested and arrange to have the file in the courtroom at the time of the hearing. Cal Rules of Ct 3.1306(c).

NOTE: For some motions, *e.g.*, a motion to strike, the request for judicial notice must be raised in the notice of motion or in the supporting memorandum. See CCP §437(b).

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IV. TIME FOR MAKING MOTION; SHORTENING AND EXTENDING TIME

§12.60 A. Timing Considerations

There are two timing factors that must be considered before making any motion: (1) as a procedural matter, when the motion can be made (including when papers can be served and when the hearing can take place) and (2) as a tactical matter, when the motion should be made. The first factor is discussed in §§12.61-12.62. The second factor must be evaluated in the context of the tactical objectives of the entire lawsuit. See §12.5.

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§12.61 B. Restrictions on Time for Motion or Hearing

Several restrictions affect the choice of the date to serve and to file motion papers and the date to notice for the motion hearing. The statute or rule that provides for a particular order may set a deadline. For example, a demurrer must be served and filed within 30 days after service of the summons and complaint. CCP §430.40(a). A notice of motion to compel further answers to interrogatories must be served within 45 days after service of the response to the interrogatories (unless extended by the parties by written agreement). CCP §2030.300(c). Motions for reconsideration or to amend an order based on new facts must be made within 10 days after service of written notice of entry of the order. CCP §1008(a). Under CCP §2024.020(a), discovery motions must be heard at least 15 days before the date initially set for trial. A motion can be made to the court to allow a discovery motion to be heard after that date (see CCP §2024.050) or the parties can agree to extend the date (see CCP §2024.060). See *Pelton-Shepherd Indus. v Delta Packaging Prods., Inc.* (2008) 165 CA4th 1568, 1589, 82 CR3d 64 (error to award terminating sanctions based on late motion to compel without reopening discovery).

For discussion of discovery motions, see California Civil Discovery Practice (4th ed Cal CEB 2006); Handling Motions To Compel and Other Discovery Motions (Cal CEB Action Guide October 2004). If the notice of motion is served or filed after the deadline, the court can deny the motion as untimely and an appellate court can overturn an order granting the motion.

Conversely, some motions are untimely if made too early. For example, a notice of motion for summary judgment can be made no sooner than 60 days after the adverse party's appearance in the action (see CCP §437c(a); see chap 36), and a motion to dismiss can be made no earlier than 2 years after the complaint was filed (see, *e.g.,* CCP §§483.410(b), 583.420(a)(2)(B); Cal Rules of Ct 3.1340; see chap 39).

Motions to strike and demurrers directed to the same pleading should be noticed for hearing simultaneously. Cal Rules of Ct 3.1322. Regarding demurrers, see chap 23; regarding motions to strike, see chap 24.

Counsel must also determine how long before the hearing on a motion the notice of motion must be served and filed. Written notice of hearing must be given (*i.e.,* served) at least 16 court days before the appointed time for the hearing, unless a judge has granted an order shortening time. CCP §1005(b); Cal Rules of Ct 3.1300(a). For some motions, a different period may be required. See, *e.g.,* chap 36 on summary judgment motions.

WARNING: Setting a hearing too many days in the future could constitute improper delay. See CCP §128.7(b)(1). See §12.5.

PRACTICE TIP: Although the adoption of Cal Rules of Ct 3.20 limits the local courts' authority to make rules concerning motions, local rules that are within the rule-making authority of the trial courts may still affect motion practice. Thus, counsel should consult local rules or the court clerk about the appropriate department for a motion hearing, as well as times and dates on which the court hears motions. See, *e.g.*, Los Angeles Ct R 9.0 (time of hearing and filing of papers). Note also that local court rules may limit the ability of the parties to stipulate to extensions of time.

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§12.62 C. Effect of Service by Mail

A written notice of motion must be given at least 16 court days before the hearing. CCP §1005. When this notice is served by mail, the notice period is increased by 5 calendar days if the place of mailing and the address of the person served are within California, by 10 calendar days if either place of mailing or the address is outside California but within the United States, and by 20 calendar days if either the place of mailing or the address is outside the United States. CCP §1005(b). Service by express mail, fax, or some other method of overnight delivery increases the notice period by 2 calendar days. The provisions of CCP §1013, extending the time within which a right may be exercised or an act may be done, do not apply to a notice of motion, opposition papers, or reply papers. CCP §1005(b).

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§12.63 D. Shortening Time

To obtain a hearing date on a motion that is sooner than would otherwise be possible under normal procedures (see §§12.60-12.62), a stipulation must be obtained from the opposing party or an order shortening time must be obtained from the court.

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§12.64 1. By Stipulation

The parties may agree to shorten the time necessary for a notice for the hearing of a motion. Such a stipulation should be in writing.

Before seeking or obtaining such a stipulation, however, contact should be made with the court clerk in the courtroom where the hearing will be held to learn any local requirements or practices with regard to such stipulations and the early setting of a hearing. Because it is best to have a stipulation specify the date, time, and place of the hearing, contact will have to be made in advance to be sure that the court can accommodate the date, time, and place agreed on.

If such an agreement can be reached between the parties, a stipulation should be prepared, signed, and submitted to the court as promptly as possible. Local court rules or policies should also be consulted in connection with such stipulations.

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§12.65 2. By Application for Order Shortening Time

If a stipulation for shortening time is not possible or practicable to obtain, an order shortening time must be sought as part of a formal application to the court. An application for an order shortening time must be supported by an affidavit or declaration showing good cause. Cal Rules of Ct 3.1300. In other words, it must be demonstrated that shortened time is appropriate and necessary because of some substantial prejudice or harm that would be suffered without the shortening of time. On ex parte applications, see chap 13. Although applications to shorten time are usually made by moving parties, they can also be made by a responding party that desires an earlier hearing date than that specified in the moving party's notice of motion.

PRACTICE TIP: The order shortening time should be drafted to address the following: (1) when motion papers are to be served, (2) when opposition papers are due, (3) when reply papers are due, (4) how papers are to be served (*e.g.,* by hand delivery), and (5) the date of the hearing.

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§12.66 E. Extending Time

Where it is desired to file a notice of motion, or seek a hearing on a motion on a date that is after the last date prescribed by statute or rule, it is necessary to obtain an extension either from opposing counsel or from the court.

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§12.67 1. By Stipulation

The parties may agree, by stipulation, to extend the time to serve and file motions, or the time for hearing on a motion. It is safest to prepare a formal stipulation, signed by both parties, for this purpose. Local court rules or policies should also be consulted in connection with these stipulations, and they may not be favored under current delay reduction rules.

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§12.68 2. By Motion

If an extension is needed (either by the moving or opposing party on a motion) and opposing counsel will not agree to it, an application seeking the extension can be made. See Cal Rules of Ct 2.20. Counsel must present the application for an order extending time to the judge before whom the action, motion, or other proceeding is pending, or, if that judge is absent or not able to hear it, to another judge of the same court. Cal Rules of Ct 2.20(a). The application must disclose the nature of the case and any prior extension granted by stipulation or court order. Cal Rules of Ct 2.20(b). After the order has been signed, it must be filed immediately and copies served within 24 hours unless the judge has set a different time. Cal Rules of Ct 2.20(c).

Be sure to consult local rules regarding extensions. On ex parte applications, see chap 13.

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V. SERVICE AND FILING

§12.69 A. Proof of Service

The last paper in the group of papers served and filed to initiate a motion is normally a proof of service form. Motion papers are often served by mail (CCP §§1012, 1013(a); see §12.71), and a proof of service by mail form can be completed (but not signed) before the papers are mailed and filed (CCP §1013a; see §§18.19 (discussion), 18.21-18.24. (forms)). A conformed copy of the proof of service form is attached to each set of copies of the motion papers served.

On service and filing of the papers generally, see chap 18.

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§12.70 1. Whom to Serve

All parties to the action should be served with the motion papers. See CCP §§1010-1020. The attorney for the plaintiff named first in the complaint must maintain and make available a list of all parties and the addresses at which they may be served. Cal Rules of Ct 3.254.

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§12.71 2. Service by Mail

Service of papers by mail may be made where there is regular mail service available. CCP §1012. Service by mail can be made by a person who is

- A resident of, or employed in, the county where the mailing occurs;
- Over the age of 18 and not a party to the lawsuit; and
- Readily familiar with the collection and processing of correspondence for mailing.

CCP §1013a(3). Papers are served by that person placing them in a sealed, addressed, and stamped envelope, and depositing it with the United States Postal Service or by placing that sealed envelope for collection and mailing in accordance with ordinary business practices. CCP §1013a(3). On service by mail and express mail, see §§18.18, 18.19.

As a matter of courtesy, mailing should be made in a timely fashion and delivered without undue delay. Moreover, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of the deposit for mailing stated on the proof of service. CCP §1013a(3).

Service is completed at the time of the deposit of the papers, but any prescribed time that depends upon the date of such service (*e.g.,* a notice period) is extended 5 calendar days for service by mail if the place of address and place of mailing is in California, 10 calendar days if either the place of mailing or place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. CCP §§1005(b), 1013(a).

The declarant may sign the proof of service by mail only after the envelopes have been sealed and are on their way. See CCP §1013a(3). Thus, a copy of the proof of service actually served on other parties should not include the signature of the declarant. See forms in §§18.21-18.24.

NOTE: Some attorneys add a statement that the declarant is aware that, on motion of the party served, service by mail under CCP §1013a(3) is presumed invalid if the cancellation date or postage meter date on the envelope is more than 1 day later than the deposit date stated in the declaration.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.72 3. Service by Personal Delivery

§12.72 3. Service by Personal Delivery

Service can be made by personal delivery of the papers. Personal delivery does not necessarily require that the recipient actually be present when the papers are delivered. If service is to be made on an attorney, the papers may be left at the attorney's office as specified in CCP §1011(a). When it is appropriate and service is to be made on a party rather than counsel, the papers may be delivered to the party's residence, as specified in CCP §1011(b).

PRACTICE TIP: If there is sufficient time to do so, the simplest method for handling a proof of service by personal delivery is to have the person making the delivery (the "messenger"), fill in how service was made, the date of execution, and sign the declaration of service. Signing of the declaration of service must take place after service has occurred and thus a copy of the proof of service served on the opposing party would not include the messenger's signature. The original of the proof of service, which the messenger signs, is what must then be submitted to the court with the original of the papers that were served.

If a filing with the court must be made before the time the messenger finishes the service and signs the proof of service, a two-step process can be undertaken. This method consists of having a declaration of service in a form similar to that discussed above, but stating that the "envelopes were given to a messenger for personal delivery." That declaration of service should be signed only after the envelopes have been sealed and delivered to the messenger. The copy served on the other parties is thus an unsigned form of the proof of service. The messenger actually making the personal delivery could then sign a proof of service, similar to that described above, but indicating that the messenger received the envelopes from counsel. That proof of service would then be filed separately with the court and would need a case caption.

See discussion and forms in chap 18.

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§12.73 4. Service by Fax or Electronically

Papers may be served by fax if the parties agree and the agreement in confirmed in writing. CCP §1013(e); Cal Rules of Ct 2.306(a)(1). Additionally, the court may serve notices by fax if the parties agree. Cal Rules of Ct 2.306(c). An attorney or a party who wishes to receive service by fax must have a fax machine available to receive documents between the hours of 9 a.m. and 5 p.m. on weekdays, except for court holidays. Cal Rules of Ct 2.306(f). On service by fax, see Cal Rules of Ct 2.300-2.306 and §§18.12-18.15.

A trial court may also adopt local rules permitting electronic filing and service of documents. See CCP §1010.6. If notice may be served by mail, CCP §1010.6(a)(6) permits it to be served electronically, even if it is one of the documents (*e.g.*, a file-stamped copy of the judgment) that triggers the time to file a notice of appeal. *InSyst, Ltd. v Applied Materials, Inc.* (2009) 170 CA4th 1129, 1138, 88 CR3d 808. Electronic service is complete at the time of transmission. CCP §1010.6(a)(6). However, according to the court in *InSyst, Ltd. v Applied Materials, Inc.*, sending the parties an e-mail notifying them that the judgment had been filed, giving them instructions for accessing it on the World Wide Web, and supplying hyperlinks to the document did not transmit the document but merely gave the parties notice of where they could find it, which is not authorized by statute or rule. 170 CA4th at 1139.

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§12.74 B. Filing Papers With Court

The original of the motion papers, with the appropriate proofs of service, is filed in the court clerk's office (Cal Rules of Ct 3.1302(a)) or where local rules specify, directly in the law and motion department in which the hearing is noticed.

The filing should comply with CCP §1005(b); Cal Rules of Ct 3.1300(a) (at least 16 court days before the hearing).

When the original papers are filed with the court, a copy should also be available so that the court clerk accepting the originals can affix a court stamp on a set of copies, showing that the originals have been filed. Counsel can then retain these stamped copies if any question arises as to the date of filing or if the originals are misplaced.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/ C. Service on Public Officer or Agency/§12.75 1. Service on Attorney General

C. Service on Public Officer or Agency

§12.75 1. Service on Attorney General

In addition to any statutory requirements for service of briefs on public officers or agencies, a party must serve its brief or petition on the Attorney General if the brief or petition (Cal Rules of Ct 8.29(c)):

- Questions the constitutionality of a state statute; or
- Is filed on behalf of the State of California, a county, or an officer whom the Attorney General may lawfully represent in:
- A criminal case;
- A case in which the state or a state officer in his or her official capacity is a party; or
- A case in which a county is a party, unless the county's interest conflicts with that of the state or a state officer in his or her official capacity.

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§12.76 2. Proof of Service

When a statute or this rule of service on the Attorney General requires a party to serve any document on a nonparty public officer or agency, the party must file proof of such service with the document unless a statute permits service after the document is filed, in which event the proof of service must be filed immediately after the document is served on the public officer or agency. Cal Rules of Ct 8.29(a).

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§12.77 3. Identification on Cover

When a statute or this rule of service on the Attorney General requires a party to serve any document on a nonparty public officer or agency, the cover of the document must contain a statement that identifies the statute or rule requiring service of the document on the public officer or agency in substantially the following form: "Service on [insert name of officer or agency] required by [insert citation to statute or rule]." Cal Rules of Ct 8.29(b).

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VI. OPPOSING MOTION

A. Tactical Considerations

§12.78 1. Initial Evaluating; Options

An attorney served with a notice of motion should read the motion papers immediately and decide what response, if any, should be made. As a part of that evaluation, thought should be given to:

- The merits of the motion itself, *i.e.,* whether the moving party is entitled to the order sought;
- Whether the moving party met all time and technical requirements for the particular motion; and
- How the motion is likely to affect the parties' overall tactical positions.

The party served with motion papers has three basic options:

- Do nothing, effectively acquiescing in issuance of the order sought.
- Attempt to negotiate with opposing counsel some compromise order or result.
- Oppose the motion (normally by filing and serving opposition papers).

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§12.79 a. Cost-Benefit Analysis

Counsel must decide whether opposing a motion is advisable in the context of the party's overall litigation plan. Opposing a motion entails time, effort, and expense, and counsel may find it useful to undertake a cost-benefit analysis.

Counsel should consider such questions as: Does the anticipated benefit (after discounting the possibility of losing the motion and any disadvantage of educating the adversary) outweigh the expense of opposing the motion? How does the balance thus determined compare with the balance reached by weighing the advantages and costs of other approaches, such as trying to negotiate a resolution with opposing counsel?

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.80 b. Factors to Be Evaluated

§12.80 b. Factors to Be Evaluated

Among the factors determining the attorney's response to an opposing motion are:

- The significance of success or failure of the motion to the ultimate outcome of the case. For example, correcting an easily correctable error in a pleading may make greater sense than spending the time and money opposing a special demurrer. Similarly, providing more detail or some extra information in a discovery response may have no effect on the outcome of the case and may be faster and cheaper than opposing a discovery motion even if the relevance of the information is questionable.
- The likelihood that vigorous opposition can defeat the motion.
- The danger of alerting the adversary to matters that are best left unfocused. For example, the best opposition to a particular motion might be to focus on a particular defect or potential defect in the opponent's case with the result that the opponent will pursue a different theory or develop additional evidence on the original theory.
- The advantage, if any, of early determination of the issue raised by the motion. In some situations, even though the particular issue is not crucial to the outcome of the case, the principle that would be decided on resolution of the motion would have broader significance in the continuing conduct of the case. For example, it may be useful to have the court rule on attorney-client privilege questions early if issues arising from that privilege might recur later. Further, favorable resolution of the motion, given the facts on which it will be decided, may set a pattern for resolution of later disputes or questions.
- Whether opposition to the motion will help or interfere with any settlement possibilities.
- The cost of opposing the motion, in both direct monetary cost to the party and in the general conduct of the litigation and the relationship between counsel.
- Whether an acceptable result can be achieved by less costly measures.

PRACTICE TIP: Unless there is a legitimate objective to be achieved by opposing the motion, a motion should not be opposed. Frivolous or unnecessary opposition results in increased costs for the parties involved and unnecessary time by the court, and may subject an attorney, firm, or party to sanctions under CCP §128.7.

Section 128.7 does not apply to discovery requests, responses, objections, or motions. CCP §128.7(g). Sanctions under the California Civil Discovery Act (CCP §§2016.010-2036.050) apply to discovery matters. See, *e.g.,* CCP §2023.030. See §1.6.

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§12.81 2. Consulting With Client

It is usually good practice, and often good protection for counsel, to discuss the nature of the motion and whether it should be opposed with the client. Some factors to be evaluated in deciding whether to oppose a motion are matters as to which the client may have significant information or constraints, including those involving the costs of opposing the motion.

NOTE: As a rule, the client who is involved in the tactical decisions made in the litigation is more likely to feel well represented than one who is not.

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§12.82 3. Leaving Motion Unopposed

Out of courtesy to other counsel and to the court, an attorney who decides not to oppose a motion should:

- Telephone counsel for the moving party to say that there is no opposition, or to offer to do (or not do) whatever was moved for, if what is sought by the motion can be achieved without a formal court order.

  NOTE: The moving party should immediately inform the court that the parties have resolved the issues raised by the motion, so that the court can take the motion off the calendar, and the judge and law clerks can avoid having to consider the motion papers. See Cal Rules of Ct 3.1304(b).

- Advise the court, when a court order is needed or desirable, that there is no opposition to the motion so that the court may sign the order without having to spend time reading the motion papers or to set aside time for a hearing.

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§12.83 4. Resolving Motions by Stipulation or Compromise

Before spending the time and effort in preparing opposition papers to a motion, the attorney should consider whether a negotiated compromise or stipulation might be possible to resolve the issues raised by the motion. If a resolution is possible, opposing counsel should contact counsel for the moving party to try to negotiate that resolution. If a resolution is possible but more time is needed for discussion or analysis before opposition papers are due, the parties may agree on a later date for the hearing on the motion and for service and filing of opposition papers in order to allow time for negotiation. See §12.92.

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B. Grounds for Opposing Motion

§12.84 1. Noncompliance With Procedural Requirements

Opposing counsel must determine whether the moving party has met the applicable procedural requirements. Thus, the following questions should be considered:

- Was the motion served and filed at the appropriate time? Did the moving party meet the specific requirements in the Code of Civil Procedure or in the Rules of Court that limit the time within which the particular motion must be brought? See, *e.g.,* §§12.60-12.62. The terms of any case management order should be checked to see if there are limitations expressed there. See Cal Rules of Ct 3.728.
- Has service been made in a timely and proper fashion? If there is an applicable minimum or maximum time for notice, have those requirements been met? See, *e.g.,* §§12.60-12.62. On requirements for proof of service, see §§12.69-12.73.
- Is there a memorandum in support of the motion as required by Cal Rules of Ct 3.1112(a) and 3.1113? See generally §12.30.
- If required, has evidentiary support for the motion been provided? See generally §§12.43-12.53.
- Are there any other special requirements in the Code of Civil Procedure or in any other applicable statute or rule that must be met? See, *e.g.,* the affidavit requirement in CCP §1008(b) for a motion seeking the same order that was sought on a prior motion.

PRACTICE TIP: When it appears that there is a procedural defect in the motion papers, opposing counsel, before spending the time and effort for further research or to prepare opposition papers on that basis, should consult with the court clerk to learn whether the motion papers have been accepted for filing and whether the hearing has actually been scheduled. Depending on the type of defect, defective motion papers may be refused for filing altogether or the hearing may simply not be scheduled. If that occurs, there may be no danger of the motion being granted and ordinarily nothing further need be done. But see, *e.g.*, Cal Rules of Ct 3.1300(d) (no paper shall be rejected for filing on ground that it was untimely). If there is potential that the motion would be heard and ruled on by a judge, however, then opposition papers must be filed. Any procedural defects in the motions can be addressed in the opposition papers.

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§12.85 2. Evidentiary Matters Inadmissible or Declarant Incompetent

If evidentiary material is offered to support the motion, opposing counsel should determine whether evidentiary objections should be made. Declarations or affidavits, for instance, can be objected to if the formal requirements for these papers were not met. See, *e.g.,* CCP §2015.5; see §§12.43-12.53. The declarant must be competent to testify to the statements made in a declaration. The same objections can be made to declaration statements as would be made at trial if those statements were offered as testimony. See §§12.49-12.50. Finally, the subscription on a declaration must be proper. See CCP §2015.5; see §12.52.

Regarding other proposed evidence (*e.g.,* documents, requests for admissions, or deposition transcripts), the standards for admissibility of evidence in connection with a motion are the same as for admissibility at trial and the same objections can be made. Evidentiary objections can be made either in a separate paper served and filed, and identified as such, or in a separate section in the opposition's memorandum. The evidentiary objections should clearly identify the matter to which objection is made, the precise objection or objections made, and any necessary argument or supporting authority for such objections.

For summary judgment motions, evidentiary objections must be made in writing or arrangements must be made for a court reporter to be present at the hearing (Cal Rules of Ct 3.1352); written objections must be "served and filed at the same time as the objecting party's opposition or reply papers are served and filed." (Cal Rules of Ct 3.1354(a)). On summary judgment, see chap 36.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.86 3. Facts or Law Insufficient to Support Motion

§12.86 3. Facts or Law Insufficient to Support Motion

The most common way to oppose a motion is to argue that the facts, the law, or both do not justify granting the motion. Thus, if opposition to a motion is to be made, counsel should perform sufficient research and analysis to be able to present a well-reasoned argument.

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C. Preparing Opposition Papers

§12.87 1. Memorandum in Opposition to Motion

The general principles for researching, preparing, and organizing a memorandum in support of a motion, discussed in §§12.30-12.42, apply equally to a memorandum in opposition to a motion. The opposition memorandum may be in a form like that shown in §12.147. The caption should identify the moving party and the nature of the motion being opposed. See Cal Rules of Ct 2.111(6).

The organization of the opposition memorandum should be appropriate to respond to the moving party's memorandum and argument. The discussion should be divided, or subdivided, into specific subjects so that the judge hearing the motion can easily locate the response to a particular point made in the moving papers. Thus, the response is often organized in the same way, and in the same order, as the motion papers.

In preparing the opposition memorandum, opposing counsel may consider the following:

- Provide a case summary, particularly if the moving party did not summarize the case in its moving papers. A summary of the posture of the case and the setting for the particular motion may be persuasive to suggest that a motion should not be granted. For example, if nearly identical issues were previously raised in a motion and repeatedly denied by the court, opposing counsel might benefit from presenting these facts in a summary at the beginning of an opposition memorandum.
- Identify and correct any material inaccuracies in the moving party's statement of issues or facts.
- State if particular points argued in the moving party's papers are not disputed in an introductory section or summary.
- State when one of the moving party's points is opposed and briefly summarize the moving party's point and then respond to that point. It is unnecessary and counterproductive to repeat or detail the arguments made in the moving party's papers, and opposing counsel's summary should serve only to orient the reader to the subject being discussed.
- Object to inadmissible evidence in any portion of the moving party's papers. These objections may be stated separately or as a part of the opposition memorandum. See §12.85.

The opposition memorandum may not exceed 15 pages except in a summary judgment or summary adjudication motion, in which the memorandum is limited to 20 pages. The page limit does not apply to exhibits, declarations, attachments, a table of contents, a table of authorities, or the proof of service. Cal Rules of Ct 3.1113(d).

If the opposition memorandum exceeds 10 pages, it must include a table of contents and table of authorities; if it exceeds 15 pages, it must contain an "opening summary of argument." Cal Rules of Ct 3.1113(f). Generally, the summary should precede the argument itself; it should be relatively short and it should have a separate heading identifying it as a summary.

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§12.88 2. Declarations Opposing Motion

The attorney must assess whether any opposition declarations or affidavits are needed. As with motion papers (see §§12.43-12.53), if a point to be made requires presentation of a fact to the court, then the attorney must present that fact to the court in a proper manner. That manner is often by declaration or affidavit. Declarations may present facts not addressed in the moving party's papers at all, or they may contain denials or responses to facts presented by the moving party. Not every motion opposition will need a declaration, of course. See CCP §2015.5.

A declarant's responses or denials of facts presented in a moving party's declarations or evidence should not be simply the formal denials used in pleadings. The declarant's positive statement of the facts should be presented, which can include identification of errors or inexactitudes in the moving party's declaration. The opposition declaration may also, when appropriate, call the court's attention to conflicts between the opposing declarant's statements and those in the moving party's declarations, and state facts showing why the opposing declarant should be believed and the moving party's declaration considered unpersuasive or not pertinent.

The general principles for preparing a declaration or affidavit, discussed in §§12.43-12.53, apply as well in preparing declarations and affidavits in opposition to a motion. The caption of a declaration or affidavit must state both the name of the declarant or affiant and specifically identify the motion that it opposes. Cal Rules of Ct 3.1115. A sub caption should specify the trial date, if set, the hearing date, location, and hearing judge, if ascertainable, as well as the date the action was filed. In addition, the caption must specify the nature or title of any attached document other than an exhibit. Cal Rules of Ct 3.1110(b).

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§12.89 3. Other Evidentiary Material

As with support for a motion, other evidentiary material may be presented as part of the opposition (see §§12.54-12.58), and the court may be asked to take judicial notice of facts (see Evid C §§452-453 on mandatory or permissive judicial notice, discussed in §12.59).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/ D. Opposition Procedure/§12.90 1. Check for Additional Filing Requirements

D. Opposition Procedure

§12.90 1. Check for Additional Filing Requirements

Care should be taken to ensure that any additional filing requirements in the applicable statutes, court rules, or local rules that have not been preempted by Cal Rules of Ct 3.20, 2.100(a) are met. On preemption of local rules, see §11.2. For example, a party opposing a summary judgment motion must file a separate statement that responds to each of the material facts the moving party contends are undisputed, indicating whether the opposing party agrees or disagrees. The statement must also set forth any other material facts the opposing party contends are disputed and include references to the supporting evidence. Failure to file such a statement would allow the court, in the exercise of its sound discretion, to deny the motion. CCP §437c(b)(3).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.91 2. Time for Filing Opposition Papers

§12.91 2. Time for Filing Opposition Papers

All papers opposing a motion must be filed with the court and a copy served on each party at least 9 court days before the hearing. CCP §1005(b).

NOTE: Other times may be specified for particular motions; for example, papers in opposition to motions to dismiss for failure to prosecute are due 15 days after service of the motion papers. Cal Rules of Ct 3.1342(b).

Although CCP §1005 is explicit in requiring that papers opposing a motion be filed at least 9 court days before the hearing, courts have some discretion to accept and consider papers filed after that time. Clearly, it is not good practice to depend on a judge's willingness to exercise that discretion, because failure to file timely opposition papers can be considered a waiver of opposition and consent to entry of the order requested by the motion.

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§12.92 3. Serving and Filing Opposition Papers

The methods for serving opposition papers are the same as for initial motion papers, as are proof of service requirements (see §§12.69-12.74). The opposition papers must be served by personal delivery, fax, express mail, or other method consistent with CCP §§1010-1013 and reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c). Section 1005(c) applies to the service of opposition and reply papers on motions for summary judgment or summary adjudication, in addition to the motions listed in CCP §1005(a).

NOTE: Consult local rules to learn where the opposition papers should be filed. In some counties, they must be filed directly in the department where the hearing takes place, rather than at the court's central filing window. Some local rules may be preempted. See Cal Rules of Ct 3.20, 2.100(a). See §12.4, chap 11.

On service, see chap 18.

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§12.93 4. Moving for Continuance

If more time is needed to prepare opposition papers, counsel may seek a continuance of the date of hearing and the date for service and filing of opposition papers. It is usually best to first seek agreement from the moving party. If that agreement is given, local practice should be consulted on how to accomplish the change on the court's calendar. See, *e.g.,* San Francisco Ct R 8.2(B). If agreement cannot be reached, an ex parte motion may be made to continue and reschedule the hearing date and date for filing opposition papers. On ex parte motions, see generally chap 13. On summary judgment, see chap 36.

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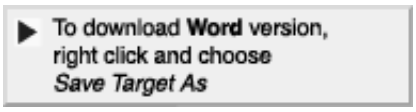
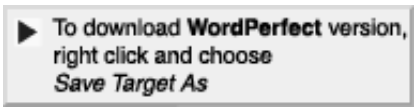
§12.94 E. Checklist: Procedure for Responding to Noticed Motion





Attorney for Party Served With Notice of Motion

- Read and analyze motion papers to determine effect of order on client
- If motion directed to another party, and grant or denial would not affect client's position, monitor progress of motion to ensure against issuance of unexpected order
- If motion unobjectionable, tell moving party you will not oppose it
- If compromise could make order sought unnecessary, negotiate modified order or arrangement with moving party
- Consult statutes or rules authorizing motion to determine whether it was properly made and supported (see §12.84)
- Find out date on which opposition papers must be served and filed (see §12.91)
- If additional time to respond needed
- Seek agreement of other counsel to reschedule hearing and due date for papers opposing motion
- If no agreement, make ex parte application for additional time (see §12.93)
- Prepare opposition papers
- Memorandum in opposition to motion (see §§12.30-12.42, 12.87)
- Declarations, if needed (see §§12.43-12.53, 12.88)
- Exhibits (papers and documents not yet on file) (see §§12.54-12.58, 12.89)
- Requests for judicial notice (see §12.59)
- Objections to evidence in motion papers (see §12.85)
- Proposed order (see §12.107)
- Proof of service of above papers (see §§12.69-12.77)
- Serve and file opposition papers
- If moving party serves reply papers
- Review and, if there is time, file written response
- Check with court for tentative ruling
- Attend hearing (see §§12.97-12.103)
- Present oral argument
- Present evidence, if permitted
- Present any written response to reply papers not previously filed
- If ruling is favorable
- Prepare order and notice of ruling, if necessary (see §12.108)
- Serve and file notice of ruling and signed order (unless done by court or otherwise unnecessary) (see §12.110)

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VII. THE REPLY

§12.95 A. Replying to Opposition Papers

Opposition papers are often filed and served only 9 court days before the hearing. CCP §1005(b). see §12.91. Because reply papers must be served and filed at least 5 court days before the hearing, they must be prepared and submitted quickly. CCP §1005(b); Cal Rules of Ct 3.1300(a). Note that summary judgment reply papers must be served 5 days before the hearing. CCP §437c(b)(4). Service of reply papers must be made personally or by fax, express mail, or some other method that is reasonably calculated to ensure delivery to other parties by the close of the next business day after the reply is filed. CCP §1005(c).

PRACTICE TIP: Counsel for the moving party in a motion who has been served with opposition papers should immediately consider whether it is worthwhile to submit a written reply. If a point or argument made in the written opposition papers has not been adequately addressed in the initial motion papers, counsel should submit a written reply if there is sufficient time to do so. If there is time, it is usually better to reply in writing than to depend on the opportunity for an oral reply at the hearing. If authority is cited in a reply that was not cited in earlier papers, the written reply will give the opposition party an opportunity to address that authority orally at the hearing, which will usually avoid the danger of the judge delaying a ruling on the motion by allowing the opposing party an opportunity to review the new authority and further respond. Furthermore, having the reply argument before the judge when the papers are read and when tentative rulings are made will allow the reply arguments to be more persuasive. Reply papers should respond to the opposition's papers and not raise new points.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.96 B. Responding to Reply Papers

§12.96 B. Responding to Reply Papers

Any reply papers from the moving party must be served and filed at least 5 court days before the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). Even though the reply must be served by personal delivery, fax, express mail, or other method consistent with CCP §§1010-1013 and reasonably calculated to ensure delivery by the close of the next business day after the papers are filed (CCP §1005(b)), there is usually little time for any detailed response to new materials presented in the moving party's reply papers. Nonetheless, if some new point or new evidence necessitates a response, at least two possible options are available:

- Present the response as part of the oral argument at the hearing on the motion. The judge hearing the motion would not, of course, have the benefit of the response when reading the motion papers before the hearing. Further, it may be impossible to present evidence orally at the hearing. Perhaps the attorney could make an offer of proof, agreeing to provide supplemental declarations or evidence after the hearing.
- Prepare, serve, and file responsive papers quickly. If there is time to do so before a judge reads the motion papers, submitting a written response may be more effective than waiting for oral argument. Any such written papers should be as brief and to the point as possible, avoiding repetition of points or arguments already made and focusing only on the new argument or piece of evidence raised in the reply papers. Counsel should be ready to make the same points orally at the hearing if the papers are refused for filing or if they do not reach the judge in time to be read and considered. Filing of any such papers should be directly with the court in which the hearing is to take place if possible, and service on the opposing party should be made by hand delivery.

NOTE: For motions seeking dismissal for failure to prosecute, different time periods are prescribed. The opportunity to respond to the moving party's reply papers is established by the California Rules of Court, and those responsive papers are due 5 days after the moving party's reply papers were filed. Cal Rules of Ct 3.1342(d). For discussion of motions to dismiss, see chap 39.

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VIII. HEARING

§12.97 A. Attendance

Parties have the right, on giving notice of nonappearance, to submit a matter without appearing at the hearing. Cal Rules of Ct 3.1304(c). If no party appears (and no notice of nonappearance was given), the court may take the matter off calendar to be reset only on motion, or may rule on the matter. Cal Rules of Ct 3.1304(d). See Cal Rules of Ct 3.1320(f) on demurrers.

NOTE: Even before Cal Rules of Ct 3.1304(c), no statute required the attorney for the moving party, or for an adverse party, to attend the hearing on a motion. See *Ensher, Alexander & Barsoom, Inc. v Ensher* (1964) 225 CA2d 318, 325, 37 CR 327. The motion is deemed to have been made when the notice of motion was served and filed. CCP §1005.5. The parties are not normally required to be present at motion hearings, and their presence may even be a distraction.

If a matter will not be heard on a scheduled date, the moving party must promptly notify the court. Cal Rules of Ct 3.1304(b).

PRACTICE TIP: An attorney who does not wish to attend a hearing should contact adverse counsel to see whether all will agree to submission of the motion on the papers filed. The attorney should also notify the clerk that the motion is submitted for decision without attendance of counsel. This method permits the court to move more quickly through the calendar and ensures that the judge will not put the matter off-calendar or interpret nonattendance as lack of interest in a ruling.

There are several positive reasons for attorneys to attend a hearing. The judge may ask for clarification of some point raised in the motion or opposition papers. If the attorneys could not informally solve the dispute about which the motion was made, and it was worth counsel's time and effort to prepare the motion or opposition papers, it should also be worth the time to attend the hearing. See §12.102.

NOTE: A court's law and motion calendar for a given day normally lists several cases that will be called in the listed order beginning at a specified hour. The attorneys on the first case should be ready to present argument at that time. Attorneys on subsequent cases should also be present and ready because early cases may be taken off the calendar or submitted without argument.

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B. Telephone Appearances

§12.98 1. When Appropriate

A party generally has the option of appearing by telephone in any hearing or conference at which witnesses are not expected to be called to testify. Cal Rules of Ct 3.670(b). Local rules may also provide procedures for an appearance by telephone. See Cal Rules of Ct, Standards of J Admin 3.1(d). The option to appear by telephone applies to civil actions as defined in Cal Rules of Ct 1.6(4) and to unlawful detainer and probate proceedings. Cal Rules of Ct 3.670(b).

Each court must ensure that the participants' statements are audible to all other participants and that the statement made by a participant is identified as being made by that participant. Cal Rules of Ct 3.670(j).

Each court must publish information for parties and attorneys on how to appear by telephone. Cal Rules of Ct 3.670(m). A court may require that a particular conference call provider must be used for telephone appearances. Cal Rules of Ct 3.670(*l*). Proceedings involving telephone appearances are recorded just as if the parties appeared in person. Cal Rules of Ct 3.670(k).

No telephone appearances are permitted, however, and personal appearances are required, for (Cal Rules of Ct 3.670(b), (d)(1)-(6)):

- Trials and hearings at which witnesses are expected to testify;
- Hearings on restraining orders;
- Settlement conferences;
- Trial management conferences;
- Hearings on motions in limine; and
- Hearings on petitions to confirm the sale of property under the Probate Code.

In addition, personal appearance is required for (Cal Rules of Ct 3.670(b), (d)(7)):

- Applicants seeking an ex parte order, except when the applicant is seeking an order to for permission to file a memorandum in excess of the applicable page limits, for an extension of time to serve pleadings, to set hearing dates on alternative writs and orders to show cause, or by stipulation of the parties;
- Persons ordered to appear to show cause why sanctions should not be imposed for violation of a court order or rule; and
- Persons ordered to appear in an order or citation issued under the Probate Code.

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§12.99 2. Notice of Intent to Appear by Telephone

A party who wishes to appear by telephone should include the words "telephone appearance" in the caption of the moving or opposing papers. Cal Rules of Ct 3.670(g)(1)(A). See §12.15. If a party is not filing papers, the party must notify the court and all other parties of the party's intent to appear by telephone at least 3 days before the appearance. If the notice is oral, it must be given either in person or by telephone. If the notice is in writing, it must be given by filing a "Notice of Intent to Appear by Telephone" with the court at least 3 court days before the hearing and by serving the notice at the same time on all other parties by personal delivery, facsimile transmission, express mail, or other means reasonably calculated to ensure delivery to the parties no later than the close of the next business day. Cal Rules of Ct 3.670(g)(1)(B).

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§12.100 3. Personal Appearance After Notice to Appear by Telephone

A party who has given notice that it intends to appear by telephone and subsequently chooses to appear in person must notify the court and all other parties that have appeared in the action by telephone at least 2 court days before the hearing. Cal Rules of Ct 3.670(e)(3). If, after a party has requested a telephone appearance, the court decides that a personal appearance by that party is necessary, the court must give reasonable notice to all parties before the hearing and may continue the hearing if necessary to accommodate the personal appearance. Cal Rules of Ct 3.670(h). Courts using a telephonic tentative ruling system for law and motion matters may use the tentative ruling to require the parties' personal appearances if the notice is given 1 court day before the hearing. Cal Rules of Ct 3.670(h).

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§12.101 4. Teleconferencing

A court may provide teleconferencing for court appearances by entering into a contract with a private vendor. The contract may provide that the vendor may charge the party appearing by telephone a reasonable fee, specified in the contract, for its services. Cal Rules of Ct 3.670(i).

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§12.102 C. Oral Argument; Answering Judge's Questions

The hearing gives counsel an opportunity to persuade the judge to decide the motion in the client's favor. It also permits counsel to see how the judge and adverse counsel perceive particular aspects of the case and allows counsel to clear up any confusion or misconception. The argument should be planned and not be merely a rehash of points made in the filed memorandum and declarations. Oral argument at a hearing is a privilege, not a right, and the court has discretion to limit argument or deny it. See *Gillette v Gillette* (1960) 180 CA2d 777, 781, 4 CR 700.

At the hearing, an attorney can begin the argument by stating points that support his or her position, but should be flexible, prepared to answer questions when they are asked, and ready to shift to issues that the judge wants discussed. Mention of a statute or case should include the page where the judge can find the citation in the motion or opposition papers. It can be helpful to tab portions of declarations or documents to which reference may be necessary.

Ordinarily, no transcript will be made of oral argument on a motion unless one of the attorneys arranges before the hearing for a court reporter to be present.

If possible, the attorney who prepared the motion or opposition papers should attend the hearing and should be familiar with the facts of the case and all papers in the file. The judge may ask counsel such procedural questions as:

- Who are the parties and their attorneys?
- Have all parties been served?
- Is there a case management statement on file? See Cal Rules of Ct 3.734(g). Has a case management conference been conducted or set? See Cal Rules of Ct 3.734(e). Is the case set for trial? On case management conferences, see chap 40.
- Does the order sought affect the procedural status of the case?
- Have local rules applicable to the motion been complied with?
- Have all proofs of service and declarations or affidavits been properly executed?
- Has discovery been completed or is the case within 30 days of trial?
- Is there any reason (*e.g.,* other motions, trial-setting, or settlement conference) why the file or any part of it may be unavailable to the court? On settlement conferences, see chap 40.

In preparing for oral argument at the hearing, the attorney should also consider such questions as:

- Were any arguments in favor (or against) the motion omitted from the memorandums?
- Is new evidence available or needed?
- What points in counsel's own memorandum or documents need to be highlighted?
- What points in the opponent's documents are easily or surely refutable?
- What reasons, if any, might give the judge difficulty in reaching a favorable conclusion?
- Are there points of compromise that might be suggested if the judge seems to be leaning the other way?

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§12.103 D. Presenting Evidence

All testimony offered at a hearing must be written except as allowed "in the court's discretion for good cause shown." Cal Rules of Ct 3.1306(a). A party desiring to introduce oral testimony must file, no later than 3 court days before the hearing, a written statement describing the nature and extent of the testimony and a reasonable time estimate for the hearing. When the statement is filed less than 5 court days before the hearing, it must be served on the other parties in a manner that ensures delivery no later than 2 court days before the hearing. Cal Rules of Ct 3.1306(b).

WARNING: Judges rarely welcome testimony at the hearing or exhibits that could have been, but were not, served and filed with the motion papers. See, *e.g.*, Los Angeles Ct R 9.1 (statement required by Cal Rules of Ct 3.1306 must explain why evidence cannot be presented by declaration or affidavit).

A judge has the power to rule on a motion on declarations alone and has discretion to refuse to hear oral testimony at the hearing on a motion. See *Beckett v Kaynar Mfg. Co.* (1958) 49 C2d 695, 698 n3, 321 P2d 749; *Crocker Citizens Nat'l Bank v Knapp* (1967) 251 CA2d 875, 880, 60 CR 66. The judge also has discretion to receive testimony and exhibits at the hearing. See *Continental Baking Co. v Katz* (1968) 68 C2d 512, 524 n7, 67 CR 761; *Reifler v Superior Court* (1974) 39 CA3d 479, 485, 114 CR 356. See generally 6 Witkin, California Procedure, *Proceedings Without Trial* §§40, 42 (5th ed 2008).

If a party requests permission to present testimony at the hearing, or to introduce an exhibit not previously mentioned, the judge must exercise the discretion to receive or to exclude it; the judge cannot exclude the testimony or exhibit solely because there is a local policy to consider declarations only. *Reifler v Superior Court, supra*. The judge should base the decision on the circumstances of the request and the reasons for it.

PRACTICE TIP: A party who wants a judge to consider oral testimony or a new exhibit, or to permit cross-examination of a declarant or other person, should make that request as soon as possible so that calendar time can be scheduled. The reasons for the request should be stated, because the judge must be persuaded to exercise the discretion to permit more than legal argument.

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IX. RULINGS AND ORDERS

§12.104 A. Rulings and Orders Defined

An order is a "direction of a court or judge, made or entered in writing, and not included in a judgment." CCP §1003. A judgment is a final determination of the parties' rights in an action or proceeding. CCP §577.

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§12.105 B. Court's Ruling on Noticed Motion

A judge ruling on a noticed motion may:

- Make a tentative ruling which, unless modified at the hearing, becomes the order;
- Render an oral ruling at the hearing, which the clerk will enter as a minute order; or
- Take the motion under submission at the hearing and later issue a written order or ask one of the attorneys to prepare an order to be signed.

See chap 13 on ex parte orders. An oral ruling becomes effective when the clerk enters it in the minutes (*Adam v Los Angeles Transit Lines* (1957) 154 CA2d 535, 541, 317 P2d 642); a written order, after it has been signed, becomes effective when it is filed (*Maxwell v Perkins* (1953) 116 CA2d 752, 756, 255 P2d 10). See *Hollister Convalescent Hosp. v Rico* (1975) 15 C3d 660, 664, 125 CR 757. See generally 6 Witkin, California Procedure, *Proceedings Without Trial* §44 (5th ed 2008).

If the ruling on a motion is complicated, an attorney may be asked to prepare a written order for the judge's signature and for filing. Conformed copies of the order can then be served on all parties. See §12.153.

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§12.106 C. Reason to Submit

A proposed order may be submitted along with the moving papers. If a proposed order is submitted, it must be lodged and served with the moving papers, but it must not be attached to them. Cal Rules of Ct 3.1113(m).

PRACTICE TIP: The proposed order may aid the judge by showing exactly what the court is being asked to order and by requiring only a signature, without the need for further drafting time or delay. The judge can also sign the order with confidence that adversaries served with the order form in advance had the chance to argue against its form and content. Preparing a form of order at the outset is also useful for counsel as a means to better focus the motion papers on precisely what is being requested.

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§12.107 D. Contents of Proposed Order

The proposed form of order should be a separately captioned document, which will ordinarily have a title such as:

ORDER FOR _ _[*specify nature of order*]**_ _**

The order should then begin by identifying the motion made and the fact that it was heard by the court on the date and time it was heard. If known, the introduction can also identify the attorneys and parties represented at the hearing. These introductory recitals of when and how the motion came on for hearing and who appeared, although customarily included, are not required. See, *e.g., Doran v Burke* (1953) 118 CA2d 806, 258 P2d 1078.

Following that introduction, the ordering language itself should be preceded by language such as:

The Court having heard and considered the arguments made by counsel for the parties, and good cause appearing,

IT IS ORDERED that:

PRACTICE TIP: The specific ordering paragraphs should be clear, concise, and unambiguous. If the order is to grant a motion, the language should specifically state that the motion of that particular party is granted, in addition to language specifically stating what it is the court is ordering by granting that motion.

The order should end with a place for the date and the judge's signature.

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§12.108 E. Attorney Preparation of Order

An attorney may prepare in advance a form of the order sought and submit it along with the moving (or opposition) papers that are served and filed. Cal Rules of Ct 3.1113(m) (proposed order must be lodged and served with moving papers, but shall not be attached to them). See §12.106. Alternatively, the attorney may

- Bring a form of the order to the hearing and present it for signature if the judge rules in the party's favor; or
- Prepare the form after the judge has ruled on the motion or indicated what the ruling will be.

The date and signature line in the original typed order, and sometimes also date and number spaces in the body of the order, are left blank for the judge to fill in. After the judge has signed the order, it is normally returned to counsel for the prevailing party to serve and file. See §§12.69-12.74.

In some counties, the judge or clerk prepares the original order and mails copies to the parties. The judge may request that an order prepared by counsel be approved as to form by adverse counsel before it is presented to the judge for signature. This may be done by asking adverse counsel to sign and date a line at the end of the order:

Approved as to form:

Date: _ _ _ _ _ _ __[*Signature*]__
John Smith
Attorney for Defendant Johnson

An order is valid even if it does not contain recitals of when and how the motion came on for hearing, who appeared, and that proof was made and good cause appeared. However, it is customary to include these recitals, and at a later proceeding they will be regarded as true unless contradicted by other parts of the record. See, *e.g., E. M. Derby & Co. v Jackman* (1891) 89 C 1, 26 P 610; *Doran v Burke* (1953) 118 CA2d 806, 258 P2d 1078. The recitals also add clarity when several motions have been made in an action or there are multiple parties.

PRACTICE TIP: Some court clerks and judges refuse to sign or file orders that are not specified in the caption. Merely "ORDER" or "ORDER OF COURT" is insufficient. Examples of proper descriptions are "ORDER CONTINUING TRIAL DATE," "ORDER SUSTAINING DEMURRER," and "ORDER GRANTING MOTION TO STRIKE."

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§12.109 F. Findings

Findings of fact need not be made in connection with the granting or denial of a pretrial motion (*Beckett v Kaynar Mfg. Co.* (1958) 49 C2d 695, 699, 321 P2d 749) unless the order is the basis of a final judgment or a contempt judgment. See generally 7 Witkin, California Procedure, *Trial* §§389-392 (5th ed 2008). Detailed findings may also be required when sanctions are ordered. See, *e.g.,* CCP §128.7(e) (order imposing sanctions for violation of specified conditions regarding filed pleadings and similar filed documents); see discussion in §3.4. Some recitation of facts may be put in an order if it is necessary to provide guidelines to the persons who must obey it.

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§12.110 G. Notice of Ruling

The time within which a party must act after an order takes effect normally begins to run against the party when he or she is served with a notice of the ruling (see form in §12.149) or a conformed copy of the order (see form in §12.153). If the ruling is made orally at the hearing, in the presence of all counsel, and entered by the clerk in the minutes, counsel may be asked to waive notice. If counsel agree, no written notice of the order need be given. The attorney for a prevailing party can notify any party who is not present at the hearing by serving a notice of the oral ruling. See CCP §1019.5.

If the judge took the motion under submission and later ruled on it, the court clerk must send notice of ruling to the parties. Cal Rules of Ct 3.1109(a). Under Rule 3.1109(a), however, notification by the clerk constitutes service of notice of ruling or order only if the clerk must give notice under CCP §664.5, which relates to judgments and orders that conclude the case. The prevailing party usually prepares and serves on the parties an order form signed by the judge (see §12.153) or a notice of ruling (see §12.149). A notice of ruling is not an order but is only notification that a minute order has been entered.

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H. Procedures After Motion Granted

§12.111 1. Moving Party

If the judge makes an oral ruling granting the motion at the hearing, counsel for the moving party may ask all attorneys or parties present to waive notice of the ruling. See CCP §1019.5. If any party does not agree, or if an attorney or unrepresented party is not present, the moving party's attorney can prepare a notice of ruling (see §§12.108, 12.149), serve copies, and file the notice with proof of service.

PRACTICE TIP: It is important to serve a notice of an oral ruling on adverse parties who must perform some act within a specified time.

The trial judge granting a motion may fill in and sign a written order form prepared by the moving party's attorney in advance or may ask the attorney to prepare a written order form embodying specified terms. After a written order has been signed, the attorney should prepare conformed copies for service. These may be

- Photocopies of the filled-in and signed original order; or
- Copies of the original made before it was signed that have been conformed by writing or typing in dates and numbers that the judge put in the original, and by writing or typing the judge's name on the signature line after the symbol "s/." For example:

s/ Richard S. Row
Judge

PRACTICE TIP: Sometimes, the court clerk will conform copies by rubber stamping the judge's name on the signature line. The conformed copies are then served on each other party, and a proof of service form is filed along with the original signed order if the latter was not previously filed.

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§12.112 2. Opposing Party

After a motion has been granted, an opposing party may pursue several possible courses of action. For example:

- Review of a particular order (see, *e.g.,* CCP §400 authorizing writ of mandate to review order granting or denying a change of venue).
- Appeal from certain orders. CCP §§904.1-904.2.
- Relief from an order on the ground that it was taken against the party through mistake, inadvertence, surprise, or excusable neglect. CCP §473(b); see *Los Angeles v Gleneagle Dev. Co.* (1976) 62 CA3d 543, 553, 133 CR 212 (failure to oppose motion properly).
- Motion for reconsideration. CCP §1008(a). See §§12.113-12.118.

Further, the nature of the order, or the circumstances of its issuance (*e.g.,* a deficiency in the notice of motion), may suggest forms of collateral attack on the order. The adverse party can even risk declining to obey the order, stating objections to it or the way in which it was obtained when enforcement of the order is sought.

Until an order given orally is entered in the court minutes, or until a written order is signed and filed, the judge has authority to change his or her mind and to reverse or modify a ruling granting a motion. See *Adam v Los Angeles Transit Lines* (1957) 154 CA2d 535, 541, 317 P2d 642; *Miller v Stein* (1956) 145 CA2d 381, 385, 302 P2d 403. After the order has been entered or filed, however, there is no general statutory basis for a motion to reconsider or to vacate the order unless the reconsideration is sought under CCP §473 or some other specific statute. *Dunas v Superior Court* (1970) 9 CA3d 236, 239, 87 CR 719. See also *Farrar v McCormick* (1972) 25 CA3d 701, 705, 102 CR 190 (*e.g.,* declarations supporting motion to vacate did not show mistake). But see §§23.58, 23.62 (motions to reconsider after demurrer has been overruled or sustained).

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I. Procedures After Motion Denied

§12.113 1. Motion for Reconsideration

A party whose application for an order, including any interim order, has been denied (or granted only in part, conditionally, or on terms) may move for reconsideration based on "new or different facts, circumstances, or law" under CCP §1008(a), (g). See *Le Francois v Goel* (2005) 35 C4th 1094, 1098, 29 CR3d 249. This motion must be made within 10 days after service of written notice of entry of the order to which it is directed. CCP §1008(a).

A motion for reconsideration may also be made by "any party affected by the order," including a responding party, after a motion has been granted wholly, partially, or conditionally. CCP §1008(a).

Under Cal Rules of Ct 8.108(e), filing a valid motion to reconsider an appealable order under CCP §1008 extends the time to appeal from the order for all parties until the earliest of:

- 30 days after the clerk mails or a party serves the order denying a motion or a notice of entry of that order;
- 90 days after the first motion to reconsider is filed; or
- 180 days after entry of the appealable order.

NOTE: Subsection (e) was added to Cal Rules of Ct 8.108 in 2002 specifically to address a split in case authority regarding whether filing a motion for reconsideration extended a party's time to appeal. Cal Rules of Ct 8.103, Advisory Committee Comment (2002). Older cases discussing this issue should be read in light of this change in the law. See, *e.g.*, *Conservatorship of Coombs* (1998) 67 CA4th 1395, 79 CR2d 799 (holding former Cal Rules of Ct 3, see now revised Cal Rules of Ct 8.108, did not apply to motions for reconsideration).

To extend the time to appeal, a motion for reconsideration must be valid. *Branner v Regents of Univ. of Cal.* (2009) 175 CA4th 1043, 1048, 96 CR3d 690. A motion that is filed without the supporting affidavit required by CCP §1008(a) is invalid and remains so, even if the court later allows the party to file the affidavit. 175 CA4th at 1049.

Once judgment has been entered, the court has no power to reconsider its order without a postjudgment request for relief from the judgment. *Nave v Taggart* (1995) 34 CA4th 1173, 40 CR2d 714 (prejudgment motion does not survive subsequently entered judgment; entry of judgment implied denial of pending motion).

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§12.114 a. Subsequent Motion for Same Order

Alternatively, a party whose motion was not granted fully and unconditionally may make a later application (motion) for the same order. CCP §1008(b). The motion must be supported by an affidavit or declaration that states what the original motion was, when and by what judge it was ruled on, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown by the later motion. CCP §1008(b). "New or different law" does not include a later-enacted statute that may not be applied retroactively. CCP §1008(f).

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§12.115 b. Jurisdiction to Hear Motion

No judge or court has jurisdiction to hear a motion to reconsider, or the renewal of a motion previously ruled on, that does not comply with CCP §1008, although a court may reconsider a prior order on its own motion if it finds that a change of law warrants doing so. CCP §1008(c), (e). The court exceeds its jurisdiction if it grants reconsideration of a motion that is not based on "new or different facts, circumstances, or law." CCP §1008(e); *Gilberd v AC Transit* (1995) 32 CA4th 1494, 38 CR2d 626; *Morite of Cal. v Superior Court* (1993) 19 CA4th 485, 23 CR2d 666. This jurisdictional prerequisite is not satisfied by arguing that the court "misinterpreted" the law in its initial decision and would, therefore, be relying on "different" law on reconsideration. *Gilberd v AC Transit* (1995) 32 CA4th 1494, 1500, 38 CR2d 626. See §12.119 regarding the court's inherent power to reconsider interim decisions.

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§12.116 c. Denial of Motion

When a motion has been denied, the attorney for a party who opposed the motion may prepare a form of order denying the motion (see §12.153) or a notice of ruling (see §12.149) to inform other parties of the denial. This step ensures the commencement of any time period that begins to run against the moving party on denial of the motion.

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§12.117 d. Sanctions

Various sanctions may be imposed on a party or an attorney who does not comply with CCP §1008 when making a motion to reconsider or a renewed motion, including punishment for contempt, sanctions under CCP §128.7, or revocation of any order made under the section. However, penalties for failure to comply with §1008 have been held not to be mandatory. *Moore v Moore* (1955) 133 CA2d 56, 60, 283 P2d 338.

NOTE: Section 1008 was substantially amended in 1992. Judicial decisions based on former versions of §1008 must be read in the light of the new wording.

A judge presented with a subsequent motion based on substantially the same grounds and seeking substantially the same relief as a denied motion may:

- Deny it summarily without further reconsideration (*City & County of San Francisco v Muller* (1960) 177 CA2d 600, 603, 2 CR 383); or
- Consider it and deny it (*Josephson v Superior Court* (1963) 219 CA2d 354, 358, 33 CR 196).

The court may not ignore the subsequent motion. *Muller v Tanner* (1969) 2 CA3d 445, 460, 82 CR 738.

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§12.118 e. Appeal

There is a split in authority about whether a denial of a motion for reconsideration is appealable. In *Marriage of Burgard* (1999) 72 CA4th 74, 81, 84 CR2d 739, the Sixth District Court of Appeal noted a trend to treat motions for reconsideration as not appealable, but held that the instant case did not provide an opportunity to review its position in *Santee v Santa Clara County Office of Educ.* (1990) 220 CA3d 702, 710, 269 CR 605 (motion for reconsideration that raises new facts is appealable). See also *City of Los Angeles v Glair* (2007) 153 CA4th 813, 823 n8, 63 CR3d 280. But see *Branner v Regents of Univ. of Cal.* (2009) 175 CA4th 1043, 1050, 96 CR3d 690 (denial of motion for reconsideration is not appealable under any circumstances).

WARNING: In *Blue Mountain Dev. Co. v Carville* (1982) 132 CA3d 1005, 1010, 183 CR 594, the court noted that an order on a motion for reconsideration is appealable only if the original ruling as to which reconsideration was sought was a judgment under CCP §904.1.

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§12.119 2. Court's Inherent Power to Reconsider

Trial courts have the inherent power to reconsider and correct their own interim decisions in order to achieve substantial justice. *Phillips v Phillips* (1953) 41 C2d 869, 874, 264 P2d 926 (trial court may change its decision on law or facts at any time before judgment is entered); *Kerns v CSE Ins. Group* (2003) 106 CA4th 368, 388, 130 CR2d 754. This power is derived from the California Constitution. Cal Const art III, §3; art IV, §1; art V, §1; art VI, §1 (providing for legislative, executive, and judicial branches of government); *Manduley v Superior Court* (2002) 27 C4th 537, 557, 117 CR2d 168; *Kerns v CSE Ins. Group, supra*. The only requirement of the court is that it exercise "due consideration" before modifying, amending, or revoking its prior orders. *Darling, Hall & Rae v Kritt* (1999) 75 CA4th 1148, 1156, 89 CR2d 676.

Code of Civil Procedure §1008 limits the ability of parties to file repetitive motions, but it does not limit a court's ability, on its own motion, to reconsider a prior interim order to correct an error. *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249. A trial court may sua sponte reconsider its own interim orders irrespective of CCP §1008, because to eliminate a trial court's jurisdiction in this regard would materially impair and defeat a core function of the judiciary and violate the separation of powers doctrine. *Case v Lazben Fin. Co.* (2002) 99 CA4th 172, 175, 121 CR2d 405. See also *Abassi v Welke* (2004) 118 CA4th 1353, 1359, 14 CR3d 336 (court had power to reconsider ruling on motion for summary judgment sua sponte and request that parties resubmit motion court had previously denied). But see *Schachter v Citigroup, Inc.* (2005) 126 CA4th 726, 23 CR3d 920 (court's inherent power to correct its own rulings does not excuse party from complying with requirements of CCP §437c(f)(2) when seeking reconsideration of summary judgment ruling).

A trial court that grants reconsideration on its own motion does so because, based on the evidence originally submitted, its earlier decision was wrong; the court does not have inherent power to grant a new trial, *i.e.*, to take new evidence and hold a new hearing. *Marriage of Herr* (2009) 174 CA4th 1463, 95 CR3d 464 (when trial court expressly rejected parties' trial evidence as inaccurate or unreliable, its sua sponte grant of reconsideration ordering them to produce new, competent evidence at new hearing was a grant of new trial and beyond its power under CCP §659; party's own motion for new trial was untimely under CCP §659).

A change in the law is always an appropriate basis, until a final judgment is entered, for changing an interim order; courts retain the inherent power, regardless of CCP §1008, to change their orders at any time before entry of judgment. *Darling, Hall & Rae v Kritt* (1999) 75 CA4th 1148, 1155, 89 CR2d 676.

A party may not file a written motion to reconsider that has procedural significance if it does not satisfy CCP §1008. *Le Francois v Goel* (2005) 35 C4th 1094, 1108, 29 CR3d 249. Although a party may not be prevented from communicating to the court that it should reconsider a prior ruling, this communication may not be made ex parte. 35 C4th at 1108. If the requirements of CCP §1008 are not satisfied, an action to reconsider a prior interim order must formally begin with the court on its own motion. 35 C4th at 1108. See *Barthold v Barthold* (2008) 158 CA4th 1301, 70 CR3d 691 (motion for reconsideration granted on court's own motion after party filed motion that failed to meet requirements of CCP §1008).

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§12.120 J. Motion for Relief Under CCP §473 (Mistake, Inadvertence, Surprise, Neglect)

Depending on the circumstances, the court may, in effect, reconsider a prior order under CCP §473 if the moving party can show that the prior order was a result of "mistake, inadvertence, surprise or excusable neglect." See *Juarez v Superior Court* (1982) 31 C3d 759, 765, 183 CR 852; *Garber & Assocs. v Eskandarian* (2007) 150 CA4th 813, 822, 59 CR3d 1. However, a motion for relief under §473 cannot be used merely to evade the jurisdictional requirements of CCP §1008. *Gilberd v AC Transit* (1995) 32 CA4th 1494, 38 CR2d 626 (mistake on issue collateral to merits of initial motion). See also *Standard Microsystems Corp. v Winbond Elec. Corp.* (2009) 179 CA4th 868, 890, 102 CR3d 140 (motion for mandatory relief from default based on attorney error under CCP §473 was not motion for reconsideration under CCP §1008, because first, unsuccessful motion for reconsideration had been based on mistake of law). On motions for relief from default under §473, see chap 38.

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§12.121 X. SANCTIONS

The court has the power to order payment of attorney fees and expenses incurred in responding to pleadings or other papers that are "presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" or for legal contentions that are unwarranted "by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." CCP §128.7(b)-(d). Under CCP §128.7, attorneys who represent themselves cannot recover their attorney fees as sanctions for filing abuses. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475.

Section 128.7 does not apply to discovery motions. CCP §128.7(g). Sanctions under the California Civil Discovery Act (CCP §§2016.010-2036.050) apply to discovery matters. See, *e.g.,* CCP §2023.030. For further discussion of sanctions under CCP §128.7 (applying only to complaints filed, or proceedings initiated, after December 31, 2004), see §1.6.

In addition, the court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. CCP §§128.5, 128.7; *Wallis v PHL Assoc., Inc*. (2008) 168 CA4th 882, 86 CR3d 297. A determination of frivolousness requires a finding that a motion is totally and completely without merit, *i.e.,* any reasonable attorney would agree that such a motion is totally devoid of merit. *Decker v U. D. Registry, Inc.* (2003) 105 CA4th 1382, 1392, 129 CR2d 892.

The court may also order sanctions under Cal Rules of Ct 2.30(b) for failure to comply with the trial and pretrial rules of the Rules of Court (Cal Rules of Ct 2.2-2.958). Cal Rules of Ct 2.30(b).

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XI. SEALING OF COURT RECORDS

§12.122 A. Standards and Procedures Generally

California Rules of Court 2.550 and 2.551 provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 86 CR2d 778. These rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. The rules do not apply to records that courts must keep confidential by law. Examples of confidential records to which public access is restricted by law are records of the family conciliation court (Fam C §1818(b)), fee waiver applications (Cal Rules of Ct 3.54), and search warrant affidavits sealed under *People v Hobbs* (1994) 7 C4th 948, 30 CR2d 651. The sealed records rules do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication. See *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1208 n25, 86 CR2d 778; Advisory Committee Comment to Cal Rules of Ct 2.550 (2004).

A record filed publicly in the court must not disclose material from a record that is sealed, conditionally under seal, or subject to a pending motion or an application to seal. Cal Rules of Ct 2.551(c).

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§12.123 1. Applicability

California Rules of Court 2.550-2.585 apply to records sealed or proposed to be sealed by court order. Cal Rules of Ct 2.550(a)(1).

California Rules of Court 2.550-2.585 does not apply to records that are required to be kept confidential by law. These rules also do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings. The rules do apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings. Cal Rules of Ct 2.550(a)(2).

California Rules of Court 8.46 applies to sealed records and records proposed to be sealed on appeal and in original proceedings under Cal Rules of Ct 8.490, but it does not apply to records required to be kept confidential by law. See *Universal City Studios, Inc. v Superior Court* (2003) 110 CA4th 1273, 2 CR3d 484.

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§12.124 2. Definitions

Unless the context indicates otherwise, "record" as used in this rule means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court. Cal Rules of Ct 2.550(b)(1).

A "sealed" record is a record that by court order is not open to inspection by the public. Cal Rules of Ct 2.550(b)(2).

A "lodged" record is a record that is temporarily placed or deposited with the court but not filed. Cal Rules of Ct 2.550(b)(3).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.125 3. Court Records Presumed to Be Open

§12.125 3. Court Records Presumed to Be Open

Unless confidentiality is required by law, court records are presumed to be open. Cal Rules of Ct 2.550(c).

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B. Procedures for Filing Records Under Seal

§12.126 1. Court Approval Required

A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties. Cal Rules of Ct 2.551(a).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/ 2. Motion or Application to Seal a Record/§12.127 a. Motion or Application

2. Motion or Application to Seal a Record

§12.127 a. Motion or Application

A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing. Cal Rules of Ct 2.551(b)(1).

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§12.128 b. Express Factual Findings Required to Seal Records

The court may order that a record be filed under seal only if it expressly finds facts that establish (Cal Rules of Ct 2.550(d)(1)-(5)):

- There is an overriding interest that overcomes the right of public access to the record;
- The overriding interest supports sealing the record;
- A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- The proposed sealing is narrowly tailored; and
- No less restrictive means exist to achieve the overriding interest.

California Rules of Court 2.550(d)-(e) is derived from *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 86 CR2d 778. That decision contains the requirements that the court, before closing a hearing or sealing a transcript, must find an "overriding interest" that supports the closure or sealing and must make certain express findings. 20 C4th at 1217. The decision notes that the First Amendment right of access applies to records filed in both civil and criminal cases as a basis for adjudication. 20 C4th at 1208 n25. Thus, the *NBC Subsidiary* test applies to the sealing of records. Advisory Committee Comment to Cal Rules of Ct 2.550 (2004).

NBC Subsidiary (KNBC-TV), Inc. v Superior Court, *supra,* provides examples of various interests that courts have acknowledged may constitute "overriding interests." 20 C4th at 1222 n 46. Courts have found that, in appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute "overriding interests." The rules do not attempt to define what may constitute an "overriding interest," but leave this to case law. Advisory Committee Comment to Cal Rules of Ct 2.550 (2004).

In an insurance coverage dispute, the defendant failed to show an "overriding interest" supporting the sealing of various documents. Thus, none of the following documents could remain sealed: the settlement agreement with a confidentiality clause containing an exception for court-ordered disclosure; papers that revealed sources of payments to settle claims; documents that contained admissions that the defendant may have violated pollution laws; papers revealing the identity of witnesses to possible violations of laws; and documents that disclosed the identity of other entities that may have violated laws. *Huffy v Superior Court* (2003) 112 CA4th 97, 4 CR3d 823; see *Universal City Studios, Inc. v Superior Court* (2003) 110 CA4th 1273, 1279, 2 CR3d 484 (defendant failed to make any showing of prejudice to any of its legitimate commercial interests if heavily redacted settlement agreement was unsealed); *In re Providian Credit Card Cases* (2002) 96 CA4th 292, 298 n3, 116 CR2d 833 (defendant claimed that materials contained trade secrets, but court noted that they were telemarketing scripts that had already been disclosed to defendant's customers).

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§12.129 c. Service

A copy of the motion or application must be served on all parties who have appeared in the case. Unless the court orders otherwise, any party that already possess copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version. Cal Rules of Ct 2.551(b)(2).

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§12.130 3. Lodging of Records

The party requesting that a record be filed under seal must lodge it with the court under Cal Rules of Ct 2.551(d) when the motion or application is made, unless good cause exists for not lodging it or the record was previously lodged under Cal Rules of Ct 2.551(b)(3)(A)(i). Pending the determination of the motion, the lodged record will be conditionally under seal. Cal Rules of Ct 2.551(b)(4).

If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal. Cal Rules of Ct 2.551(b)(5).

A record that may be filed under seal must be put in an envelope or other appropriate container, sealed in the envelope or container, and lodged with the court. Cal Rules of Ct 2.551(d)(1).

The envelope or container lodged with the court must be labeled "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 2.551(d)(2).

The party submitting the lodged record must affix to the envelope or container a cover sheet that (Cal Rules of Ct 2.551(d)(3)(A)-(B)):

- Contains all the information required on a caption page under Cal Rules of Ct 2.100-2.119; and
- States that the enclosed record is subject to a motion or an application to file the record under seal.

On receipt of a record lodged under this rule, the clerk must endorse the affixed cover sheet with the date of its receipt and must retain but not file the record unless the court orders it filed. Cal Rules of Ct 2.551(d)(4).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.131 4. Trial Records Subject to Confidentiality Agreement or Protective Order

§12.131 4. Trial Records Subject to Confidentiality Agreement or Protective Order

A party who files or intends to file with the court for the purposes of adjudication or to use at trial records produced in discovery that are subject to a confidentiality agreement or protective order, and does not intend to request to have the records sealed, must (Cal Rules of Ct 2.551(b)(3)(A)):

- Lodge the unredacted records subject to the confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records, in the manner stated in Cal Rules of Ct 2.551(d) (Cal Rules of Ct 2.551(b)(3)(A)(i));
- File copies of the documents named in Cal Rules of Ct 2.551(b)(3)(A)(i) that are redacted so that they do not disclose the contents of the records that are subject to the confidentiality agreement or protective order (Cal Rules of Ct 2.551(b)(3)(A)(ii)); and
- Give written notice to the party who produced the records that the records and the other documents lodged under Cal Rules of Ct 2.551(b)(3)(A)(i) will be placed in the public court file unless that party files a timely motion or application to seal the records under this rule (Cal Rules of Ct 2.551(b)(3)(A)(iii)).

If the party who produced the documents and who was served with the notice under Rule 2.551(b)(3)(A)(iii) fails to file a motion or application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk must promptly remove all documents named in Rule 2.551(b)(3)(A)(i) from the envelope or container where they are located and place them in the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court. Cal Rules of Ct 2.551(b)(3)(B).

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5. Order

§12.132 a. Content and Scope of Order

An order sealing the record must:

- Specifically set forth the factual findings that support the order; and
- Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages that contain the material that needs to be placed under seal.

All other portions of each document or page must be included in the public file. Cal Rules of Ct 2.550(e)(1).

Consistent with CCP §§639 and 645.1, if the records that a party is requesting to be placed under seal are voluminous, the court may appoint a referee and fix and allocate the referee's fees among the parties. Cal Rules of Ct 2.550(e)(2).

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§12.133 b. Procedure on Grant or Denial of Order

If the court grants an order sealing a record, the clerk must substitute on the envelope or container for the label required by Cal Rules of Ct 2.551(d)(2) a label prominently stating, "SEALED BY ORDER OF THE COURT ON [DATE]," and must replace the cover sheet required by Rule 2.551(d)(3) with a filed-endorsed copy of the court's order. Cal Rules of Ct 2.551(e)(1).

The order must state whether—in addition to records in the envelope or container—the order itself, the register of actions, any other court records, or any other records relating to the case are to be sealed. Cal Rules of Ct 2.551(e)(2).

The order must state whether anyone other than the court is authorized to inspect the sealed record. Cal Rules of Ct 2.551(e)(3).

Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in any subsequently filed records or papers. Cal Rules of Ct 2.551(e)(4).

If the court denies the motion or application to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed. Cal Rules of Ct 2.551(b)(6).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.134 C. Custody of Sealed Records

§12.134 C. Custody of Sealed Records

Sealed records must be securely filed and kept separate from the public file in the case. Cal Rules of Ct 2.551(f).

NOTE: If the court mistakenly files in a public file documents subject to a protective order, an action by an attorney or party to take advantage of this mistake may be viewed as made in bad faith and subject to sanctions under CCP §128.5. See *Wallis v PHL Assoc., Inc.* (2008) 168 CA4th 882, 86 CR3d 297. See §12.121.

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§12.135 D. Custody of Voluminous Records

If the records to be placed under seal are voluminous and are in the possession of a public agency, the court may by written order direct the agency instead of the clerk to maintain custody of the original records in a secure fashion. If the records are requested by a reviewing court, the trial court must order the public agency to deliver the records to the clerk for transmission to the reviewing court under these rules. Cal Rules of Ct 2.551(g).

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§12.136 E. Motion, Application, or Petition to Unseal Records

A sealed record must not be unsealed except by court order. Cal Rules of Ct 2.551(h)(1). See *H.B. Fuller Co. v Doe* (2007) 151 CA4th 879, 889, 60 CR3d 501 (no clear enunciation of specific facts to support maintaining documents sealed under stipulated order).

A party or member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record. Notice of any motion, application, or petition to unseal must be filed and served on all parties in the case. The motion, application, or petition and any opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary to comply with Cal Rules of Ct 2.551(c). Cal Rules of Ct 2.551(h)(2).

If the court proposes to order a record unsealed on its motion, the court must mail notice to the parties stating the reason therefor. Any party may serve and file an opposition within 10 days after the notice is mailed or within such time as the court specifies. Any other party may file a response within 5 days after the filing of an opposition. Cal Rules of Ct 2.551(h)(3).

In determining whether to unseal a record, the court must consider the matters addressed in Cal Rules of Ct 2.550(c)-(e) (court records presumed to be open, express factual findings required to seal records, content and scope of order). Cal Rules of Ct 2.551(h)(4).

The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If, in addition to the records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether the additional records are unsealed. Cal Rules of Ct 2.551(h)(5).

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.137 F. Request for Delayed Public Disclosure

§12.137 F. Request for Delayed Public Disclosure

In an action in which the prejudgment attachment remedy under CCP §§483.010-483.020 is sought, if the plaintiff requests at the time a complaint is filed that the records in the action or the fact of the filing of the action be made temporarily unavailable to the public under CCP §482.050, the plaintiff must file a declaration stating one of the following (Cal Rules of Ct 2.580(a)(1)-(2)):

- "This action is on a claim for money based on contract against a defendant who is not a natural person. The claim is not secured within the meaning of CCP §483.010(b)."
- "This action is on a claim for money based on contract against a defendant who is a natural person. The claim arises out of the defendant's conduct of a trade, business, or profession, and the money, property, or services were not used by the defendant primarily for personal, family, or household purposes. The claim is not secured within the meaning of CCP §483.010(b)."

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G. In Camera Confidential Proceedings

§12.138 1. Minutes of Proceedings

If a confidential in camera proceeding is held in which a party is excluded from being represented, the clerk must include in the minutes the nature of the hearing and only such references to writings or witnesses that will not disclose privileged information. Cal Rules of Ct 2.585(a).

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§12.139 2. Disposition of Examined Records

Records or copies of records examined by the court in confidence under Cal Rules of Ct 2.585(a) must be filed with the clerk under seal and must not be disclosed without court order. Cal Rules of Ct 2.585(b).

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XII. FORMS

A. Moving Party's Forms

§12.140 1. Form: Notice of Motion

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,**	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR** _ _[*SPECIFY*
	)	*NATURE OF ORDER*
_ _[*Name(s)*]_ _**,**	)	*SOUGHT*]_ _**;**
Defendant(s)	)	_ _[*SUPPORTING*
	)	*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER;*]_ _
	)	_ _[*IDENTIFY OTHER*
	)	*ATTACHED PAPERS*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____)		**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court for an order** _ _[*specify nature of order sought*]_ _ **under** _ _[*specify statute or rule authorizing motion*]_ **on the following grounds:** _ _[*state grounds, preferably in terms used in authorizing statute or rule; if more than one ground, list them as numbered or bulleted items*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _**,** *dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (usually filed with court clerk); ___ copies for service (usually one for each other party); ___ office

copies.

Comment: On general format and contents of notices of motion, see §§12.7-12.28.

Note: The caption of every pleading filed in a unified court in a limited civil case must include the words "Limited Civil Case." See Cal Rules of Ct 2.111(10). Format requirements are set forth in Cal Rules of Ct 2.100-2.119 and 3.1110-3.1302.

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.141 2. Form: Memorandum in Support of Motion

§12.141 2. Form: Memorandum in Support of Motion

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**MEMORANDUM IN SUPPORT**
vs	)	**OF MOTION OF** _ _[*NAME*]_ _
	)	**FOR** _ _[*SPECIFY NATURE OF*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*ORDER SOUGHT*]_ _
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*INTRODUCTION:*]_ _

_ _[*Add introductory statement if useful*]_ _.

_ _[*SUMMARY OF ARGUMENT:*]_ _

_ _[*Add summary; required if memorandum exceeds 15 pages*]_ _.

FACTS:

_ _[*Succinctly state facts underlying motion*]_ _.

ARGUMENT:

1. _ _[*Briefly state first point of law; capital letters are often used*]_ _.

_ _[*Cite authorities supporting above point (statutes, rules, and case citations are usually underlined); set forth argument, showing the application of points and authorities to case and order sought*]_ _.

[2.]_ _[*Continue stating points, citing authorities, and arguing position advanced*]_ _.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _

Attorney for _ _[*name*]_ _

Copies: Original (same as notice of motion); ___ copies for service (same as notice of motion); ___ office copies.

Comment: On general format and contents of supporting memorandums, see §§12.30-12.42.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.142 3. Form: Declaration Supporting Motion

§12.142 3. Form: Declaration Supporting Motion

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S MOTION** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*identify declarant*]_ _**.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could testify competently to them.

3. _ _[*Set forth statements of fact supporting issuance of motion in numbered paragraphs*]_ _**.**

4. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (same as notice of motion); ___ copies for service (same as notice of motion); ___ office copies.

Comment: On general format and contents, see §§12.43-12.53. See also CCP §2015.5.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.143 4. Form: Request for Judicial Notice

§12.143 4. Form: Request for Judicial Notice

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**REQUEST THAT COURT**
vs	)	**TAKE JUDICIAL NOTICE OF**
	)	_ _[*SPECIFY NATURE OF*
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	*MATTER TO BE NOTICED*]_ _
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*E.g., Plaintiff*]_ _**,** _ _[*name*]_ _**, in support of** _ _[*his/her/its*]_ _ **motion for** _ _[*specify nature of order sought*]_ _**, asks the Court to take judicial notice of the following:**

1. Under California Evidence Code §_ _[*451/452*]_ _**,** _ _[*specify records, facts, and other matters to be noticed and reasons the court should take judicial notice of each in numbered paragraphs*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (same as notice of motion); ___ copies for service (same as notice of motion); ___ office copies.

Comment: On general format and contents, see §12.59. See also Evid C §§451-452.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.144 5. Form: Application for Order Shortening Time; Order

§12.144 5. Form: Application for Order Shortening Time; Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**APPLICATION FOR EX PARTE ORDER SHORTENING NOTICE TIME ON MOTION OF** _ _[*NAME*]_ _ **FOR** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _; _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am an attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, in this action.**

2. It is necessary that the hearing on the attached motion for _ _[*specify nature of order sought*]_ _ **take place, and the order issue, on** _ _[*date*]_ _**, for the following reasons:** _ _[*State reasons*]_ _**.**

3. I have _ _[*not*]_ _ **notified counsel for all other parties** _ _[*and all unrepresented parties*]_ _ **that this application would be presented at this time and place** _ _[*by/because*]_ _ _ _[*describe date, time, manner, and name of party informed, any response, and whether opposition is expected/state reasons why notice should not be required*]_ _.

4. _ _[*Continue declarant's statements, if any*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (present to judge with proposed order for signature, then file); ___ copies for service (one for each

other party); ___ office copies.

Comment: If a proposed order is submitted, it must be separately lodged and served with the moving papers, and not attached to them. Cal Rules of Ct 3.1113(m), 3.1201(5). For proposed order, see §12.150. On shortening notice time, see §§12.63-12.65; on ex parte applications generally, see chap 13.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§12.145 6. Form: Proposed Order Shortening Time

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER SHORTENING TIME ON MOTION OF** _ _[*NAME*]_ _ **FOR** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. The motion of _ _[*e.g., plaintiff*]_ _ **for an order** _ _[*state nature of order*]_ _ _ _[*, papers for which were submitted with the application for ex parte order shortening time,*]_ _ **may be heard on** _ _[*date*]_ _**.**

2. This order and the attached notice of motion and supporting papers must be served _ _[*by personal delivery*]_ _ **on the attorney of record for each party** _ _[*and on each unrepresented party*]_ _ **by** _ _[*date*]_ _**.**

3. Any opposition must be filed and served _ _[*by personal delivery*]_ _ **by** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: On use of proposed orders, see §§12.106-12.107.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§12.146 7. Form: Stipulation Extending Time

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**STIPULATION** _ _[*EXTENDING TIME TO SERVE NOTICE OF MOTION/SETTING NEW HEARING DATE*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The parties agree that

[*Option 1: To extend time*]

_ _[*name of party*]_ _ **will have until** _ _[*date*]_ _**, to serve and file a notice of motion for an order** _ _[*specify nature of order*]_ _**.**

[*Option 2: To reset hearing date*]

the motion of _ _[*name of party*]_ _ **for** _ _[*specify nature of order sought*]_ _**, previously set to be heard on** _ _[*date*]_ _**, will instead be set for hearing at** _ _[*time*]_ _ **on** _ _[*date*]_ _**, in** _ _[*e.g., Department* _ _ _ _ _ _]_ _ **of this Court at** _ _[*address*]_ _**.**

[*Continue*]

[*Add other provisions (e.g., relating to service and filing) if appropriate*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (present to other parties to sign, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: On extending time, see §§12.66-12.68. Counsel is advised to consult local rules, because delay reduction rules may limit stipulations extending time.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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B. Opposing Party's Forms

§12.147 1. Form: Memorandum in Opposition to Motion

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,**	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**MEMORANDUM IN**
vs	)	**OPPOSITION TO MOTION OF**
	)	_ _[*NAME*]_ _ **FOR**
_ _[*Name(s)*]_ _**,**	)	_ _[*SPECIFY NATURE OF*
Defendant(s)	)	*MOTION*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____)		**Trial date:** _ _[*if set*]_ _

FACTS: _ _[*Set forth facts if not accurately provided by moving party*]_ _**.**

ARGUMENT: _ _[*State points of law, authorities, and argument*]_ _**.**

WHEREFORE, _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, respectfully requests that** _ _[*name*]_ _**'s motion** _ _[*specify nature of motion*]_ _ **be denied.**

Date: _ _ _ _ _ _

Respectfully submitted,

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On the opposing memorandum, see §12.87.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§12.148 2. Form: Declaration Opposing Motion

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**DECLARATION OF** _ _[*NAME*]_ _ **OPPOSING MOTION OF** _ _[*NAME*]_ _ **FOR** _ _[*SPECIFY NATURE OF MOTION*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*specify declarant's status, e.g., plaintiff's attorney of record*]_ _**.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could testify competently to them.

3. _ _[*Continue declarant's statements in opposition to motion*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On the opposing declaration, see §12.88. See also CCP §2015.5.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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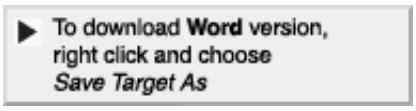
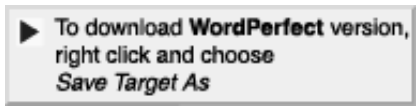
Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/ C. Notice of Ruling and Orders/ §12.149 1. Form: Notice of Ruling on Motion

C. Notice of Ruling and Orders

§12.149 1. Form: Notice of Ruling on Motion





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**NOTICE OF RULING ON**
vs	)	**MOTION FOR _ _[*SPECIFY***
	)	*NATURE OF ORDER*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*SOUGHT*]_ _
_____	)	

To each party and attorney of record:

PLEASE TAKE NOTICE that the motion of _ _[*name*]_ _ for _ _[*specify nature of order sought*]_ _ came on regularly for hearing on _ _[*date*]_ _, in this Court. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _. On _ _[*that date/_ _[date*]_ _]_ _, Judge _ _[*name*]_ _ of this Court

[*Option 1: If motion is granted*]

_ _[*ordered that: _ _[state terms of order*]_ _/*made orders as set forth in a minute order dated _ _[date*]_ _, *a copy of which is attached to this notice*]_ _.

[*Option 2: If motion is denied*]

denied that motion.

[*Continue*]

This _ _[*order/order denying the motion*]_ _ was entered in the minutes of the Court on _ _[*date*]_ _.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: Serving notice of an oral ruling may be necessary to begin the running of the time period prescribed by statute or rule for an adverse party to an act. See generally §12.110. A proof of service form attached to and served with the notice should name each party or person served. In multiple party cases, the notice must name the moving party and the party against whom relief was requested and specify the motion ruled on. Cal Rules of Ct 3.1109.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§12.150 2. Form: Proposed Order

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, for _ _[*specify nature of order sought*]_ _ was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*State proposed order, using numbered paragraphs when order has two or more parts*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (same as notice of motion if attached to it; otherwise, present to judge for signature, then file); ___ copies for service (same as notice of motion); ___ office copies.

Comment: On use of proposed orders, see §§12.106-12.107.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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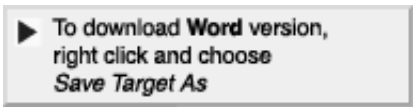
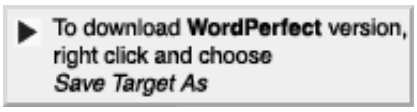
§12.151 3. Form: Application for Order Extending Time





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**APPLICATION FOR EX PARTE ORDER** _ _[*EXTENDING TIME TO SERVE/SETTING NEW HEARING DATE ON*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	_ _[*NAME*]_ _**'S MOTION FOR** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _**;** **DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S APPLICATION FOR** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _**;** _ _[*PROPOSED ORDER*]_ _
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am an attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, in this action.**

2. This is an action _ _[*specify nature of action*]_ _**.**

[*Option 1: To extend time*]

3. _ _[*Specify statute or rule*]_ _ **would normally require notice of a motion for** _ _[*specify nature of order sought*]_ _ **to be served in this action by** _ _[*date*]_ _**.**

4. _ _[*Applicant's name*]_ _ **needs an extension of time until** _ _[*date*]_ _**, to serve such a notice of motion for the following reasons:** _ _[*State reasons*]_ _**.**

[*Option 2: To reset hearing date*]

3. _ _[*E.g., Plaintiff*]_ _ **has served a notice of motion for** _ _[*specify nature of order sought*]_ _ **that sets a**

hearing on the motion for _ _[*date*]_ _.

4. _ _[*Applicant's name*]_ _ asks that the date of that hearing be changed to _ _[*date*]_ _, for the following reasons: _ _[*State reasons*]_ _.

[*Continue*]

5. I have _ _[*not*]_ _ notified counsel for all other parties _ _[*and all unrepresented parties*]_ _ that this application would be presented at this time and place _ _[*by/because*]_ _ _ _[*describe date, time, manner, and name of party informed, any response, and whether opposition is expected/state reasons why notice should not be required*]_ _.

6. _ _[*Continue declarant's statements*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (present to judge with proposed order for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: On extending time, see §§12.66-12.68; on ex parte applications generally, see chap 13.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/12 Noticed Motions/§12.152 4. Form: Proposed Order Extending Time

§12.152 4. Form: Proposed Order Extending Time

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER** _ _[*EXTENDING TIME TO SERVE/SETTING NEW HEARING DATE ON*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	_ _[*NAME*]_ _**'S MOTION FOR** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

[*Option 1: If time to serve is extended*]

1. _ _[*E.g., Plaintiff*]_ _**'s notice of motion for an order** _ _[*specify nature of order*]_ _ _ _[*, papers for which were submitted with the above application,*]_ _ **may be served before** _ _[*date*]_ _**.**

[*Option 2: If hearing date is reset*]

1. _ _[*E.g., Plaintiff*]_ _**'s motion for** _ _[*specify nature of order sought*]_ _**, previously set to be heard on** _ _[*date*]_ _**, will instead be set for hearing at** _ _[*time*]_ _ **on** _ _[*date*]_ _**, in** _ _[*e.g., Department* _ _ _ _ _ _]_ _ **of this Court at** _ _[*address*]_ _**.**

[*Continue with other orders, e.g.*]

2. This order and the attached notice of motion and supporting papers must be served _ _[*by personal delivery*]_ _ **on the attorney of record for each party** _ _[*and on each unrepresented party*]_ _ **by** _ _[*date*]_ _**.**

3. Any opposition must be filed and served _ _[*by personal delivery*]_ _ **by** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: A proposed ex parte order must be lodged with the court and served with (but not attached to) the moving papers. Cal Rules of Ct 3.1113(m), 3.1201(5). On use of proposed orders, see §§12.106-12.107. Counsel is advised to check local rules.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading

paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§12.153 5. Form: Order

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER** _ _[*SPECIFY NATURE*
vs	)	*OF ORDER*]_ _
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, for _ _[*specify nature of order*]_ _ was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

[*Option 1: If motion is granted*]

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*Set out terms of order in numbered paragraphs*]_ _.

[*Option 2: If motion is denied*]

IT IS ORDERED that the motion is denied.

1. _ _[*Set out any conditions or terms in numbered paragraphs*]_ _.

[*Continue*]

[2.]_ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); _____ copies for service (one for each other party); _____ office copies.

Comment: On preparing a proposed order, see §§12.106-12.107.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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13

Ex Parte Motions and Orders to Show Cause

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- A. Scope of Chapter §13.1
- B. Governing Law §13.2

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- C. Required Documents §13.5
  - 1. Contents of Application §13.6
  - 2. Declaration Stating Basis for Relief §13.7
  - 3. Declaration Regarding Notice §13.8
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- E. Filing of Ex Parte Application §13.11
- F. Service of Papers §13.12
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- B. Form: Proposed Ex Parte Order §13.19
- C. Form: Application for Order to Show Cause and Order §13.20

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I. INTRODUCTION

§13.1 A. Scope of Chapter

This chapter covers the procedures and forms for obtaining a court order without serving a notice of motion on adverse parties, called an "ex parte" order. It discusses applications (see §§13.3-13.14) and contains forms (see §§13.18-13.19). This chapter also highlights the procedures for obtaining an order to show cause, which requires another party to attend a hearing and show cause why a specified order should not issue. See §§13.15-13.17, 13.20. The OSC procedure is typically used for contempt proceedings, family law disputes, preliminary injunctions, and other provisional remedies.

Particular ex parte applications and orders are discussed in the other chapters of this book that cover the procedures in which they are used. For example, an ex parte application for an order shortening the time within which a hearing may be held on a noticed motion is covered in §§12.63-12.64.

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.2 B. Governing Law

§13.2 B. Governing Law

Procedures for applying for an ex parte order are set forth in Cal Rules of Ct 3.1200-3.1207. The Judicial Council has preempted local rules relating to ex parte applications in civil cases under the courts' general jurisdiction, unless such rules "are otherwise permitted or required by a statute or a rule in the California Rules of Court." Cal Rules of Ct 3.20(a). Nevertheless, some local courts still have rules regarding ex parte motions, and it is suggested that these rules be followed, even though they are arguably preempted. See, *e.g.,* Contra Costa Ct R 7(G); Los Angeles Ct R 7.12(j)(2)-(3).

NOTE: Local rules continue to apply to ex parte applications in, *e.g.*, family court and probate court, because Cal Rules of Ct 3.20 does not preempt local rules in these areas (Cal Rules of Ct 3.20(b)). See, *e.g.*, Los Angeles Ct R 10.37-10.38 (probate); Los Angeles Ct R 14.3 (family).

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II. APPLICATION FOR EX PARTE ORDER

§13.3 A. Nature

The ex parte procedure is used in situations in which a judge may issue an order on the request of one party without the need to give other parties time to prepare and present either papers in opposition or oral argument against the order. A judge asked to sign an ex parte order often wants to be assured that opposing parties have been notified that the moving party is requesting the particular order and has been given an opportunity to informally voice any objections they have to its issuance. See Cal Rules of Ct 3.1200-3.1207.

NOTE: Attorneys use "ex parte" as an adjective to denote the request (*e.g.,* "an ex parte application") or the result (*e.g.,* "an ex parte order") when the noticed motion procedure specified in chap 12 is not used.

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.4 B. When Available

§13.4 B. When Available

A motion may be made and granted ex parte when the order issued would affect only the moving party or would not affect a substantial right of any adverse party. *McDonald v Severy* (1936) 6 C2d 629, 631, 59 P2d 98. Although certain orders may be obtained through ex parte application, a statute silent on the question should not be interpreted as authorizing an ex parte application for an order. *St. Paul Fire & Marine Ins. Co. v Superior Court* (1984) 156 CA3d 82, 85, 202 CR 571. Some statutes expressly provide that a party may apply ex parte for a particular order. When a statute provides that an order may be obtained "on notice," however, the notice of motion procedure in chap 12 must be followed. See *McDonald v Severy, supra*. Additionally, the use of the term "motion" rather than "ex parte application" in a statute imposes the notice and hearing requirements generally applicable to motions. *St. Paul Fire & Marine Ins. Co. v Superior Court, supra*.

NOTE: Some attorneys and judges believe that an order may be issued ex parte, unless a statute or rule specifically requires a noticed motion and hearing. Other judges believe that orders should be granted ex parte only when it is clear that requiring notice or a hearing would be impracticable, or detrimental to the moving party's rights or to the purpose of order. See generally 6 Witkin, California Procedure, *Proceedings Without Trial* §§58-61 (5th ed 2008).

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.5 C. Required Documents

§13.5 C. Required Documents

An ex parte application must be in writing and include all of the following (Cal Rules of Ct 3.1201):

- An application containing the case caption and stating the relief requested (see §§13.6, 13.18);
- A declaration in support of the application making the factual showing required under Cal Rules of Ct 3.1202(c) (see §§13.7, 13.18);
- A competent declaration based on personal knowledge of the notice given under Cal Rules of Ct 3.1204(b) (see §§13.8-13.9, 13.18);
- A supporting memorandum (see §13.18); and

PRACTICE TIP: An extensive memorandum is seldom needed to support the routine orders usually applied for ex parte. The authorizing statute can be cited, and any comment needed made under an "Argument" heading following the declarant's signature. The statute may also be cited in the caption and the opening paragraph.

- A proposed order (see §13.19).

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§13.6 1. Contents of Application

Like other court papers, the application for an ex parte order should comply with form and format requirements prescribed by Cal Rules of Ct 2.100-2.119. See chap 12 for discussion. The nature of the paper may be, *e.g.,* "Ex Parte Application for Order _ _ _ _ _ _," or "Declaration for Ex Parte Order for _ _ _ _ _ _."

An ex parte application for an order must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of such party if known to the applicant. Cal Rules of Ct 3.1202(a).

If an ex parte application for an order has been made to the court and has been refused in whole or in part, any subsequent application of the same character or for the same relief, although made on an allegedly different state of facts, must include a full disclosure of any previous applications and the court's actions. Cal Rules of Ct 3.1202(b).

For form of application, see §13.18.

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.7 2. Declaration Stating Basis for Relief

§13.7 2. Declaration Stating Basis for Relief

An applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte. Cal Rules of Ct 3.1202(c). For form of declaration, see §13.18.

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§13.8 3. Declaration Regarding Notice

An ex parte application for an order must be accompanied by an affidavit or a declaration showing one of the following (Cal Rules of Ct 3.1204(b)):

- That, within the applicable time period under Cal Rules of Ct 3.1203(a) (see §13.10), the applicant informed the opposing party when and where the application would be made;
- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or
- That, for reasons specified, the applicant should not be required to inform the opposing party.

For form, see §13.18.

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.9 4. Contents of Notice and Declaration Regarding Notice

§13.9 4. Contents of Notice and Declaration Regarding Notice

When notice of an ex parte application is given, the person giving notice must state with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application, and must attempt to determine whether the opposing party will appear to oppose the application. Cal Rules of Ct 3.1204(a).

Every ex parte application must be accompanied by a declaration regarding notice that states (Cal Rules of Ct 3.1204(b)):

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected; or
- Why notice should not be required.

If notice was provided later than 10 a.m. the court day before the ex parte appearance, the declaration regarding notice must explain (Cal Rules of Ct 3.1204(c)):

- The exceptional circumstances that justify the shorter notice, or
- In unlawful detainer proceedings, why the notice given is reasonable.

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§13.10 D. Time of Notice

A party seeking an ex parte order must notify all parties no later than 10 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice. A party seeking an ex parte order in an unlawful detainer proceeding may provide shorter notice as long as the notice given is reasonable. Cal Rules of Ct 3.1203(b).

PRACTICE TIP: Notification may be given by telephoning the attorneys for other parties or by delivering or mailing a copy of the application with an indication of the department or judge and of the date and time of submission for issuance of the order. If notice is given by telephone message, include details regarding the time and contents of the message in counsel's declaration supporting the ex parte application. See *Datig v Dove Books, Inc.* (1999) 73 CA4th 964, 87 CR2d 719 (decided under former Cal Rules of Ct 379(b); see now Cal Rules of Ct 3.1203; defense attorney failed to give plaintiff appropriate notice of ex parte application to dismiss and attorney's declaration stated that he had telephoned plaintiff's counsel, but did not state contents of messages or time he left messages).

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.11 E. Filing of Ex Parte Application

§13.11 E. Filing of Ex Parte Application

The clerk must not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration, despite the applicant's failure to comply with the notification requirements in Cal Rules of Ct 3.1203(a) (see §13.10). Cal Rules of Ct 3.1205.

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.12 F. Service of Papers

§13.12 F. Service of Papers

Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless such service has been made. Cal Rules of Ct 3.1206.

PRACTICE TIP: Usually, service at the hearing is sufficient. However, courts will deny a motion if the moving party prepared the application a significant time before the hearing, but failed to serve the papers until the hearing.

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.13 G. Personal Appearance Requirements

§13.13 G. Personal Appearance Requirements

A personal appearance is not required on an ex parte application to (1) file a memorandum that exceeds the page limit or (2) set hearing dates on alternative writs and orders to show cause. An appearance is also not required on stipulations by the parties or other orders of the court. Cal Rules of Ct 3.1207.

NOTE: Although Rule 3.1207 does not require an appearance on an ex parte application to file an oversize brief or to set hearing dates on alternative writs and orders to show cause, as a practical matter, courts are often less inclined to grant relief if the attorney does not appear to argue.

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§13.14 H. Checklist: Procedure for Application for Ex Parte Order

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- Prepare moving papers (see §13.5), including:
- Written application for order. See §§13.6, 13.18.
- A declaration in support of the application. See §§13.7, 13.18.
- A competent declaration showing that the required advance notification was given or excused. See §§13.8-13.9, 13.18.
- The proposed order, which should be appended to application. See §13.19.
- Supporting memorandum, which is usually brief and attached to application. See §13.18.
- Any other declaration or documents in support of motion deemed necessary.
- A proof of service form.
- Give all parties notice of ex parte hearing no later than 10:00 a.m. the court day before the ex parte appearance (Cal Rules of Ct 3.1203(a)). See §13.10.
- Serve copies of moving papers by delivery or mail on other attorneys of record and unrepresented parties, or, if service cannot be made or would not give notice by 10:00 a.m. on the court day before the hearing, notify by telephone of nature of relief requested and when and where ex parte application will be made and serve copies of moving papers at the hearing. See §13.12.
- Attempt to determine whether opposing party will appear to oppose application.
- Present papers to judge and request signing of order (ordinarily, attached proof of service form should show sufficient lapse of time for other parties to have made objections known to judge).
- Prepare conformed copies of application and signed order.
- Serve copies on other parties.
- File signed original.

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III. APPLICATION FOR ORDER TO SHOW CAUSE

§13.15 A. Nature; When to Use

The order to show cause procedure is an alternative to proceeding by noticed motion. Basically, the moving party makes an ex parte application for an order that requires another party to attend a hearing and show cause why a specified order should not issue. Service of the order to show cause on the other party acts as the service of a notice of motion. The judge may order that the show-cause hearing take place sooner than the 16 court days normally required for a notice of motion (CCP §1005(b)), thus eliminating the need for a separate application for an order shortening time.

Applying for an order to show cause is the customary method of obtaining an order in cases involving, *e.g.,* requests for a preliminary injunction (see chap 32), family law disputes (see Cal Rules of Ct 5.118), contempt proceedings, provisional remedies, and extraordinary writs. See generally 6 Witkin, California Procedure, *Proceedings Without Trial* §§60-62 (5th ed 2008). The procedure may be used in other types of cases, the order to show cause being treated as if it were a notice of motion accompanied by a citation to a party to appear at a stated place and time. See *Green v Gordon* (1952) 39 C2d 230, 232, 246 P2d 38; *Difani v Riverside County Oil Co.* (1927) 201 C 210, 213, 256 P 210; *Marriage of Nadkarni* (2009) 173 CA4th 1483, 1499, 93 CR3d 723.

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§13.16 B. Notice of Application

An order to show cause is obtained on ex parte application. However, it is rarely necessary to give advance notice of the application to adverse parties. The order to show cause gives notice of a hearing, and the procedure is often used when it would be futile to try to give notice, a quick hearing is necessary, or giving notice would frustrate the purpose of the relief sought. See, *e.g.*, Cal Rules of Ct 5.118 (governing orders to show cause in family law proceedings).

The order to show cause, when signed by the judge, should be personally served on the adverse party if the order is to serve as a citation or summons that gives jurisdiction over that party, or as a basis for holding the party in contempt. *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1286, 100 CR2d 320. The order may be served on the party's attorney, however, if the party has appeared in the action and the order serves merely as a form of notice of motion. *In re Morelli* (1970) 11 CA3d 819, 838, 91 CR 72, disapproved on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287 n6, 100 CR2d 320.

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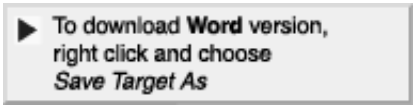
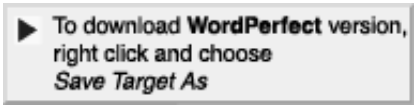
Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.17 C. Checklist: Procedure for Application for Order to Show Cause

§13.17 C. Checklist: Procedure for Application for Order to Show Cause





- Prepare application for order to show cause (see §13.20).
- Attach additional declarations and supporting authorities as needed, and form of proposed order.
- Present moving papers to judge and request signing of order to show cause.
- Serve conformed copies of order to show cause and other papers on adverse parties.
- File originals with form of proof of service.
- Attend show cause hearing to argue for issuance of proposed order.
- If proposed order is issued, serve and file copies as in notice of motion proceeding.

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IV. FORMS

§13.18 A. Form: Application for Ex Parte Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**APPLICATION FOR EX PARTE ORDER FOR** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _**; DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S APPLICATION DECLARATION REGARDING NOTICE;** _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	

In support of _ _[*e.g., plaintiff*]_ _ _ _[*name*]_ _**'s application under** _ _[*specify statute*]_ _ **for an order** _ _[*specify nature of order sought*]_ _**, the undersigned** _ _[*e.g., attorney for plaintiff*]_ _ **declares:**

1. I am an attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, in this action.**

2. _ _[*Continue in numbered paragraphs with statements of facts and reasons supporting issuance of order and need for issuance of order ex parte rather than on noticed motion*]_ _**.**

[*Add regarding notice; see §13.8*]

3. I have _ _[*not*]_ _ **notified counsel for all other parties** _ _[*and all unrepresented parties*]_ _ **that this application would be presented at this time and place** _ _[*by/because*]_ _ _ _[*describe date, time, manner, and name of party informed, any response, and whether opposition is expected/state reasons why notice should not be required*]_ _**.**

[*Continue*]

[4.]_ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Add supporting authorities and argument*]

Copies: Original (present to judge with proposed order for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: Supporting authorities and argument appended to the application may be brief (*e.g.,* a citation to a code section or case). See §13.5.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27. See also sample forms in chap 12.

The Judicial Council has promulgated Judicial Council forms for some ex parte procedures, mostly in family law and probate proceedings. Some of these forms are mandatory. See, *e.g.*, Ex Parte Application for Restoration of Former Name After Judgment and Order (Judicial Council Form FL-395). For a list of these forms, see www.courtinfo.ca.gov/forms.

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§13.19 B. Form: Proposed Ex Parte Order

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**PROPOSED EX PARTE**
vs	)	**ORDER FOR** _ _[*SPECIFY*
	)	*NATURE OF ORDER*
_ _[*Name(s)*]_ _,	)	*SOUGHT*]_ _
Defendant(s)	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Good cause appearing,

IT IS ORDERED that _ _[*state terms of order*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: A separate proposed ex parte order must be lodged and served with (but not attached to) the moving papers. Cal Rules of Ct 3.1113(m), 3.1201(5). See chap 12 on use of proposed orders.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

See also sample forms in chap 12.

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Source: Civil Litigation/California Civil Procedure Before Trial/13 Ex Parte Motions and Orders to Show Cause/§13.20 C. Form: Application for Order to Show Cause and Order

§13.20 C. Form: Application for Order to Show Cause and Order

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**APPLICATION FOR ORDER FOR** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _; **DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S APPLICATION** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _; **ORDER TO SHOW CAUSE**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name of attorney*]_ _ **declares:**

1. I am an attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, in this action.**

2. _ _[*Continue in numbered paragraphs with statements of facts and reasons supporting need for relief or order sought, need to have an early hearing if that has been requested, and need to proceed by order to show cause rather than by noticed motion*]_ _**.**

[3.]_ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Add authorities and brief legal argument if appropriate*]

[*Continue*]

ORDER TO SHOW CAUSE

To _ _[*name of each party to whom order is directed*]_ _:

Good cause appearing,

YOU ARE ORDERED to appear in Department No. _ _ of this Court, located at _ _[*room no. and address*]_ _, on _ _[*date*]_ _, at _ _[*time*]_ _, to give any legal reason why the _ _[*following/attached*]_ _ order requested by _ _[*e.g., plaintiff*]_ _ should not be made by this Court.

[*Add if form of order sought is not attached, e.g.*]

If _ _[*e.g., plaintiff*]_ _'s motion is granted, you will be ordered to _ _[*specify nature of order*]_ _.

[*Add if moving party also requests other forms of interim relief*]

IT IS FURTHER ORDERED that _ _[*state nature of additional orders*]_ _.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: Although this form gives general guidelines for drafting an application for an order to show cause, applications should be tailored to the particular proceeding. See, *e.g.,* chap 32 (injunctions), chap 33 (receivers).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

See also sample forms in chap 12.

The Judicial Council has promulgated Judicial Council forms for orders to show cause, mostly in family law proceedings. Some of these forms are mandatory. See, *e.g.*, Order to Show Cause (Judicial Council Form FL-300). For a list of these forms, see www.courtinfo.ca.gov/forms.

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14

Ascertaining, Joining, and Naming Parties

I. INTRODUCTION
- A. Scope of Chapter §14.1
- B. Governing Law §14.2

II. REAL PARTY IN INTEREST
- A. Requirement; Definition §14.3
- B. Exceptions §14.4

III. CAPACITY TO SUE OR BE SUED §14.5
- A. Individuals Without Capacity §14.6
- B. Entities Without Capacity §14.7

IV. JOINDER
- A. Compulsory Joinder
  - 1. Requirements §14.8
  - 2. Effect of Failure to Join §14.9
  - 3. Procedure §14.10
- B. Permissive Joinder
  - 1. Plaintiffs §14.11
  - 2. Defendants §14.12

V. NAMING PARTICULAR PARTIES
- A. Defendants Sued by Fictitious Names
  - 1. Situations §14.13
  - 2. Fictitious Name Allegation §14.14
  - 3. Need to State Cause of Action §14.15
- B. Individual Doing Business Under Fictitious Name
  - 1. As Plaintiff §14.16
  - 2. As Defendant §14.17
- C. Partnerships; Unincorporated Associations
  - 1. As Plaintiffs §14.18
  - 2. As Defendants §14.19
- D. Corporations §14.20

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I. INTRODUCTION

§14.1 A. Scope of Chapter

This chapter covers questions that a plaintiff's attorney considers when determining whom to name as plaintiff and defendants in the complaint:

- Is the person a "real party in interest"? See §§14.2-14.3.
- Does the person have the legal capacity to sue or be sued? See §§14.5-14.7.
- Is it compulsory (see §§14.8-14.10), or merely permissive that the person be named (see §14.11-14.12)?

Also covered are the rules for, and the choice of words used, to name corporations, associations and other entities, and persons and entities whose true names are not known when the complaint is being drafted and filed. See §§14.13-14.20.

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.2 B. Governing Law

§14.2 B. Governing Law

The definition of the real party in interest is set forth in CCP §367. Compulsory joinder is governed by CCP §389, and permissive joinder is governed by CCP §378. Defendants sued by fictitious names are generally governed by CCP §474.

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II. REAL PARTY IN INTEREST

§14.3 A. Requirement; Definition

Every action must be prosecuted in the name of the real party in interest, with exceptions specified in CCP §369 and CC §1368.3. CCP §367.

A real party in interest is generally defined as the person possessing the right sued on by reason of the substantive law. See *Estate of Bowles* (2008) 169 CA4th 684, 690, 87 CR3d 122. The real party in interest is the party who has title to the cause of action, *i.e.,* the one who has the right to maintain the cause of action. A real party in interest is the owner of the cause of action. For example, someone who is not a party to a contract has no standing to enforce the contract or to recover extra-contract damages for wrongful withholding of benefits to the contracting party. *Windham at Carmel Mountain Ranch Ass'n v Superior Court* (2003) 109 CA4th 1162, 1172, 135 CR2d 834.

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.4 B. Exceptions

§14.4 B. Exceptions

Certain persons with what appear to be "indirect" or "secondary" interests in a dispute may, nonetheless, sue without joining the "beneficiaries" of that action; such persons include:

- A personal representative as defined in Prob C §58(a) (CCP §369);
- A trustee suing on a claim by an express trust (CCP §369; *Giselman v Starr* (1895) 106 C 651, 657, 40 P 8), unless the controversy is between beneficiaries and a trustee (*De Olazabal v Mix* (1937) 24 CA2d 258, 261, 74 P2d 787);
- A lessor who, although no longer the owner, sues on a claim of unlawful detainer (*Commonwealth Mem., Inc. v Telophase Soc'y* (1976) 63 CA3d 867, 871, 134 CR 58);
- An assignee of an assignable chose in action (see generally 4 Witkin, California Procedure, *Pleading* §§127-131 (5th ed 2008)), but not the assignor, or an executor or administrator (CCP §§369, 377.22; Prob C §§573(e), 9820, 9823), unless the personal representative is guilty of fraud or collusion with those against whom the right of action exists (*Landis v First Nat'l Bank* (1937) 20 CA2d 198, 207, 66 P2d 730 (action pleading special circumstances by heirs or distributees allowed));
- A principal to a contract, not his or her agent, unless the agent has a beneficial interest in the subject matter, or certain other exceptions apply (see 4 Witkin, Procedure, *Pleading* §§140-141);
- A "common interest development" owners' association suing for damages to commonly owned lots, parcels, or areas (CC §1368.3);
- A person with whom or in whose name a contract is made for the benefit of another, except someone who has a power of sale through a mortgage or a deed of trust (CCP §369); and
- Anyone else expressly authorized by statute (CCP §369).

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§14.5 III. CAPACITY TO SUE OR BE SUED

After the identities of the real parties in interest have been determined, counsel must be satisfied that those persons have the capacity to sue or be sued. There must be "some existing entity aimed at by the processes of the law, and against whom the court's judgment will operate." *Tanner v Estate of Best* (1940) 40 CA2d 442, 445, 104 P2d 1084.

Only an existing natural, artificial, or quasi-artificial person has the capacity to be a party to a civil action; a nonentity can neither sue nor be sued. *Oliver v Swiss Club Tell* (1963) 222 CA2d 528, 537, 35 CR 324 (unincorporated association that has ceased to exist cannot be defendant). Human beings, corporations, governmental entities, public agencies, partnerships, and unincorporated associations are all "persons" with the capacity to be party plaintiffs or defendants. See 4 Witkin, California Procedure, *Pleading* §69 (5th ed 2008).

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.6 A. Individuals Without Capacity

§14.6 A. Individuals Without Capacity

Persons who may not, at least individually, prosecute civil actions include:

- Nonemancipated minors;
- Incompetent persons; and
- Persons for whom a conservator has been appointed (CCP §372(a); 4 Witkin, California Procedure, *Pleading* §§70-72 (5th ed 2008)).

Under such circumstances, the minor or incompetent is designated in the complaint along with his guardian, who appears for him as follows: "A, a minor (or insane person), by G, his guardian ad litem (or guardian)."

The same rule applies when the action is against the minor or incompetent—*i.e.,* "D, a minor (or insane person)." *Justice v Ott* (1891) 87 C 530, 25 P 691. See chap 9 on appointment of guardians ad litem.

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.7 B. Entities Without Capacity

§14.7 B. Entities Without Capacity

Entities that may not prosecute actions include:

- Estates, which are merely collections of assets and liabilities (see *Estate of Bright v Western Air Lines, Inc.* (1951) 104 CA2d 827, 828, 232 P2d 523), although an executor or administrator can be a party, and under certain circumstances the estate may be named as a defendant (see Prob C §§550, 555, 9390);
- Entities that have ceased to exist, *e.g.,* one corporation merged into another (*J.C. Peacock, Inc. v Hasko* (1960) 184 CA2d 142, 150, 7 CR 490);
- Foreign corporations that have failed to comply with the statutory conditions for conducting interstate commerce (Corp C §2203(c)); and
- Domestic or foreign corporations that have been suspended or forfeited for failure to pay the corporate franchise tax (Rev & T C §23301).

On the effect on litigation of the revival of corporate powers, *e.g.,* after a suspended corporation has filed all tax returns and paid all taxes due, see *Center for Self-Improvement & Community Dev. v Lennar Corp.* (2009) 173 CA4th 1543, 94 CR3d 74.

NOTE: See 4 Witkin, California Procedure, *Pleading* §§70-119 (5th ed 2008) for a listing of various other persons and entities and their capacity under California law.

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IV. JOINDER

A. Compulsory Joinder

§14.8 1. Requirements

Once the potential parties' capacity and beneficial interest in the action are ascertained, the attorney must then determine which (potential) parties must, or should be, joined in the action as plaintiffs or defendants.

The purpose of joinder is to avoid injury to absent persons, and to obtain a complete and final resolution of the controversy in one proceeding. 4 Witkin, California Procedure, *Pleading* §173 (5th ed 2008).

Generally, all persons materially interested in the subject matter of an action must be joined as either plaintiffs or defendants whenever feasible. See Comment to CCP §389. Specifically, CCP §389(a) provides that a person subject to service of process whose joinder would not deprive the court of subject matter jurisdiction must be joined as a necessary party if (*Tracy Press Inc. v Superior Court* (2008) 164 CA4th 1290, 1297, 80 CR3d 464; *Kaczorowski v Mendocino County Bd. of Supervisors* (2001) 88 CA4th 564, 568, 106 CR2d 14):

- In the person's absence, complete relief cannot be accorded among those already joined as parties; or
- The person claims an interest relating to the subject of the action, and not joining this person would, as a practical matter, impair or impede his or her ability to protect that interest or create a substantial risk of subjecting a party to multiple or inconsistent obligations.

If a party is "necessary" under CCP §389(a) but cannot be joined (*e.g.*, is not amenable to service of process), then under CCP §389(b), the court decides whether as a matter of equity and convenience the party is indispensable to the litigation and the litigation should not proceed without that party. See *Salsedo v Dep't of Parks & Recreation* (2009) 175 CA4th 1510, 1522, 97 CR3d 493 (as matter of law, cooperating federal agency neither necessary nor indispensable party in action regarding governmental permits for vehicle access to state beach).

For example, in a challenge by environmental groups to an environmental impact report prepared in connection with a water transfer agreement, purchasers of water were not indispensable parties when named parties (sellers and one purchaser) had an interest in litigation sufficient to protect the interests of those not joined, and nonjoined parties conceded that the named parties could fully represent their interests. *Deltakeeper v Oakdale Irrig. Dist.* (2001) 94 CA4th 1092, 1101, 115 CR2d 244. See also *RiverWatch v Olivenhain Mun. Water Dist.* (2009) 170 CA4th 1186, 1216, 88 CR3d 625 (county environmental agency was not indispensable party because its actions were not challenged). But see *County of Imperial v Superior Court* (2007) 152 CA4th 13, 38, 61 CR3d 145 (disparate interests of water districts and lack of joint litigation agreement supported finding that unnamed water districts were indispensable parties).

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.9 2. Effect of Failure to Join

§14.9 2. Effect of Failure to Join

Failure to name as a party a person who fits one of the categories specified in CCP §389 may be met by a:

- Motion to make the person a party;
- Demurrer for defect or misjoinder of parties (see chap 23); or
- Motion to dismiss for absence of an indispensable party.

The court should not dismiss the action unless a person described in one of the categories specified in CCP §389 cannot be made a party and the court determines in equity and good conscience that the action should be dismissed without prejudice (the absent person being regarded as indispensable) on consideration of the following factors:

- The extent to which a judgment rendered in the person's absence would be prejudicial to that person or to those who are already parties;
- The extent to which the prejudice can be lessened or avoided by protective provisions in the judgment, the shaping of relief, or other measures;
- Whether a judgment rendered in the person's absence will be adequate; and
- Whether the plaintiff (or cross-complainant) will have an adequate remedy if the action is dismissed for nonjoinder (*i.e.,* whether there is another forum where all parties can be joined). CCP §389(b).

The plaintiff's failure to join an indispensable party, which could not be joined because the status of limitations had expired, was dispositive of its petition for a writ of mandamus. *Kaczorowski v Mendocino County Bd. of Supervisors* (2001) 88 CA4th 564, 568, 106 CR2d 14.

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.10 3. Procedure

§14.10 3. Procedure

A plaintiff's attorney who knows of the existence of a person who must be joined as a plaintiff in the action (see §14.8) may, under CCP §382:

- Seek the person's consent to be joined as a plaintiff;
- If that consent cannot be obtained, name and serve the person as a defendant in the action, stating in the complaint the reason why the person is not joined as a plaintiff; or
- If the person is not subject to service of process or if joinder of this person would deprive the court of jurisdiction over the subject matter, state the person's name in a paragraph of the complaint and the reasons why that person is not joined (CCP §389(c)).

PRACTICE TIP: In some cases, the plaintiff's attorney may prefer not to name the absent party. If the defendant then demurs or moves to dismiss (see §14.9), the plaintiff can amend or state in opposition to the demurrer or motion the reasons why the person was not joined.

If the absent person cannot be made a party, and there is a motion to dismiss or abate the action, the plaintiff can argue that in equity and good conscience the action should not be dismissed but should proceed, with the judgment to contain any necessary protective provisions. CCP §389(b).

A plaintiff's attorney who knows of the existence of a person who must be joined as a defendant should:

- Name that person in the complaint and serve him or her with process as a defendant; or
- If that person cannot be made a party, decide whether to name him or her and state the reasons why that person is not joined (CCP §389(c)) or leave him or her unnamed and oppose any demurrer or motion filed by the defendant as above.

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B. Permissive Joinder

§14.11 1. Plaintiffs

An attorney who has determined which parties must be joined (see §14.8) should also consider whether additional parties may be joined as plaintiffs and whether it is tactically useful to do so. Generally, CCP §378 permits the broadest sort of permissive joinder of plaintiffs. Comment to CCP §378. See also Fed R Civ P 20(a).

Specifically, CCP §378(a) provides that all persons may join in one action as plaintiffs who:

- Assert any right to relief, jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, if any question of law of fact common to all these persons will arise in the action; or
- Have a claim, right, or interest adverse to the defendant in the property or controversy that is the subject of the action.

It is not necessary that each plaintiff have an interest in every cause of action or in all relief prayed for. Judgment may be given for one or more plaintiffs according to their respective rights to relief. CCP §378(b).

PRACTICE TIP: Joining several plaintiffs in one action helps avoid duplicated effort, encourages cooperation and pooling of resources, may change the jurisdictional classification of a case (see chap 6), or establish venue in a more favorable county (see chap 8). On the other hand, with several plaintiffs in one action, the impact of the case for each may be diluted, differences between their cases may confuse the trier of fact, and defenses good against one may muddy the case of another.

If joinder of several plaintiffs might cause undue hardship to a party or create unnecessary confusion or complexity at trial, the court may order separate trials or make other orders to prevent embarrassment, delay, or undue expense to any party. CCP §379.5.

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.12 2. Defendants

§14.12 2. Defendants

A plaintiff's attorney who has determined which parties must be joined in the action as plaintiffs and defendants (see §14.8), and which additional plaintiffs may, and tactically should, be joined (see §14.11), should also consider whether defendants he or she wishes to sue are permitted to be joined and whether there are additional permitted defendants who should be joined for tactical reasons.

Generally, CCP §379 provides standards for permissive joinder of defendants comparable to those for permissive joinder of plaintiffs. Comment to CCP §379. See also Fed R Civ P 20(a). Specifically, CCP §379(a) provides that all persons may be joined in one action as defendants if there is asserted against them:

- Any right to relief, jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action; or
- A claim, right, or interest adverse to them in the property or controversy that is the subject of the action.

It is not necessary that each defendant have an interest in every cause of action or in all relief prayed for. Judgment may be given against one or more of the defendants according to their respective liabilities. CCP §379(b).

A plaintiff who does not know which of two or more defendants is liable, or to what extent, may sue them in the alternative. CCP §379(c); *Kraft v Smith* (1944) 24 C2d 124, 148 P2d 23 (joinder of two doctors who operated on plaintiff's leg at different times); *Landau v Salam* (1971) 4 C3d 901, 95 CR 46 (joinder of two defendants who allegedly injured plaintiff in accidents on separate days). See also 4 Witkin, California Procedure, *Pleading* §§204-208 (5th ed 2008).

PRACTICE TIP: Joining several defendants in one action saves the expense of separate suits, increases the chances that one will be found liable, may induce the defendants to blame each other for detriment suffered by the plaintiff, and may affect jurisdiction and venue. On the other hand, multiple defendants can combine resources and, by asserting different defenses, confuse the issues.

If joinder of several defendants might cause undue hardship to a party or create unnecessary confusion or complexity at trial, the court may order separate trials or make other orders to prevent embarrassment, delay, or undue expense to any party. CCP §379.5.

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/ V. NAMING PARTICULAR PARTIES/ A. Defendants Sued by Fictitious Names/§14.13 1. Situations

V. NAMING PARTICULAR PARTIES

A. Defendants Sued by Fictitious Names

§14.13 1. Situations

If the complaint states that the plaintiff does not know the name of a defendant, it may designate that defendant by any name and be amended to substitute the true name when it is discovered. CCP §474. Plaintiffs who designate defendants by fictitious names must be sure the summons to those defendants includes notice that they have been sued under a fictitious name. CCP §474; *Carol Gilbert, Inc. v Haller* (2009) 179 CA4th 852, 866, 101 CR3d 843 (default judgment against defendant vacated because summons did not notify him that he was sued under fictitious name).

Pleaders designate defendants by fictitious names in several basic situations, for example, when the pleader:

- Believes that certain persons are liable to the plaintiff, but does not know and cannot readily learn their names. Code of Civil Procedure §474 enables the plaintiff to sue these defendants under fictitious names before the suit is barred by the statute of limitations. *Austin v Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 15 CR 817.
- Believes that there might be other persons involved in the events, or related to known defendants in a way that would make them liable. The plaintiff may state causes of action against fictitiously named defendants so that true names can be substituted if such persons are later discovered to exist. This speculative use of fictitiously named defendants has been recognized in appellate opinions. See, *e.g., Garrett v Crown Coach Corp.* (1968) 259 CA2d 647, 66 CR 590 (manufacturer of vehicle); *Larson v Barnett* (1950) 101 CA2d 282, 289, 225 P2d 297 (owner of vehicle); *Day v Western Loan & Bldg. Co.* (1940) 42 CA2d 226, 108 P2d 702 (employer of tortfeasor). See also 4 Witkin, California Procedure, *Pleading* §483 (5th ed 2008).
- Adds one or more fictitious names after each known defendant's name so that additional parties can be brought in if the known defendant was not acting alone or if the pleader used an incorrect name.
- Wants to preserve causes of action against potential defendants whose names are known, in case the main defendants are judgment-proof, but for tactical reasons prefers not to name them in the action. The pleader may hope, *e.g.,* to retain their goodwill or to avoid unleashing their lawyers.

WARNING: There is some risk in suing known persons by fictitious names. Many opinions state that ignorance of the true name must be real, not feigned. See *Maier Brewing Co. v Flora Crane Serv.* (1969) 270 CA2d 873, 76 CR 219; *Lipman v Rice* (1963) 213 CA2d 474, 28 CR 800. However, other cases state that even though a plaintiff knows of the actual name and existence of a defendant sued by a fictitious name, it is "well established" that substitution of a true name is permitted when the plaintiff is ignorant within the meaning of CCP §474, because he or she lacks knowledge of the facts that make the person liable. *General Motors Corp. v Superior Court* (1996) 48 CA4th 580, 593, 55 CR2d 871; *Parker v Robert E. McKee, Inc.* (1992) 3 CA4th 512, 4 CR2d 347. See *Mishalow v Horwald* (1964) 231 CA2d 517, 41 CR 895; *Johnson v Goodyear Tire & Rubber Co.* (1963) 216 CA2d 133, 30 CR 650; *Larson v Barnett* (1950) 101 CA2d 282, 225 P2d 297. "Section 474 allows a plaintiff in good faith to delay suing particular persons as named defendants until he has knowledge of sufficient facts to cause a reasonable person to believe liability is probable." *General Motors Corp. v Superior Court* (1996) 48 CA4th 580, 595, 55 CR2d 871; *Dieckmann v Superior Court* (1985) 175 CA3d 345, 363, 220 CR 602.

Although the requirement is not explicit, it has been held that CCP §474 implicitly requires the plaintiff to amend the complaint to add the true names of the Doe defendants within a reasonable period of time after learning of their identity. *A.N. v County of Los Angeles* (2009) 171 CA4th 1058, 1066, 90 CR3d 293, citing *Barrows v American Motors Corp.* (1983) 144 CA3d 1, 192 CR 380. A defendant may challenge the CCP §474 amendment of the complaint by an evidence-based motion that argues unreasonable delay and shows that filing the Doe amendment would cause defendant to suffer undue prejudice. *A.N. v County of Los Angeles, supra*. On amending complaint, see §16.14.

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.14 2. Fictitious Name Allegation

§14.14 2. Fictitious Name Allegation

Fictitiously named defendants are usually named in the caption of the complaint as a group, for example, as "Doe 1 through Doe 100" or "Does I through XX." See form in chap 15.

The fictitious name allegation is directly and simply made, *e.g.:*

1. Plaintiff does not know the true names of defendants sued herein as Doe 1 through Doe _ _[*number of fictitiously named defendants*]**_ _.**

The plaintiff must directly allege ignorance of the true names of defendants sued by fictitious names. Without such an allegation, a new party cannot be brought in by amendment after the statute of limitations has run. *Kline v Beauchamp* (1938) 29 CA2d 340, 84 P2d 194.

WARNING: Indirect allegations are not sufficient. See, *e.g., Stephens v Berry* (1967) 249 CA2d 474, 57 CR 505 (First Doe through Fourth Doe are fictitious names sued under CCP §474); *Lipman v Rice* (1963) 213 CA2d 474, 28 CR 800 (John Doe One to John Doe Twenty are fictitiously designated individuals). See also *Armstrong v Superior Court* (1956) 144 CA2d 420, 423 n1, 301 P2d 51 (allegation that "Does One and Two are fictitious" means that they are imaginary). But see *Motor City Sales v Superior Court* (1973) 31 CA3d 342, 346, 107 CR 280 (sufficient to say defendants, Does I through XXV, inclusive, are sued under provisions of CCP §474).

It is not necessary to allege that the plaintiff does not know the capacities of the fictitiously named parties. A capacity can be stated when the complaint is amended to show the true name. Nor is it necessary to indicate that a fictitiously named defendant is a corporation or other business entity. "Doe 1" can stand for a corporation or other entity as well as for a person. See *Irving v Carpentier* (1886) 70 C 23, 11 P 391 ("Pacific Improvement Co." substituted for fictitious name "Tom Jones").

It is not necessary to state that the plaintiff will (or prays leave to) amend to show the true names when they have been ascertained. Code of Civil Procedure §474 gives the plaintiff the right to amend the complaint and does not require such a recital or the statement that the plaintiff give notice that he or she will amend.

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§14.15 3. Need to State Cause of Action

The complaint must state a cause of action against each fictitiously named defendant. This is often done by adding one or more fictitious names to the known names in the allegations that show the known persons' involvement in the events sued on.

The plaintiff can amend to insert true names and factual allegations that repair an imperfect statement of original causes of action or that charge a defendant under a new theory arising out of the same cause of action. *Austin v Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 15 CR 817. However, if the statute of limitations has run, it is too late to insert new charging allegations against a fictitiously named defendant. See *Milam v Dickman Constr. Co.* (1964) 229 CA2d 208, 213, 40 CR 130 (charging allegations referred only to named defendants); *Williams v Goodman* (1963) 214 CA2d 856, 861, 29 CR 877.

WARNING: Statements such as "each Doe is in some manner negligently responsible for plaintiff's injury and damages" are usually not considered sufficient charging allegations and have been stricken from complaints by law and motion judges as stating a legal conclusion. But see *Breceda v Gamsby* (1968) 267 CA2d 167, 72 CR 832.

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B. Individual Doing Business Under Fictitious Name

§14.16 1. As Plaintiff

A person doing business under a fictitious name (*i.e.,* a business name that does not include the person's surname) should not bring a civil action on a contract made or transaction performed under the fictitious business name until the required fictitious business name statement has been executed, filed, and published. Bus & P C §17918.

When suit is brought, the caption of the complaint usually shows both the individual and business names, *e.g.*:

John Henry Smith, doing)
business as Henry's,)
Plaintiff)
_____)

A paragraph of the complaint should allege compliance with Bus & P C §17918, *e.g.*:

Plaintiff John Henry Smith is now, and at all times mentioned in this complaint has been, an individual doing business under the fictitious name Henry's. Plaintiff has filed the statement and published the notice required by California Business and Professions Code §17918.

A plaintiff's failure to comply with Bus & P C §17918 is a ground for abatement of the action until there is compliance. See Comment to Bus & P C §17918; 4 Witkin, California Procedure, *Pleading* §§94-96 (5th ed 2008). On fictitious name declarations in small claims actions, see CCP §116.430 and Cal Rules of Ct 3.2100.

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§14.17 2. As Defendant

Plaintiffs may not know the organizational form of the business entity being sued. If they sue "John H. Smith, doing business as Henry's," they may be limited to judgment against Smith the individual even though there may be a separate business entity that would also have been liable. See §14.19 for discussion and form.

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C. Partnerships; Unincorporated Associations

§14.18 1. As Plaintiffs

Any partnership or unincorporated association, whether organized for profit or not, may sue and be sued by the name it has assumed or by which it is known. CCP §369.5(a). If the name is fictitious (*i.e.,* does not include the surname of each general partner), compliance with Bus & P C §17918 should be alleged.

The caption should indicate that the plaintiff is a partnership, *e.g.*:

The Partners, a partnership,)
Plaintiff)
_____)

An allegation paragraph can state:

Plaintiff is now, and at all times mentioned in this complaint has been, a partnership doing business under the fictitious name "The Partners." The members of this partnership are John H. Smith and William H. Jones, and they have filed the statement and published the notice required by California Business and Professions Code §17918.

Because former CCP §388, the predecessor of §369.5, was amended in 1967 to permit partnerships to sue by the name of the entity, it does not appear necessary to name each partner. A plaintiff's failure to comply with Bus & P C §17918 is a ground for abatement of the action until there is compliance. See Comment to Bus & P C §17918; 4 Witkin, California Procedure, *Pleading* §§94-96 (5th ed 2008).

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§14.19 2. As Defendants

Plaintiffs may be uncertain whether the business they want to sue is a partnership or some other form of business entity. Naming the entity incorrectly can produce later inconvenience and even loss of causes of action against certain defendants. See *Mayberry v Coca Cola Bottling Co.* (1966) 244 CA2d 350, 352, 53 CR 317. See chap 16 on amending to correct a name.

The complaint should be drawn to state a cause of action against the business, whatever its form, and against the individuals who operate it in case they prove to be personally liable.

WARNING: A suit against "John Jones and Henry Smith, individually and as partners doing business as The Partners Company" is a suit against Jones and Smith as individuals, not against the partnership as an entity. See *Hildebrand v Stonecrest Corp.* (1959) 174 CA2d 158, 169, 344 P2d 378; *Macclay Co. v Meads* (1910) 14 CA 363, 370, 112 P 195; 4 Witkin, California Procedure, *Pleading* §§99, 473-474 (5th ed 2008). Similarly, a suit against "The Partners Company, a partnership comprised of John Jones and Henry Smith," is a suit against the entity, not the individuals.

A safe course is to set forth in the caption and in an allegation the business name as the pleader knows it, the names of known partners or proprietors, and several fictitious names, *e.g.*:

vs.)
)
The Partners Company, John)
Jones, Henry Smith, and)
Doe 1 through Doe 10,)
)
Defendants)
_____)

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Source: Civil Litigation/California Civil Procedure Before Trial/14 Ascertaining, Joining, and Naming Parties/§14.20 D. Corporations

§14.20 D. Corporations

Existing corporations can sue and be sued. For exceptions, see 4 Witkin, California Procedure, *Pleading* §§87-92 (5th ed 2008).

Corporations can be identified in complaints by name alone. It is not necessary to add "a corporation" after the name in the caption or allegations, or to allege that the corporation is "duly organized and existing." See *Los Angeles Ry. v Davis* (1905) 146 C 179, 79 P 865; *Craig v San Fernando Furniture Co.* (1928) 89 CA 167, 171, 264 P 784.

However, if a cause of action is one that can be brought only by or against a corporation, or if plaintiff wants to inform the court and other parties that a party is a corporation, the following language may be used:

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _**, is now, and at all times mentioned in this complaint has been, a corporation duly organized and existing under the laws of** _ _[*state*]_ _ _ _[*and authorized to do business in California*]_ _**.**

NOTE: A corporation that is under suspension for failure to comply with Rev & T C §23305 suffers a legal disability, but when the corporation comes back into compliance and its corporate powers are revived, the procedural litigation steps it took during the suspension period are validated retroactively. *Center for Self-Improvement & Community Dev. v Lennar Corp* (2009) 173 CA4th 1543, 1554, 94 CR3d 74.

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Complaints

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I. INTRODUCTION

§15.1 A. Scope of Chapter

The complaint is a pleading that commences a lawsuit. It is the first pleading filed by the plaintiff. CCP §§350, 410.10, 411.10, 425.10. This chapter covers the drafting of the formal parts of complaints. See §§15.3-15.13. It also discusses verification (see §§15.14-15.21), pleading causes of action (see §§15.22-15.27), choice and election of remedies (see §§15.28-15.30), filing the complaint (see §§15.31-15.33), and using official forms (see §15.34). Sample forms are set forth in §§15.35-15.48.

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§15.2 B. Governing Law

Complaint captions are governed by CCP §422.30, pleadings demanding relief by CCP §§425.10-425.17, compulsory cross-complaints by CCP §§426.10-426.70, cross-complaints by CCP §§428.10-428.80, and contents of documents in particular actions or proceedings by CCP §429.30. The format of complaints is governed by Cal Rules of Ct 2.100-2.119.

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II. COMPONENTS OF COMPLAINTS

§15.3 A. First-Page Format; Caption

The first page of a complaint filed in a California superior court must set forth (CCP §422.30; Cal Rules of Ct 2.111):

- Name, State Bar membership number, address, telephone number, fax number (optional), and e-mail address (optional) of the attorney filing the complaint.
- Name of the court and county in which the action is brought, and a space for the number of the case, stamped by the clerk on filing. Misnaming the court in the caption is an irregularity that does not affect the jurisdiction of a court in which the complaint was properly filed. *Ex parte Fil Ki* (1889) 79 C 584, 21 P 974; CCP §475.
- Title of the action, which should include the names of all the parties. CCP §422.40. Misstating a name in the caption does not affect the sufficiency of the pleading; the caption is not a part of the cause of action. See *McDonough v Waxman* (1930) 103 CA 169, 173, 284 P 482. Occasionally, a correct identification of the party's identity in the caption may clarify an ambiguous or omitted allegation. See *Morton v Shannon* (1915) 26 CA 689, 691, 147 P 1179. See discussion of the naming of particular parties in the caption and body of the complaint in chap 14.
- Case number and the nature of the paper and the character of the action (*e.g.,* "COMPLAINT FOR DAMAGES —PERSONAL INJURY" or "COMPLAINT TO QUIET TITLE"). Cal Rules of Ct 2.111(5)-(6). A statement of the character of the action aids the clerk in compiling statistics and indexes, and gives the court and other parties an idea of what the case is about. However, it does not determine the nature of the action and does not limit the relief that can be granted; the allegations in the complaint control. See *Jaffe v Carroll* (1973) 35 CA3d 53, 57, 110 CR 435; *Coffelt v Coffelt* (1964) 229 CA2d 659, 665, 40 CR 513.
- In a limited civil case, immediately below the character of the action, either "Amount demanded exceeds $10,000" or "Amount demanded does not exceed $10,000." Govt C §70613; Cal Rules of Ct 2.111(9).
- In a limited civil case, the phrase, "Limited Civil Case" in the caption of the case. Cal Rules of Ct 2.111(10); see CCP §422.30(b); example in §11.26 ("LIMITED CIVIL CASE" centered immediately below name of court).

On additional form and format requirements applicable to all court papers (*e.g.*, footer giving paper's title below the page number on each page; use of pleading paper with consecutive line numbers at left margin of each page; weight of paper; typeface required), see chap 11.

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§15.4 B. Introductory Clause

It is customary to introduce the body of the complaint with a line such as "Plaintiff alleges:" placed below the caption (see form in §15.35).

NOTE: Some lawyers continue to use such stately but archaic clauses as: "Comes now the plaintiff and complains against the above-named defendants, and for a cause of action alleges."

When different plaintiffs assert different causes of action against different defendants, it is helpful to use a separate introduction under each cause of action heading, *e.g.:*

FIRST CAUSE OF ACTION FOR FRAUD

Plaintiffs John Jones and Henry Smith, for a cause of action against defendant William Johnson, allege:

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C. Allegation Paragraphs

§15.5 1. Paragraphing and Numbering; Headings for Causes of Action and Counts

The body of a complaint consists of allegations or statements of fact "in ordinary and concise language" that constitute each cause of action. CCP §425.10(a)(1). Each ultimate fact (see §15.26) may be stated in a separate paragraph, although this is not required. Several closely related facts may be stated in a single paragraph for convenience, and a paragraph may contain more than one sentence.

Each cause of action or count must be separately numbered (*e.g.,* "FIRST CAUSE OF ACTION" or "FIRST COUNT") (Cal Rules of Ct 2.112) and specify its nature (*e.g.,* "SECOND CAUSE OF ACTION—FRAUD") (Cal Rules of Ct 2.112). However, the nature of the case made by the allegations, not the heading or label, determines whether the group of paragraphs constitutes a cause of action or a count, and the character of the remedy sought. *Jaffe v Carroll* (1973) 35 CA3d 53, 57, 110 CR 435.

Traditionally, attorneys have numbered paragraphs with roman numerals and have started a new series of paragraph numbers under each new cause of action or count heading. Modern practice is to begin each paragraph with an Arabic numeral and to number paragraphs consecutively throughout the complaint. See form in §15.35.

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§15.6 2. Incorporating Allegations by Reference

It is a common and accepted practice to incorporate the allegations of one cause of action or count into a subsequent cause of action or count. *Treweek v Howard* (1895) 105 C 434, 441, 39 P 20; *Casaretto v DeLucchi* (1946) 76 CA2d 800, 806, 174 P2d 328, disapproved on other grounds in *Sinz v Owens* (1949) 33 C2d 749, 205 P2d 3. See 4 Witkin, California Procedure, *Pleading* §435 (5th ed 2008). Even incorporation from a superseded pleading in the action has been allowed. See *Turney v Collins* (1941) 48 CA2d 381, 388, 119 P2d 954.

The incorporation should be clear and direct, but no particular words are required, *e.g.:*

Plaintiff incorporates in this cause of action the allegations of paragraphs __ through __ of the _ _[*e.g., first*]**_ _ cause of action.**

WARNING: Indirect statements, *e.g.,* "the allegations of the first cause of action are true," should not be used. See *Pennie v Hildreth* (1889) 81 C 127, 131, 22 P 398. The pleader should also carefully analyze each allegation to avoid incorporating unnecessary or conflicting facts that render the subsequent cause of action ambiguous, meaningless, or more difficult to prove.

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D. Demand for Judgment (Prayer)

§15.7 1. Requirement

Code of Civil Procedure §425.10(a)(2) requires that each complaint and cross-complaint contain a demand for judgment for the relief to which the pleader claims he or she is entitled. This demand, called the prayer, is usually a separate paragraph placed at the end of the complaint. See form in §15.35. If money or damages are demanded, the amount must be stated. CCP §425.10(a)(2). When an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated, but the complaint shall comply with CCP §422.30 (caption requirements) and, in a limited civil case, with Govt C §70613 (requirements for first paper in limited civil case). CCP §425.10(b). For further discussion of limited civil cases, see chap 6.

A well-drafted prayer serves the pleader in several ways:

- It shows each defendant the nature and extent of the relief demanded from that defendant, perhaps inducing settlement, default, or a confessed judgment.
- It shows whether the amount in controversy or the nature of the relief sought places jurisdiction in the court in which the complaint has been filed. See *Silverman v Greenberg* (1938) 12 C2d 252, 254, 83 P2d 293; 2 Witkin, California Procedure, *Jurisdiction* §§23, 50 (5th ed 2008). Jurisdiction, however, can be found from the allegations of the complaint, regardless of the prayer. *Hoffman v Pacific Coast Constr. Co.* (1918) 37 CA 125, 131, 173 P 776.
- If the complaint's allegations are not clear, the court may look to the prayer to ascertain the plaintiff's theory of action and whether the allegations sufficiently inform the defendant of the cause of action asserted. See *Hails v Martz* (1946) 28 C2d 775, 777, 172 P2d 52; *Central Sur. & Ins. Corp. v Foley* (1962) 204 CA2d 738, 742, 22 CR 504. See also *Hiroshima v Bank of Italy* (1926) 78 CA 362, 368, 248 P 947 (statement of specific sum in prayer cured failure to allege damages in stated amount). However, the prayer is not a part of the statement of the cause of action and will not cure a basic deficiency in the facts pleaded. See *Berg v Investors Real Estate Loan Co.* (1962) 207 CA2d 808, 815, 24 CR 701.
- If there is no answer to the complaint, the prayer limits the extent of damages or other relief that may be granted by default judgment. See §15.11. Even if the case is contested, a demand for a specific amount of money or damages may limit the amount of the judgment. See §15.12.

Despite the requirement of CCP §425.10(b) that the complaint state a demand for the relief sought, cases have stated that:

- Failure to include a prayer in a complaint does not deprive a court of jurisdiction.
- The prayer cannot be the subject of a demurrer.
- An omitted, incomplete, or defective prayer may be supplied or corrected by amendment.

See, *e.g., Miller v Superior Court* (1922) 59 CA 334, 338, 210 P 832; 4 Witkin, California Procedure, *Pleading* §495 (5th ed 2008).

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§15.8 2. Placement; Wording

The demand, or prayer, is usually placed at the end of the complaint, below the last allegation paragraph and above the subscription, *e.g.:*

WHEREFORE, plaintiff demands judgment from defendants for: _ _[*Specify in numbered paragraphs*]**_ _.**

See also sample form in §15.35.

The format of the prayer can become complicated when different plaintiffs seek different relief from different defendants on different causes of action, *e.g.*:

WHEREFORE:

1. Plaintiff John Jones demands judgment as follows:

a. From defendant Walter Johnson:

(1) _____ .

(2) _____ .

b. From defendant Guy F. Wilson:

(1) _____ .

(2) _____ .

2. Plaintiff William Smith demands judgment as follows:

a. On his first cause of action:

(1) _____ .

(2) _____ .

b. On his second cause of action:

(1) _____ .

(2) _____ .

NOTE: Most pleaders conclude with a general prayer, *e.g.,* "for such other and further relief as this Court may deem proper." Some opinions have mentioned these clauses when upholding or ordering, in contested cases, relief beyond that specifically prayed for. In contrast, the 1872 Code Commissioner's Note for a predecessor of CCP §425.10 calls such a demand "unauthorized" and "useless." See §§15.11-15.12.

Interest may be awarded in a contested action even though there is no specific prayer for it. *Sanders v City of Los Angeles* (1970) 3 C3d 252, 263, 90 CR 169.

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§15.9 3. Personal Injury and Wrongful Death Actions: Statement of Damages

The demand for judgment in a superior court complaint to recover damages for personal injury or wrongful death must not state the amount of damages sought, but the complaint shall comply with CCP §422.30 (caption requirements) and, in a limited civil case, with Govt C §70613(b) (requirements for first paper in limited civil case). CCP §425.10(b). See form in §15.35. The purpose of this prohibition is to protect defendants, particularly in medical malpractice cases, from adverse publicity resulting from inflated demands. *Schwab v Rondel Homes, Inc.* (1991) 53 C3d 428, 431, 280 CR 83. For further discussion of limited civil cases, see chap 6.

A defendant (or cross-defendant) who wants to know the amount of damages being sought may simply ask the plaintiff's attorney, or may serve a request for that information on the plaintiff (or cross-complainant) at any time. CCP §425.11(b). The request may be in the form of a court paper, captioned as are other papers in the action, signed by the attorney, and stating, *e.g.*:

REQUEST FOR STATEMENT OF DAMAGES

Under Code of Civil Procedure §425.11, please serve on defendant, _ _[*name*]_ _, by _ _[*date*]_ _, a statement of the nature and amount of damages claimed by plaintiff(s) in this action.

If the plaintiff does not respond to this request within 15 days, the defendant may petition the court, on notice to the plaintiff, for an order requiring the plaintiff to respond. CCP §425.11(b). A default judgment for the plaintiff is limited to the amount of general and special damages stated (see chap 38), but it is unclear whether the plaintiff's statement of damages will act as a limit on the judgment awarded in a contested case (see §15.12). However, the plaintiff is not limited to the amount specified in the statement of punitive damages when the defendant appears in the action. CCP §425.115(c).

Code of Civil Procedure §425.11 does not indicate how much information the plaintiff must give in response to a request for a statement of the nature and amount of damages. The response might say no more than what the prayer in a personal injury complaint was required to say before the 1974 amendment of CCP §425.10. For example, a statement such as the following might be deemed sufficient:

Plaintiff's damages are as follows:

1. General damages for John Smith: $100,000.

2. General damages for Helen Smith: $25,000.

3. Medical and related expenses for each plaintiff according to proof.

See *Thorson v Western Dev. Corp.* (1967) 251 CA2d 206, 213, 59 CR 299 (prayer for "damages according to proof" supported default judgment when allegations of complaint stated specific sum); *Wilcox v Sway* (1945) 69 CA2d 560, 573, 160 P2d 154. To elicit more detailed information about the nature and amounts of the damages sought, the defendant can use discovery procedures, *e.g.,* depositions and interrogatories.

If the defendant does not request a statement of damages, the plaintiff must give notice to the defendant of the amount of special, general, and punitive damages before a default may be taken. CCP §§425.11(b)-(c), 425.115(f). See §15.10 for discussion of statement of punitive damages.

If the party has appeared in the action, the statement of damages must be served on his or her attorney, or on the party if he or she has appeared without an attorney. CCP §§425.11(d)(2), 425.115(g)(2). If the party has not appeared, the statement must be served in the same manner as a summons. CCP §§425.11(d)(1), 425.115(g)(1). See *Anastos v Lee* (2004) 118 CA4th 1314, 13 CR3d 716 (plaintiff who obtains court order allowing service of summons and complaint by publication need not obtain separate order to simultaneously serve statement of damages by publication).

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§15.10 4. Statement Reserving Right to Punitive Damages

A plaintiff must serve a statement preserving the right to seek punitive damages before taking a default, when the request for default judgment includes punitive damages under CC §3294. CCP §425.115. The statement may be served as part of the statement of damages required by CCP §425.11. See §38.19 for form of statement of punitive damages.

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5. Effect of Prayer on Judgment

§15.11 a. Default Cases

If there is no answer to the complaint, the relief granted to the plaintiff cannot exceed the relief demanded in the complaint, the statement of damages (CCP §425.11), or a statement reserving the right to seek punitive damages (CCP §425.115). CCP §580. See §15.9 on use of a statement of damages if the complaint is one for damages for personal injury or wrongful death filed in a superior court in other than a limited civil case (see chap 6). See generally chap 38.

A default judgment that exceeds the demand or gives relief not demanded is in excess of the court's jurisdiction and is void. *Marriage of Lippel* (1990) 51 C3d 1160, 1166, 276 CR 290; *Burtnett v King* (1949) 33 C2d 805, 808, 205 P2d 657. See 4 Witkin, California Procedure, *Pleading* §498 (5th ed 2008).

The court can refuse to look beyond the prayer in resolving what relief to grant in a default judgment. *Gudarov v Hadjieff* (1952) 38 C2d 412, 416, 240 P2d 621; *Brooks v Forington* (1897) 117 C 219, 48 P 1073 ("demanded in the complaint" means asked for in prayer). Relief that was not specifically demanded cannot be granted under a general prayer such as "other relief that the court considers proper." *Gudarov v Hadjieff, supra*; *Lee v Ski Run Apartments Assocs.* (1967) 249 CA2d 293, 299, 57 CR 496. However, allegations of the complaint may sometimes clarify a prayer, justifying relief not specifically detailed. See *Thorson v Western Dev. Corp.* (1967) 251 CA2d 206, 213, 59 CR 299; *Padgett v Padgett* (1962) 199 CA2d 652, 658, 18 CR 789.

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§15.12 b. Contested Cases

If the complaint has been answered, the court may grant the plaintiff any relief consistent with its jurisdiction and the case made by the complaint and embraced within the issue. CCP §580. That is, in a contested case, the plaintiff may secure relief greater than or different from that demanded in the prayer or statement of punitive damages. CCP §425.115(c); *Singleton v Perry* (1955) 45 C2d 489, 498, 289 P2d 794; *Damele v Mack Trucks, Inc.* (1990) 219 CA3d 29, 38, 267 CR 197 ($568,000 verdict upheld although CCP §425.11 statement of damages specified $400,000); *Lawrence v Shutt* (1969) 269 CA2d 749, 767, 75 CR 533; *Wright v Rogers* (1959) 172 CA2d 349, 367, 342 P2d 447. Full relief should be granted even if there is no prayer at all. *Petersen v Ridenour* (1955) 135 CA2d 720, 727, 287 P2d 848.

Even in contested cases, however, courts have limited judgments for damages to the amount alleged or prayed for in the complaint. See *Meisner v McIntosh* (1928) 205 C 11, 269 P 612; *Brown v North Ventura Rd. Dev. Co.* (1963) 216 CA2d 227, 234, 30 CR 568; *Frost v Mighetto* (1937) 22 CA2d 612, 616, 71 P2d 932. See also *Crofoot v Blair Holdings Corp.* (1953) 119 CA2d 156, 195, 260 P2d 156; 4 Witkin, California Procedure, *Pleading* §497 (5th ed 2008).

PRACTICE TIP: If, in a personal injury or wrongful death case (see §15.9), it appears that the proof will justify a greater money award than that alleged and prayed for (or specified in a statement under CCP §425.11), or if the verdict actually exceeds the demand, the plaintiff may ask leave to amend the allegations, prayer, or statement, or argue that CCP §580 permits the judgment to exceed the amount of the demand.

In a limited civil case, however, the court may not allow relief that exceeds the amount-in-controversy limitation (*i.e.,* $25,000) for a limited civil case. CCP §§85(a), 580(b)(1). For further discussion of limited civil cases, jurisdictional classification, and reclassification, see chap 6.

A plaintiff who is seeking punitive damages under CC §3294 is not limited to the amount set forth in the statement re punitive damages (CCP §425.115) if the defendant appears in the action. CCP §425.115(c).

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§15.13 E. Subscription

Every complaint must be signed by at least one attorney of record in the attorney's individual name or by the party, if the party is unrepresented. CCP §128.7(a). By presenting the complaint to the court, the attorney is certifying to the best of his or her knowledge, after reasonable inquiry, that the factual allegations have evidentiary support. CCP §128.7(b). See §1.6 for discussion of sanctions.

The usual practice is for the attorney to sign on a line under which his or her name is typed. See, *e.g.,* form in §15.35. A failure to sign is an irregularity that can be corrected by amendment. *Board of Trustees of Leland Stanford Jr. Univ. v Superior Court* (2007) 149 CA4th 1154, 1158, 57 CR3d 755 (plaintiff exercised control over content of complaint signed by plaintiff's father); *Canadian Bank of Commerce v Leale* (1910) 14 CA 307, 309, 111 P 759 (filing tolled statute of limitations even though complaint was not signed).

An unsigned complaint will be stricken, however, unless the problem is corrected promptly after it is called to the attention of the attorney or the party. CCP §128.7(a).

NOTE: Code of Civil Procedure §128.7 is based on Fed R Civ P 11 and replaces the part of CCP §446 that required each pleading to be subscribed by the party or the party's attorney. Section 128.7 applies to complaints filed after December 31, 2004. See CCP §128.7(i).

Typing a date at the bottom of the complaint is not required and serves no purpose. The clerk's filing stamp on the first page controls.

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§15.14 III. VERIFICATION

A verification is a statement in the form of a declaration under penalty of perjury or affidavit that the complaint is true. CCP §446. Verifications in the exact words of §446 have been approved. See *Patterson v Ely* (1861) 19 C 28, 39; *Ware v Stafford* (1962) 206 CA2d 232, 236, 24 CR 153.

However, any wording that substantially asserts the truth of the matters stated is sufficient. See *City of Los Angeles v Superior Court* (1925) 196 C 445, 449, 238 P 670; *Seattle Coal & Transp. Co. v Thomas* (1881) 57 C 197; 4 Witkin, California Procedure, *Pleading* §463 (5th ed 2008). See forms in §§15.18-15.21. The test of sufficiency is whether the verification is clear and certain enough to sustain a perjury indictment on it if false. *Sheeley v City of Santa Clara* (1963) 215 CA2d 83, 85, 30 CR 121.

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§15.15 A. Deciding Whether to Verify

A complaint needs to be verified only when a particular statute requires verification. See *Parke & Lacy Co. v Inter Nos Oil & Dev. Co.* (1905) 147 C 490, 493, 82 P 51; *Quick v Corsaro* (1960) 180 CA2d 831, 836, 4 CR 674. See, *e.g.,* CCP §§527 (action seeking preliminary injunction), 761.020 (action by adverse possessor), 1166 (action for unlawful detainer or forcible entry), 396a (actions involving installment or automotive sales, consumer obligations, or unlawful detainer). See also 4 Witkin, California Procedure, *Pleading* §466 (5th ed 2008).

If a complaint required by statute to be verified is not verified, or the attempted verification does not comply with CCP §446, the complaint may, on motion, be stricken. See *Ware v Stafford* (1962) 206 CA2d 232, 237, 24 CR 153. However, lack of or defective verification is waived if not raised before the case proceeds to trial, and a proper verification may be supplied by amendment, even after the statute of limitations on filing the action has run. *Ware v Stafford, supra*; *Board of Educ. v Mulcahy* (1942) 50 CA2d 418, 423, 123 P2d 114. See 4 Witkin, Procedure, *Pleading* §468.

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§15.16 1. Reasons to Verify

There are reasons to verify complaints even when verification is not required by statute:

- If the complaint is verified, the answer must be verified, unless the defendant is a public entity or officer. CCP §446. The defendant's denials and allegations must be made under oath or penalty of perjury. If the answer is not verified, the allegations of the complaint are deemed admitted and the plaintiff can move for judgment on the pleadings or move to strike the answer and take judgment by default. See *H. G. Bittleston Law & Collection Agency v Howard* (1916) 172 C 357, 156 P 515; *Huston v Huston* (1948) 87 CA2d 8, 10, 195 P2d 551; 4 Witkin, California Procedure, *Pleading* §468 (5th ed 2008).
- If the complaint is verified, denials in the answer must be specific (directed at least to individual paragraphs of the complaint). CCP §431.30(d). On answers, see chap 25. A general denial of the entire verified complaint puts nothing in issue. *Hensley v Tartar* (1860) 14 C 508; *Kinard v Kaelin* (1913) 22 CA 383, 390, 134 P 370.
- A complaint verified by a plaintiff, or other person who states that he or she knows the facts, can be used as an affidavit to support applications for certain forms of preliminary relief. *Continental Baking Co. v Katz* (1968) 68 C2d 512, 532, 67 CR 761 (preliminary injunction). See also 5 Witkin, Procedure, *Pleading* §824.

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§15.17 2. Reasons Not to Verify

There are reasons to file unverified complaints when verification is not required by a particular statute:

- A false allegation, perhaps overlooked by the verifier, creates the possibility of a perjury charge. See Pen C §§118, 125, 259; *People v Agnew* (1947) 77 CA2d 748, 176 P2d 724.
- Verification of allegations not known to be true may show bad faith on the part of a verifier later sued for malicious prosecution. See *Albertson v Raboff* (1960) 185 CA2d 372, 387, 8 CR 398.
- Contradictory or antagonistic facts in separate causes of action or counts are less permissible in verified than in unverified complaints. See *Faulkner v California Toll Bridge Auth.* (1953) 40 C2d 317, 328, 253 P2d 659.
- Facts stated in a verified complaint are sometimes treated as admissions that cannot be contradicted by or omitted from an amended complaint except on an adequate showing of mistake or excuse. *Wennerholm v Stanford Univ. Sch. of Medicine* (1942) 20 C2d 713, 716, 128 P2d 522; *Lee v Hensley* (1951) 103 CA2d 697, 709, 230 P2d 159; *Jackson v PG&E* (1949) 95 CA2d 204, 211, 212 P2d 591.
- If the verifier testifies to facts different from those alleged in a verified complaint, defense counsel can capitalize on the contradictory sworn statements.
- The defense is more apt to demur or to delay answering a verified complaint, and such tactics can result in a delay in proceedings and the plaintiff's having to file amendments to the complaint.
- Theories of recovery may be rethought between filing the complaint and trial; a verified pleading could be used at trial against the plaintiff if a theory alleged in the initial complaint were no longer viable.

PRACTICE TIP: Impressed by the foregoing reasons, many practitioners verify a complaint only when verification is required or there is a significant positive tactical reason for verification.

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B. Persons Who May Verify; Verification Forms

§15.18 1. Plaintiff

A plaintiff may verify a complaint, although it has been drafted and signed by an attorney; in this instance, the plaintiff becomes responsible for the truth of the matters stated in it. See *Albertson v Raboff* (1960) 185 CA2d 372, 387, 8 CR 398; 4 Witkin, California Procedure, *Pleading* §461 (5th ed 2008). If there is more than one plaintiff, verification by one of them is sufficient. *Clairborne v Castle* (1893) 98 C 30, 32 P 807. A verification must be by a plaintiff except in those instances noted in §§15.19-15.20.

The following declaration form uses the language of CCP §446:

VERIFICATION

I am _ _[*a/the*]_ _ plaintiff in this action; the foregoing complaint is true of my knowledge, except as to the matters stated in it on my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of plaintiff*]__
_ _[*Typed name*]_ _

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.19 2. Attorney

§15.19 2. Attorney

An attorney is authorized by CCP §446 to verify a complaint if:

- Plaintiffs are absent from the county in which the attorney has his or her office;
- Plaintiffs are unable to verify for some other reason; or
- The facts are within the attorney's knowledge.

The following is an example of an attorney's verification in the first two of these instances:

VERIFICATION

I am _ _[*an/the*]_ _ attorney for plaintiff, _ _[*name*]_ _, in this action. Plaintiff is _ _[*state reason that plaintiff is unable to verify, e.g., absent from the County in which I have my office*]_ _. I have read the foregoing complaint. I am informed and believe that the matters in it are true and on that ground allege that the matters stated in the complaint are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

A complaint verified in this form may not be used as an affidavit or declaration establishing facts alleged in the complaint. CCP §446. However, an attorney may verify a complaint on the basis of his or her own knowledge of the facts, and that form of verified complaint may be used as an affidavit. *Continental Baking Co. v Katz* (1968) 68 C2d 512, 532, 67 CR 761.

WARNING: Verification by the attorney may give the impression that the attorney is a participant in the controversy and subject the attorney to deposition or subpoena as a source of facts.

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§15.20 3. Other Person

To download **Word** version, right click and choose *Save Target As*

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A person other than the plaintiff is authorized by CCP §446 to verify the complaint if:

- Plaintiffs are absent from the county in which the attorney who files the complaint has his or her office;
- Plaintiffs are unable to verify for some other reason; or
- The facts are within the verifier's knowledge.

In the first two instances (see *Ware v Stafford* (1962) 206 CA2d 232, 236, 24 CR 153), the verifier should state:

- The verifier's relationship, if any, to the plaintiff;
- The reason the verifier, instead of the plaintiff, is making the verification; and
- That the complaint is true of the verifier's own knowledge except for matters stated on information or belief, which the plaintiff is informed are, and believes to be, true.

The following form can be used by a person, including an attorney, who verifies because the facts are within his or her knowledge:

VERIFICATION

I am _ _[*e.g., the assignor of the claim sued on*]_ _ in this action. I am more familiar with the facts alleged in the complaint than the plaintiff is. The foregoing complaint is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

When an attorney uses this form of verification, the words "attorney for plaintiff" should be inserted in the first clause. It is common for the verifier to declare that he or she has better knowledge of the facts than does the plaintiff. See *H. G. Bittleston Law & Collection Agency v Howard* (1916) 172 C 357, 156 P 515. However, a simple statement that the complaint is true of the verifier's own knowledge should be enough without further explanation. See *Milstein v Sartain* (1943) 56 CA2d 924, 927, 133 P2d 836.

NOTE: In a verification made on the ground that the facts are within the verifier's knowledge, it is inappropriate to state the verifier's belief in the truth of matters stated in the complaint on information or belief. See *Brown v Sandell* (1926) 79 CA 313, 315, 249 P 209.

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§15.21 4. Officer of Corporation or Public Entity

When a corporation is a party, verification may be made by any officer of the corporation. CCP §446; *Stockton Lumber Co. v Blodgett* (1906) 3 CA 94, 84 P 441 (manager). Complaints filed for corporations may also be verified by an attorney or other person with knowledge of the facts (see forms in §§15.19-15.20). *Continental Baking Co. v Katz* (1968) 68 C2d 512, 532, 67 CR 761; *H. G. Bittleston Law & Collection Agency v Howard* (1916) 172 C 357, 156 P 515.

Code of Civil Procedure §446 provides that an officer of a public agency may make essentially the same form of verification on its behalf that the officer of a corporation may make. Section 446 also exempts the state and any California county, city, school district, district, public agency, and public corporation from the need to verify a complaint or an answer. (Note, however, that answers to complaints filed by public entities must, with exceptions, be verified.) For example:

VERIFICATION

I am the _ _[*title of officer*]_ _ of _ _[*name of corporation or public agency*]_ _, a plaintiff in this action. I have read the foregoing complaint. I am informed and believe that the matters in it are true and on that ground allege that the matters stated in the complaint are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of officer*]__
_ _[*Typed name*]_ _

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IV. PLEADING CAUSES OF ACTION

§15.22 A. Distinctions: Cause of Action; Count; Remedy; Relief

The complaint must contain a statement of facts constituting the cause of action. CCP §§425.10(a)(1), 430.10(e). A cause of action is the legal obligation the plaintiff seeks to enforce. *Busick v WCAB* (1972) 7 C3d 967, 975, 104 CR 42. It arises from the breach of, impingement on, or interference with, a primary right of the plaintiff, by the defendant, contrary to a primary duty. See *Hurt v Haering* (1922) 190 C 198, 200, 211 P 228; *Frost v Witter* (1901) 132 C 421, 426, 64 P 705; *Lippert v Bailey* (1966) 241 CA2d 376, 381, 50 CR 478; 4 Witkin, California Procedure, *Pleading* §§34-35 (5th ed 2008). A cause of action is pleaded by stating (1) the facts from which the plaintiff's primary right and the defendant's corresponding duty arise, and (2) the facts constituting the defendant's delict, or wrong. *Kaufman & Broad Bldg. Co. v City & Suburban Mortgage Co.* (1970) 10 CA3d 206, 215, 88 CR 858.

The term "count" is sometimes used as a synonym for "cause of action." At other times, "count" is used to designate different statements of the same cause of action or statements of different theories that may be pursued for an invasion of a single primary right. See *Eichler Homes, Inc. v Superior Court* (1961) 55 C2d 845, 847, 13 CR 194.

A remedy is the means authorized by law for enforcing or preserving a right, preventing a threatened injury, or securing redress for damage. *Jewett v City Transfer & Storage Co.* (1933) 128 CA 556, 558, 18 P2d 351. Remedies may be administrative or judicial, civil or criminal, in personam or in rem, legal or equitable, and ex contractu (contract) or ex delicto (tort).

"Cause of action" is distinct from "remedy" and from "relief" or "redress." "Cause of action" means the basis or ground on which a person wronged seeks redress, *i.e.,* everything that is requisite to show that an action is maintainable. "Remedy," a more extensive term, refers to the means by which a wrong is redressed and relief obtained. "Relief" in civil actions for violation of private rights may be compensatory (damages), specific, or preventive. CC §§3274-3426.10. See *Frost v Witter, supra*; *DeMonbrun v Sheet Metal Workers Int'l Ass'n* (1956) 140 CA2d 546, 553, 295 P2d 881; *Painter v Berglund* (1939) 31 CA2d 63, 70, 87 P2d 360; 4 Witkin, Procedure, *Pleading* §30. Violation of one primary right creates only one cause of action regardless of how many legal theories are pursued or how many different forms of relief are sought. *Slater v Blackwood* (1975) 15 C3d 791, 795, 126 CR 225; *Wulfjen v Dolton* (1944) 24 C2d 891, 895, 151 P2d 846; *Kaufman & Broad Bldg. Co. v City & Suburban Mortgage Co., supra*.

NOTE: Disregarding technical distinctions, many attorneys place a separate "CAUSE OF ACTION" heading over each group of allegations that states a reason the plaintiff has for suing a defendant or for seeking a particular form of relief. See discussion in *Barrett v Superior Court* (1990) 222 CA3d 1176, 1181, 272 CR 304.

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§15.23 B. Stating Causes of Action Separately

The Code of Civil Procedure no longer requires that causes of action be separately stated, and failure to state separately has not, since 1973, been a ground for demurrer. Nevertheless, Cal Rules of Ct 2.112 and 2.112 require each cause of action to identify its number, its nature, the party asserting it (if there is more than one party represented in the pleading), and the party to whom it is directed. Thus, the facts constituting each cause of action and each count or theory for recovery should be set forth under a separate heading, *e.g.,* "FIRST CAUSE OF ACTION FOR FRAUD," "SECOND CAUSE OF ACTION FOR CONVERSION." See *Kaufman & Broad Bldg. Co. v City & Suburban Mortgage Co.* (1970) 10 CA3d 206, 88 CR 858. See also 4 Witkin, California Procedure, *Pleading* §§36-39 (5th ed 2008). It is common to label a group of allegations a "cause of action" even though it is only a count or request for different relief.

Intermingling allegations may lead to a demurrer for uncertainty. When causes and counts are separately stated, a judge ruling on a demurrer or motion to strike can more easily recognize good causes and theories. There are situations in which different theories should be stated as separate counts to clarify the issues and to permit defendants to assert appropriate objections and defenses to each of the plaintiff's causes of action and theories. See *City of Burbank v Superior Court* (1965) 231 CA2d 675, 684, 42 CR 23.

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§15.24 1. Joinder of Causes of Action

A plaintiff who has stated a cause of action against one or more defendants may assert in the same complaint any additional causes of action the plaintiff has, alone or with coplaintiffs, against any of those defendants. CCP §427.10(a). This broad principle of permissive joinder of causes of action, based on Fed R Civ P 18(a), supersedes former CCP §427 and eliminates the arbitrary categories of that section. Comment to CCP §427.10 (no longer ground for demurrer that several causes of action improperly united in complaint).

NOTE: Although unlimited permissive joinder of causes of action produces no undesirable effects at the pleading stage, joint trial of several causes may introduce undue complexity or prejudice. These problems can be avoided by severance of causes or issues for trial under CCP §1048(b). See chap 43.

California law does not require a plaintiff to join certain causes of action in a complaint. See 4 Witkin, California Procedure, *Pleading* §340 (5th ed 2008). A defendant can sometimes force a plaintiff to join additional causes of action by cross-complaining. The plaintiff must then state related causes of action in his or her own cross-complaint. On cross-complaints, see chap 26.

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§15.25 2. Rule Against Splitting Causes of Action

There are good reasons for joining all related causes of action in the same complaint. For example, an apparently separate cause of action may be no more than a request for different relief or a different way of stating the same cause of action. See §15.22. Under the rule against splitting causes of action, a first lawsuit may be pleaded in abatement of a second that states the same cause of action, albeit invoking a different theory or seeking different relief. *Wulfjen v Dolton* (1944) 24 C2d 891, 151 P2d 846. See *Purcell v Colonial Ins. Co.* (1971) 20 CA3d 807, 813, 97 CR 874; 4 Witkin, California Procedure, *Pleading* §§45-47, 340 (5th ed 2008). Even if the second complaint states a different cause of action, the unfavorable determination of an issue in the first action, when it may not have been fully presented, is conclusive in any subsequent suit between the same parties. *Pacific Mut. Life Ins. Co. v McConnell* (1955) 44 C2d 715, 724, 285 P2d 636.

Invasion of a single primary right may give rise to a cause of action under both federal and state statutes. Filing suit in a federal court under the federal statute may bar a later suit in the state court under the state statute because the plaintiff may not split a single cause of action and try it piecemeal. *Ford Motor Co. v Superior Court* (1973) 35 CA3d 676, 679, 110 CR 59. But see *City of Los Angeles v Superior Court* (1978) 85 CA3d 143, 149 CR 320; *Merry v Coast Community College Dist.* (1979) 97 CA3d 214, 158 CR 603; *Mattson v City of Costa Mesa* (1980) 106 CA3d 441, 164 CR 913.

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C. Allegations

§15.26 1. Ultimate Facts

Complaints must contain statements of fact in ordinary and concise language. CCP §425.10(a)(1). The facts stated should be only the ultimate facts essential to the plaintiff's claims. *Green v Palmer* (1860) 15 C 411, 415. See *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 1548, 87 CR3d 602 (plaintiff need not plead evidentiary facts supporting allegation of ultimate fact so long as pleading informs defendant of claim's factual basis; here, allegations that tobacco smoke in apartment complex common areas "affects a substantial number of people at the same time" adequate to state claim of public nuisance).

Ultimate facts are logical conclusions deduced from primary evidentiary facts (*Rhode v Bartholomew* (1949) 94 CA2d 272, 279, 210 P2d 768), as opposed to conclusions of law on the one hand and evidence of the facts on the other (*Krug v Meeham* (1952) 109 CA2d 274, 277, 240 P2d 732). The distinctions between ultimate facts, conclusions, and evidentiary facts, however, are not always easy to draw and often are a matter of degree. *Burks v Poppy Constr. Co.* (1962) 57 C2d 463, 473, 20 CR 609; 4 Witkin, California Procedure, *Pleading* §§378-396 (5th ed 2008).

PRACTICE TIP: The foregoing technical distinctions are little help when drafting allegations. A more practical approach is to:

- Outline the facts (*i.e.,* events, acts, omissions, relationships, and consequences) that show the plaintiff's primary rights, the defendant's duties, and the defendant's impingements on plaintiff's rights.
- Compare this outline with text discussions of the traditional causes of action and theories to ensure that each essential element is shown by a factual allegation and that nonessential facts are eliminated. See, *e.g.,* 4-5 Witkin, Procedure, *Pleading* §§515-898.
- Formulate direct, positive, and concise statements of the essential facts in a general form. Too much specificity or detail may limit evidence that can be introduced at trial or reveal potential defenses. Formbooks and treatises can show acceptable ways of stating common facts, even in conclusory form, as well as allegations that have been held to be deficient. See, *e.g.,* 4 Witkin, Procedure, *Pleading* §§384-392. However, California has not adopted "notice pleading," as have the federal courts and many states, and formbook forms adequate for those jurisdictions may be inadequate in California.

There is no need to plead facts that anticipate defenses. Allegations in the defendant's answer are considered controverted. CCP §431.20(b). However, if the allegations of the complaint reveal a defense, *e.g.,* that the statute of limitations has run, the complaint should also contain allegations that negate the defense. *Tarkington v California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 1502, 92 CR3d 131. In *Tarkington*, for example, because the plaintiffs' writ petition showed that the statute of limitations had run, plaintiffs pleaded facts sufficient to invoke the judge-made equitable tolling doctrine, which extends statutes of limitations when necessary to ensure fundamental practicality and fairness. In another example, in one series of cases the plaintiffs, anticipating a statute of limitations defense, alleged that their discovery of the defendants' wrongdoing was delayed. The complaints were insufficient to invoke the delayed discovery rule, however, because there were no allegations concerning the time or manner of discovery of the wrongdoing by any plaintiff. *McKelvey v Boeing N. Am., Inc.* (1999) 74 CA4th 151, 86 CR2d 645, superseded by statute as stated in *Grisham v Philip Morris, Inc.* (2007) 40 C4th 623, 637 n8, 54 CR3d 735. See also *Nelson v Indevus Pharms., Inc.* (2006) 142 CA4th 1202, 48 CR3d 668 (statute of limitations under CCP §340.8 begins to run from date when plaintiff has reason to suspect harm, not when effects of prescription drug are publicized).

An exhibit attached to the complaint and incorporated by reference (see §15.6) can sometimes serve as a substitute for allegations. See 4 Witkin, Procedure, *Pleading* §§427-437.

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§15.27 2. Direct Allegations; Information and Belief

Allegations of fact in a complaint should be direct and positive. Although allegations are to be liberally construed (CCP §452), and perfection in pleading is not required (*Lloyd v California Pictures Corp.* (1955) 136 CA2d 638, 643, 289 P2d 295), courts have imposed various sanctions on pleadings characterized as "argumentative," "inferential," or "by recital." See 4 Witkin, California Procedure, *Pleading* §§393-395 (5th ed 2008).

NOTE: The pleader should check the complaint for facts stated parenthetically that could be stated directly. For example, "*X*, the agent of *Y*," could be converted to "*X* was the agent of *Y* and was acting as *Y*'s agent in doing the following." See *Vilardo v County of Sacramento* (1942) 54 CA2d 413, 418, 129 P2d 165.

The pleader should not make allegations known to be false or misleading unless they are accepted legal fictions such as those embodied in common counts. See 4 Witkin, Procedure, *Pleading* §397. Making unfounded allegations can sometimes amount to malicious prosecution. See *Albertson v Raboff* (1960) 185 CA2d 372, 387, 8 CR 398. On the other hand, doubtful facts are often alleged, particularly against fictitiously named defendants, in order to preserve causes of action against the running of statutes of limitation. On joinder, see chap 14.

A pleader who has no direct personal knowledge of a fact can allege it "on information and belief." The allegation should be positive, *e.g.,* "Plaintiff is informed and believes, and thereon alleges …." The phrase "Plaintiff is informed and believes that" is merely a recital of the plaintiff's belief, not a direct allegation of the fact. See 4 Witkin, Procedure, *Pleading* §§398-399.

Pleaders use allegations on information and belief to help preserve a measure of credibility when stating facts within the defendant's knowledge or about which the plaintiff knows only by hearsay or guess.

WARNING: Alleging a fact on information and belief does not immunize the pleader from a perjury charge if he or she willfully verifies an allegation knowing it to be false. See *People v Agnew* (1947) 77 CA2d 748, 755, 176 P2d 724.

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V. CHOICE AND ELECTION OF REMEDIES

§15.28 A. General Considerations

California has only one form of civil action for enforcement or protection of private rights or prevention of private wrongs. CCP §307. Thus, a complaint may pursue both legal and equitable remedies and state causes of action based on contract and on tort. The plaintiff need only allege facts that entitle the plaintiff to some relief, and need not designate causes of action as legal or equitable, nor plead them with technical common law precision. See 4 Witkin, California Procedure, *Pleading* §§31-32 (5th ed 2008).

One cause of action, *i.e.,* one invasion of a primary right, may give rise to more than one remedy and entitle the plaintiff to alternative forms of relief. See 4 Witkin, Procedure, *Pleading* §§40-41.

EXAMPLE: The plaintiff may sometimes choose to state a cause of action that (1) is based on contract rather than tort; (2) traditionally was cognizable in courts of equity rather than courts of law; or (3) demands relief characterized as equitable (*e.g.,* specific performance) rather than legal (*e.g.,* damages).

The choice of causes of action alleged may affect such matters as:

- The jurisdictional classification of the case (for discussion of limited and unlimited civil actions, see chap 6);
- The county in which the case may be filed (venue);
- Whether factual issues will be tried to a jury;
- The applicable statute of limitations;
- The nature of available defenses; and
- The form of relief available.

See 3 Witkin, Procedure, *Actions* §§118-119.

EXAMPLE: The plaintiff may be able to avoid the procedural limitations placed on limited civil actions (see chap 6) by pursuing an equitable remedy, even though the amount in controversy is below $25,000. See *Silverman v Greenberg* (1938) 12 C2d 252, 254, 83 P2d 293. For discussion of classification of cases, see generally chap 6. A cause of action that can be pleaded as a breach of contract may sometimes be filed in a different county from the one where it would be filed if pleaded as a tort, and vice versa. On venue, see chap 8. Pleading in the form of a traditionally legal cause of action may preclude the defendant from raising such equitable defenses as laches or mutuality of remedy.

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§15.29 B. Tax Considerations

The nature of the causes of action pleaded and relief sought in a complaint can affect the form of the judgment obtained and the parties' tax liabilities. The plaintiff's choice of remedies and willingness to settle can be affected by whether the proceeds of a settlement or judgment are taxable income, and whether taxable as ordinary income or as a recovery of capital. A defendant, whether cross-complaining, asserting particular defenses, or settling on particular terms, may change nondeductible capital or personal expenditures into an item deductible as a business expense or otherwise.

EXAMPLE: A person from whom specific property was taken might sue the taker either for return of the property or for damages for its taking. Return of the specific property to the plaintiff might be viewed as a recovery of capital that is not income unless the plaintiff had previously taken a deduction for loss of the property. Recovery of money damages on the other hand might be viewed as a sale that constituted a taxable gain or loss. (This example does not purport to state the rules of tax law that govern a particular situation. The tax consequences of any prospective settlement or judgment must be determined by the pleader or consultants in light of the particular facts of the case and current tax law.)

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§15.30 C. Election of Remedies

A plaintiff's attorney must consider two aspects of election:

- Whether there is an administrative or other remedy that may be pursued as an alternative to the judicial remedy by civil action; and
- Whether in a lawsuit a choice must be made between two causes of action or theories that amount to inconsistent remedies.

If there are two coexisting but inconsistent remedies for one invasion of a primary right, the plaintiff must elect between them; an election to pursue one precludes pursuit of the other. *Mansfield v Pickwick Stages, Inc.* (1923) 191 C 129, 215 P 389; *Roam v Koop* (1974) 41 CA3d 1035, 1039, 116 CR 539. See generally 3 Witkin, California Procedure, *Actions* §§179-202 (5th ed 2008).

An injured worker may have to choose whether to pursue a defendant as an employer against whom the worker's exclusive remedy is a Workers' Compensation Appeals Board proceeding for benefits (see Lab C §3601) or as a nonemployer against whom a civil action for damages may be filed. See generally California Workers' Damages Practice §§4.38, 5.2, 5.7, 5.11 (2d ed Cal CEB 2001). In some instances, the plaintiff can file and pursue both an application for compensation and a civil action until obtaining sufficient information to know which of the remedies is more likely to be fruitful or until pursuit of one amounts to an estoppel to pursue the other. *Felix v WCAB* (1974) 41 CA3d 759, 765, 116 CR 345.

Although a plaintiff can allege different versions of the facts in separate counts of a complaint (see 4 Witkin, California Procedure, *Pleading* §§402-411 (5th ed 2008)), if the alternatives seek inconsistent remedies, the plaintiff is normally required to elect between them.

A person injured by a breach of contract may elect to affirm the contract and seek specific performance or to rescind and sue for restitution and damages, but an election to pursue one of those remedies bars invocation of the other. But see *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 336, 5 CR 686, in which the plaintiff was permitted to submit both tort and contract theories to the jury although different measures of damages flowed from each. See generally 3 Witkin, Procedure, *Actions* §§179-182.

Because election of remedies is a "harsh and disfavored" doctrine and as such is continually being narrowed and restricted, it is doubtful whether it survives at all in the context of attachment. *Waffner Int'l Corp. v Khorsandi* (1999) 69 CA4th 1261, 82 CR2d 241. Thus, election of remedies does not apply in an attachment context when different operative facts are involved in contract and tort claims. Thus, for example, a plaintiff who obtained a writ of attachment in a contract action against a corporation was not barred by the doctrine of election of remedies from pursuing tort claims against two officers of the corporation in a related but different action. 69 CA4th at 1280. The remedy of attachment is discussed in chap 32.

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VI. FILING COMPLAINT

§15.31 A. Filing and Serving Complaint and Summons; Fees

A printed Judicial Council form of summons should be prepared with the complaint. For the various prescribed forms of summons, see the forms in chap 17. The complaint and the summons are then given to the clerk of the court for filing, along with the filing fee.

The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the complaint is filed. When the complaint is amended to add a defendant, that defendant must be served and proof of service must be filed within 30 days after the amended complaint is filed. Cal Rules of Ct 3.110(a)-(b) (not applicable to unlawful detainer, family law proceedings, or proceedings with different service requirements prescribed by law). The court, on its own motion or on the application of a party, may extend or otherwise modify the time provided in Cal Rules of Ct 3.110(b). An application for a court order extending the time to serve a pleading must be filed before the time for service has elapsed. The application must be accompanied by a declaration showing why service has not been effected, documenting the efforts that were made to effect service, and specifying the date by which service is proposed to be effected. Cal Rules of Ct 3.110(e). Unless the court has granted an order extending the time to serve a complaint or cross-complaint, the failure to serve and file pleadings as required under this rule may result in an Order to Show Cause (OSC) being issued as to why sanctions shall not be imposed. Cal Rules of Ct 3.110(f). When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less than 5 calendar days before the hearing. Cal Rules of Ct 3.110(i).

The filing fee generally is fixed by statute. The fee for filing the first paper in a civil action or proceeding in superior court, other than a limited civil case or an adoption proceeding, is $355. Govt C §70611. The fee for filing the first paper in a limited civil case is $330. Govt C §70613(a). If the amount demanded, excluding attorney fees and costs, is $10,000 or less, the filing fee is $205. See Govt C §70613(b). On receipt of the complaint and the filing fee, the clerk files the complaint (see CCP §411.10) and issues a summons (see CCP §412.10). In the case of a pro se prisoner litigant, the complaint is deemed filed on the date it is delivered to prison authorities for forwarding to the superior court. *Moore v Twomey* (2004) 120 CA4th 910, 918, 16 CR3d 163. The plaintiff must then serve a copy of the complaint and the summons on the defendant (CCP §§413.10-416.90) and prepare a proof of service. On service of process and forms of proof of service, see chap 17.

On filing and serving the complaint by facsimile transmission, see §§18.11-18.16.

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§15.32 B. Case Cover Sheet

The first paper filed in an action or proceeding must be accompanied by a case cover sheet. Cal Rules of Ct 3.220(a). See form reproduced in §15.48. The case cover sheet consists of a Judicial Council form that is required in every civil action or proceeding, except those filed in small claims court or under the Probate Code, Family Law Code, or Welfare and Institutions Code. Cal Rules of Ct 3.220(b)(1). It is used for statistical purposes only and need not be served on the defendant with the complaint and summons. It does not affect the assignment of the case. Cal Rules of Ct 3.220(a).

If a party that is required to provide a cover sheet under this rule or a similar local rule fails to do so or provides a defective or incomplete cover sheet at the time the party's first paper is submitted for filing, the court clerk must file the paper. Failure of a party or a party's counsel to file a cover sheet as required by this rule may subject that party, its counsel, or both, to sanctions under Cal Rules of Ct 2.30. Cal Rules of Ct 3.220(c).

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§15.33 C. If Filing Fee Check Is Returned by Bank

If the clerk receives a complaint for filing, and the filing fees are paid by a check that is later returned by the bank without payment, the clerk must notify the party tendering the check that it has 20 days from the date of mailing of the notice within which to pay the fee and an administrative charge ($25 or no more than the actual cost incurred by the court) to reimburse the court for the costs of processing the returned check. CCP §411.20(a), (g). The fee and administrative charge must be paid by cash or certified check or by other means specified by the court, but not by traveler's check or personal check. CCP §411.20(a).

If the person who tendered the returned check is not a party but only acting on behalf of a party, the clerk shall notify not only the person who tendered the check, but also the party or that party's attorney, if any. CCP §411.20(a). The clerk's certificate of the mailing of the notice establishes a rebuttable presumption that the fee and administrative charge were not paid. CCP §411.20(a).

If, after the 20-day period following the mailing of notice, the fee and administrative charge remain unpaid, the clerk must void the filing. CCP §411.20(b), (g). See *Hu v Silgan Containers Corp.* (1999) 70 CA4th 1261, 83 CR2d 333 (once plaintiff failed to pay fees within 20 days after notice from clerk, trial court lost all jurisdiction over suit and lacked power to do anything but void complaint, even though plaintiff paid fees some months later). If an adverse party has filed a responsive pleading to the complaint, and the original filing is voided, the adverse party's filing is not required, and his or her filing fee must be refunded on request. CCP §411.20(c). If the adverse party's filing fee check is returned by the bank, the same notice procedures apply. CCP §411.20(d).

If any trial or other hearing is scheduled before the 20-day period has elapsed, the filing fee and the administrative charge must be paid before the trial or hearing; otherwise, the court will void the filing and proceed as though the paper had not been filed. CCP §411.20(e), (g).

If the clerk issues any documents in the proceeding, or performs a service for which a fee is required, and a check for the fee is returned unpaid, the court may order further proceedings suspended for the party tendering the check. The clerk must notify the party by mail that proceedings have been suspended until the fee and administrative charge have been paid by cash or certified check. The clerk's certificate of the mailing of the notice establishes a rebuttable presumption that the fees were not paid. CCP §411.20(f)-(g).

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§15.34 VII. USING OFFICIAL FORMS

Code of Civil Procedure §425.12 directs the Judicial Council to develop and approve official forms for use in California courts for complaints and answers based on personal injury, wrongful death, unlawful detainer, breach of contract, fraud, or property damage and statement of damages under CCP §§425.11 and 425.115. Use of the forms is optional. CCP §425.12; Cal Rules of Ct 1.30-1.45, 2.131-2.134.

The basic complaint form (Complaint—Personal Injury, Property Damage, Wrongful Death (Judicial Council Form PLD-PI-001) set forth in §15.36 must be accompanied by an attachment stating a cause of action. If one of the Judicial Council cause of action forms is not appropriate for use as an attachment, the complaint may be accompanied by traditional typed pleadings. The Judicial Council cause of action forms are subtitled Motor Vehicle, General Negligence, Intentional Tort, Premises Liability, and Products Liability. See §§15.37-15.41.

The mere fact that a plaintiff uses a Judicial Council form complaint does not make the complaint invulnerable to demurrer. *People ex rel Dep't of Transp. v Superior Court* (1992) 5 CA4th 1480, 7 CR2d 498 (plaintiff did not set out enough detail of "description of premises and circumstances of injury" under paragraph "Prem.L-1" in premises liability cause of action sheet (shown below in §15.40)).

If punitive damages are sought, the printed exemplary damages attachment should be used. Note that the amount of punitive damages may not be specified in the complaint. CC §3295(e).

The Judicial Council forms, supplemented with appropriate fact pleadings specifying the circumstances under which the plaintiff seeks recovery and indicating facts entitling the plaintiff to recover, are frequently used in both limited and unlimited civil cases.

NOTE: Under Govt C §§68600-68620, the Trial Court Delay Reduction Act, some superior courts have altered the pleading rules applicable to both form and nonform complaints. Practitioners should consult the local rules applicable in the court in which they will be filing the complaint. On the delay reduction rules generally, see chap 40.

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VIII. FORMS

§15.35 A. Form: Sample Complaint

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

C. Baker Able, No. 123456
1111 Main Street
Center, California 99999
Telephone: (123) 456-7890
Fax: (123) 456-7899
E-mail: cbakerable@ceb.com
Attorney for Plaintiffs

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
LIMITED CIVIL CASE

John Henry Smith, Helen B. Smith,	**No. _ _ _ _ _ _**
Plaintiffs,	**COMPLAINT**
	Personal Injuries
vs	
	[*In limited civil case, add:*
Walter A. Johnson, Good Products, Inc., Doe 1 through Doe 100,	**Amount demanded** _ _[*exceeds/does not exceed*]_ _ **$10,000**]
Defendants	

Plaintiffs allege:

FIRST CAUSE OF ACTION FOR NEGLIGENCE

1. Plaintiffs do not know the true names of the defendants sued as Doe 1 through Doe 100.

2. At all relevant times, plaintiffs were the owners of a

*** * ***

is not known and plaintiffs will amend this complaint to include this amount when it has been ascertained.

SECOND CAUSE OF ACTION FOR NEGLIGENCE

8. Plaintiffs incorporate in this cause of action the allegations of paragraphs 1 through 5 of the first cause of action.

9. In doing the things described below, Does 10 through 80

*** * ***

has been ascertained.

WHEREFORE, plaintiffs demand judgment for:

1. General damages for John Smith.

2. General damages for Helen Smith.

3. Medical and related expenses for each plaintiff according to proof.

4. Costs of this action and all other just relief.

Date: _ _ _ _ _ _ __[*Signature*]__
C. Baker Able
Attorney for Plaintiffs

VERIFICATION

I am a plaintiff in this action. The foregoing complaint is true of my own knowledge, except for matters stated in it on my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
Helen B. Smith

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: A well-pleaded complaint is fundamental to a successful civil action. For discussion of rules of pleading and guidance in shaping allegations to state a cause of action, see §§15.22-15.27.

The attorney may provide his or her fax number and e-mail address. Inclusion of a fax number or e-mail address does not constitute consent to service by fax or e-mail unless otherwise provided by law. Cal Rules of Ct 2.111(1). The caption of every pleading filed in a limited civil case must include the words "Limited Civil Case," as required by CCP §422.030(b). Cal Rules of Ct 2.111(10). A complaint filed in a limited civil case must state, immediately below the character of the action or proceeding, the amount demanded in the complaint, stated as follows: "Amount demanded exceeds $10,000" or "Amount demanded does not exceed $10,000," as required by Govt C §70613 (fee for filing first paper in limited civil case). Cal Rules of Ct 2.111(9). This amount must be specified because it affects the amount of the filing fee. See Govt C §70613. Additional format requirements are set forth in Cal Rules of Ct 2.100-2.119. For special format requirements for limited civil cases, see §11.26.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/ B. Judicial Council Official Complaint Forms/§15.36 1. Form: Complaint--Personal Injury, Property Damage, Wrongful Death (Judicial Council Form PLD-PI-001)

B. Judicial Council Official Complaint Forms

§15.36 1. Form: Complaint—Personal Injury, Property Damage, Wrongful Death (Judicial Council Form PLD-PI-001)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT: ☐ DOES 1 TO _____	
COMPLAINT—Personal Injury, Property Damage, Wrongful Death ☐ **AMENDED *(Number):*** **Type *(check all that apply):*** ☐ **MOTOR VEHICLE** ☐ **OTHER *(specify)*:** ☐ **Property Damage** ☐ **Wrongful Death** ☐ **Personal Injury** ☐ **Other Damages *(specify):***	
Jurisdiction *(check all that apply):* ☐ **ACTION IS A LIMITED CIVIL CASE** **Amount demanded** ☐ **does not exceed $10,000** ☐ **exceeds $10,000, but does not exceed $25,000** ☐ **ACTION IS AN UNLIMITED CIVIL CASE (exceeds $25,000)** ☐ **ACTION IS RECLASSIFIED by this amended complaint** ☐ **from limited to unlimited** ☐ **from unlimited to limited**	CASE NUMBER:

1. **Plaintiff** *(name or names):*
   alleges causes of action against **defendant** *(name or names):*

2. This pleading, including attachments and exhibits, consists of the following number of pages:
3. Each plaintiff named above is a competent adult
   a. ☐ **except** plaintiff *(name):*
      (1) ☐ a corporation qualified to do business in California
      (2) ☐ an unincorporated entity *(describe):*
      (3) ☐ a public entity *(describe):*
      (4) ☐ a minor ☐ an adult
         (a) ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
         (b) ☐ other *(specify):*
      (5) ☐ other *(specify):*
   b. ☐ **except** plaintiff *(name):*
      (1) ☐ a corporation qualified to do business in California
      (2) ☐ an unincorporated entity *(describe):*
      (3) ☐ a public entity *(describe):*
      (4) ☐ a minor ☐ an adult
         (a) ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
         (b) ☐ other *(specify):*
      (5) ☐ other *(specify):*

☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3.

Form Approved for Optional Use
Judicial Council of California
PLD-PI-001 [Rev. January 1, 2007]

COMPLAINT—Personal Injury, Property Damage, Wrongful Death

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Print

SHORT TITLE:	CASE NUMBER:

4. ☐ Plaintiff *(name):*
   is doing business under the fictitious name *(specify):*

   and has complied with the fictitious business name laws.
5. Each defendant named above is a natural person
   a. ☐ **except** defendant *(name):*
      (1) ☐ a business organization, form unknown
      (2) ☐ a corporation
      (3) ☐ an unincorporated entity *(describe):*
      (4) ☐ a public entity *(describe):*
      (5) ☐ other *(specify):*
   b. ☐ **except** defendant *(name):*
      (1) ☐ a business organization, form unknown
      (2) ☐ a corporation
      (3) ☐ an unincorporated entity *(describe):*
      (4) ☐ a public entity *(describe):*
      (5) ☐ other *(specify):*
   c. ☐ **except** defendant *(name):*
      (1) ☐ a business organization, form unknown
      (2) ☐ a corporation
      (3) ☐ an unincorporated entity *(describe):*
      (4) ☐ a public entity *(describe):*
      (5) ☐ other *(specify):*
   d. ☐ **except** defendant *(name):*
      (1) ☐ a business organization, form unknown
      (2) ☐ a corporation
      (3) ☐ an unincorporated entity *(describe):*
      (4) ☐ a public entity *(describe):*
      (5) ☐ other *(specify):*

   ☐ Information about additional defendants who are not natural persons is contained in Attachment 5.
6. The true names of defendants sued as Does are unknown to plaintiff.
   a. ☐ Doe defendants *(specify Doe numbers):* _____ were the agents or employees of other named defendants and acted within the scope of that agency or employment.
   b. ☐ Doe defendants *(specify Doe numbers):* _____ are persons whose capacities are unknown to plaintiff.
7. ☐ Defendants who are joined under Code of Civil Procedure section 382 are *(names)*:

8. This court is the proper court because
   a. ☐ at least one defendant now resides in its jurisdictional area.
   b. ☐ the principal place of business of a defendant corporation or unincorporated association is in its jurisdictional area.
   c. ☐ injury to person or damage to personal property occurred in its jurisdictional area.
   d. ☐ other *(specify):*

9. ☐ Plaintiff is required to comply with a claims statute, **and**
   a. ☐ has complied with applicable claims statutes, **or**
   b. ☐ is excused from complying because *(specify):*

Print

SHORT TITLE:	CASE NUMBER:

10. The following causes of action are attached and the statements above apply to each *(each complaint must have one or more causes of action attached):*
    a. ☐ Motor Vehicle
    b. ☐ General Negligence
    c. ☐ Intentional Tort
    d. ☐ Products Liability
    e. ☐ Premises Liability
    f. ☐ Other *(specify):*

11. Plaintiff has suffered
    a. ☐ wage loss
    b. ☐ loss of use of property
    c. ☐ hospital and medical expenses
    d. ☐ general damage
    e. ☐ property damage
    f. ☐ loss of earning capacity
    g. ☐ other damage *(specify):*

12. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are
    a. ☐ listed in Attachment 12.
    b. ☐ as follows:

13. The relief sought in this complaint is within the jurisdiction of this court.

14. **Plaintiff prays** for judgment for costs of suit; for such relief as is fair, just, and equitable; and for
    a. (1) ☐ compensatory damages
    (2) ☐ punitive damages
    The amount of damages is *(in cases for personal injury or wrongful death, you must check (1)):*
    (1) ☐ according to proof
    (2) ☐ in the amount of: $

15. ☐ The paragraphs of this complaint alleged on information and belief are as follows *(specify paragraph numbers):*

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY)

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.37 2. Form: Cause of Action--Motor Vehicle (Judicial Council Form PLD-PI-001(1))

§15.37 2. Form: Cause of Action—Motor Vehicle (Judicial Council Form PLD-PI-001(1))

Print

PLD-PI-001(1)

SHORT TITLE:	CASE NUMBER:

_____ CAUSE OF ACTION—Motor Vehicle

(number)

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff *(name)*:

MV- 1. Plaintiff alleges the acts of defendants were negligent; the acts were the legal (proximate) cause of injuries and damages to plaintiff; the acts occurred
on *(date)*:
at *(place)*:

MV- 2. DEFENDANTS

a. ☐ The defendants who operated a motor vehicle are *(names)*:

☐ Does _____ to _____

b. ☐ The defendants who employed the persons who operated a motor vehicle in the course of their employment are *(names)*:

☐ Does _____ to _____

c. ☐ The defendants who owned the motor vehicle which was operated with their permission are *(names)*:

☐ Does _____ to _____

d. ☐ The defendants who entrusted the motor vehicle are *(names)*:

☐ Does _____ to _____

e. ☐ The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were *(names)*:

☐ Does _____ to _____

f. ☐ The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are ☐ listed in Attachment MV-2f ☐ as follows:

☐ Does _____ to _____ **Page** _____

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.38 3. Form: Cause of Action--General Negligence (Judicial Council Form PLD-PI-001(2))

§15.38 3. Form: Cause of Action—General Negligence (Judicial Council Form PLD-PI-001(2))

Print

PLD-PI-001(2)

SHORT TITLE:	CASE NUMBER:

_____ **CAUSE OF ACTION—General Negligence** Page _____
(number)

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

GN-1. Plaintiff *(name)*:

alleges that defendant *(name)*:

☐ Does _____ to _____

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant negligently caused the damage to plaintiff

on *(date)*:

at *(place)*:

(description of reasons for liability):

Form Approved for Optional Use
Judicial Council of California
PLD-PI-001(2) [Rev. January 1, 2007]

CAUSE OF ACTION—General Negligence

CEB
Code of Civil Procedure 425.12
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.39 4. Form: Cause of Action--Intentional Tort (Judicial Council Form PLD-PI-001(3))

§15.39 4. Form: Cause of Action—Intentional Tort (Judicial Council Form PLD-PI-001(3))

Print

PLD-PI-001(3)

SHORT TITLE:	CASE NUMBER

_____ **CAUSE OF ACTION—Intentional Tort** **Page** _____
(number)

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

IT-1. Plaintiff *(name)*:

alleges that defendant *(name)*:

☐ Does _____ to _____

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff
on *(date)*:
at *(place)*:

(description of reasons for liability):

Form Approved for Optional Use
Judicial Council of California
PLD-PI-001(3) [Rev. January 1, 2007]

CAUSE OF ACTION–Intentional Tort

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.40 5. Form: Cause of Action--Premises Liability (Judicial Council Form PLD-PI-001(4))

§15.40 5. Form: Cause of Action—Premises Liability (Judicial Council Form PLD-PI-001(4))

Print

PLD-PI-001(4)

SHORT TITLE:	CASE NUMBER:

_____ CAUSE OF ACTION—Premises Liability Page _____
(number)

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

Prem.L-1. Plaintiff *(name):*

alleges the acts of defendants were the legal (proximate) cause of damages to plaintiff.

On *(date):* plaintiff was injured on the following premises in the following fashion *(description of premises and circumstances of injury):*

Prem.L-2. ☐ **Count One—Negligence** The defendants who negligently owned, maintained, managed and operated the described premises were *(names):*

☐ Does _____ to _____

Prem.L-3. ☐ **Count Two—Willful Failure to Warn** [Civil Code section 846] The defendant owners who willfully or maliciously failed to guard or warn against a dangerous condition, use, structure, or activity were *(names):*

☐ Does _____ to _____

Plaintiff, a recreational user, was ☐ an invited guest ☐ a paying guest.

Prem.L-4. ☐ **Count Three—Dangerous Condition of Public Property** The defendants who owned public property on which a dangerous condition existed were *(names):*

☐ Does _____ to _____

a. ☐ The defendant public entity had ☐ actual ☐ constructive notice of the existence of the dangerous condition in sufficient time prior to the injury to have corrected it.

b. ☐ The condition was created by employees of the defendant public entity.

Prem.L-5. a. ☐ **Allegations about Other Defendants** The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were *(names):*

☐ Does _____ to _____

b. ☐ The defendants who are liable to plaintiffs for other reasons and the reasons for their liability are ☐ described in attachment Prem.L-5.b ☐ as follows *(names):*

Form Approved for Optional Use
Judicial Council of California
PLD-PI-001(4) [Rev. January 1, 2007]

CEB

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.41 6. Form: Cause of Action--Products Liability (Judicial Council Form PLD-PI-001(5))

§15.41 6. Form: Cause of Action—Products Liability (Judicial Council Form PLD-PI-001(5))

Print

PLD-PI-001(5)

SHORT TITLE:	CASE NUMBER:

_____ **CAUSE OF ACTION—Products Liability** **Page** _____
(number)

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint
(Use a separate cause of action form for each cause of action.)

Plaintiff *(name)*:

Prod. L-1. On or about *(date)*: plaintiff was injured by the following product:

Prod. L-2. Each of the defendants knew the product would be purchased and used without inspection for defects. The product was defective when it left the control of each defendant. The product at the time of injury was being
☐ used in the manner intended by the defendants.
☐ used in the manner that was reasonably foreseeable by defendants as involving a substantial danger not readily apparent. Adequate warnings of the danger were not given.

Prod. L-3. Plaintiff was a
☐ purchaser of the product. ☐ user of the product.
☐ bystander to the use of the product. ☐ other *(specify)*:

PLAINTIFF'S INJURY WAS THE LEGAL (PROXIMATE) RESULT OF THE FOLLOWING:

Prod. L- 4. ☐ **Count One—Strict liability** of the following defendants who
a. ☐ manufactured or assembled the product *(names)*:

☐ Does _____ to _____
b. ☐ designed and manufactured component parts supplied to the manufacturer *(names)*:

☐ Does _____ to _____
c. ☐ sold the product to the public *(names)*:

☐ Does _____ to _____

Prod . L-5. ☐ **Count Two—Negligence** of the following defendants who owed a duty to plaintiff *(names)*:

☐ Does _____ to _____

Prod. L-6. ☐ **Count Three—Breach of warranty** by the following defendants *(names)*:

☐ Does _____ to _____
a. ☐ who breached an implied warranty
b. ☐ who breached an express warranty which was
☐ written ☐ oral

Prod. L-7. ☐ The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are
☐ listed in Attachment-Prod. L-7 ☐ as follows:

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Judicial Council of California
PLD-PI-001(5) [Rev. January 1, 2007]

CAUSE OF ACTION—Products Liability

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.42 7. Form: Exemplary Damages Attachment (Judicial Council Form PLD-PI-001(6))

§15.42 7. Form: Exemplary Damages Attachment (Judicial Council Form PLD-PI-001(6))

Print

PLD-PI-001(6)

SHORT TITLE:	CASE NUMBER:

Exemplary Damages Attachment

Page _____

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

EX-1. As additional damages against defendant *(name)*:

Plaintiff alleges defendant was guilty of

☐ malice
☐ fraud
☐ oppression

as defined in Civil Code section 3294, and plaintiff should recover, in addition to actual damages, damages to make an example of and to punish defendant.

EX-2. The facts supporting plaintiff's claim are as follows:

EX-3. The amount of exemplary damages sought is

a. ☐ not shown, pursuant to Code of Civil Procedure section 425.10.
b. ☐ $

Form Approved for Optional Use
Judicial Council of California
PLD-PI-001(6) [Rev. January 1, 2007]

Exemplary Damages Attachment

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: This form may be used in personal injury and wrongful death cases in which the plaintiff is requesting punitive damages. See §15.9. It may accompany a statement of damages requested pursuant to CCP §425.11. To obtain punitive damages in a request for default judgment, plaintiff must serve a statement reserving the right to seek punitive damages before entry of default. See §§15.10, 38.19.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.43 8. Form: Complaint--Contract (Judicial Council Form PLD-C-001)

§15.43 8. Form: Complaint—Contract (Judicial Council Form PLD-C-001)

Print

PLD-C-001

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT: ☐ DOES 1 TO _____	
CONTRACT ☐ **COMPLAINT** ☐ **AMENDED COMPLAINT *(Number):*** ☐ **CROSS-COMPLAINT** ☐ **AMENDED CROSS-COMPLAINT *(Number):***	
Jurisdiction *(check all that apply):* ☐ **ACTION IS A LIMITED CIVIL CASE** **Amount demanded** ☐ **does not exceed $10,000** ☐ **exceeds $10,000 but does not exceed $25,000** ☐ **ACTION IS AN UNLIMITED CIVIL CASE (exceeds $25,000)** ☐ **ACTION IS RECLASSIFIED by this amended complaint or cross-complaint** ☐ **from limited to unlimited** ☐ **from unlimited to limited**	CASE NUMBER:

1. **Plaintiff*** *(name or names):*

   alleges causes of action against **defendant*** *(name or names):*

2. This pleading, including attachments and exhibits, consists of the following number of pages:
3. a. Each plaintiff named above is a competent adult
   ☐ **except** plaintiff *(name):*
   (1) ☐ a corporation qualified to do business in California
   (2) ☐ an unincorporated entity *(describe):*
   (3) ☐ other *(specify):*

   b. ☐ Plaintiff *(name):*
   a. ☐ has complied with the fictitious business name laws and is doing business under the fictitious name *(specify):*

   b. ☐ has complied with all licensing requirements as a licensed *(specify):*
   c. ☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3c.
4. a. Each defendant named above is a natural person

☐ **except** defendant *(name):*	☐ **except** defendant *(name):*
(1) ☐ a business organization, form unknown	(1) ☐ a business organization, form unknown
(2) ☐ a corporation	(2) ☐ a corporation
(3) ☐ an unincorporated entity *(describe):*	(3) ☐ an unincorporated entity *(describe):*
(4) ☐ a public entity *(describe):*	(4) ☐ a public entity *(describe):*
(5) ☐ other *(specify):*	(5) ☐ other *(specify):*

* If this form is used as a cross-complaint, plaintiff means cross-complainant and defendant means cross-defendant.

Form Approved for Optional Use
Judicial Council of California
PLD-C-001 [Rev. January 1, 2007]

COMPLAINT—Contract

Code of Civil Procedure, § 425.12

Print

PLD-C-001

SHORT TITLE:	CASE NUMBER:

4. *(Continued)*
   b. The true names of defendants sued as Does are unknown to plaintiff.
      (1) ☐ Doe defendants *(specify Doe numbers):* _____ were the agents or employees of the named defendants and acted within the scope of that agency or employment.
      (2) ☐ Doe defendants *(specify Doe numbers):* _____ are persons whose capacities are unknown to plaintiff.
   c. ☐ Information about additional defendants who are not natural persons is contained in Attachment 4c.
   d. ☐ Defendants who are joined under Code of Civil Procedure section 382 are *(names):*

5. ☐ Plaintiff is required to comply with a claims statute, **and**
   a. ☐ has complied with applicable claims statutes, *or*
   b. ☐ is excused from complying because *(specify):*

6. ☐ This action is subject to ☐ Civil Code section 1812.10 ☐ Civil Code section 2984.4.
7. This court is the proper court because
   a. ☐ a defendant entered into the contract here.
   b. ☐ a defendant lived here when the contract was entered into.
   c. ☐ a defendant lives here now.
   d. ☐ the contract was to be performed here.
   e. ☐ a defendant is a corporation or unincorporated association and its principal place of business is here.
   f. ☐ real property that is the subject of this action is located here.
   9. ☐ other *(specify):*

8. The following causes of action are attached and the statements above apply to each *(each complaint must have one or more causes of action attached):*
   ☐ Breach of Contract
   ☐ Common Counts
   ☐ Other *(specify):*

9. ☐ Other allegations:

10. **Plaintiff prays** for judgment for costs of suit; for such relief as is fair, just, and equitable; and for
    a. ☐ damages of: $
    b. ☐ interest on the damages
       (1) ☐ according to proof
       (2) ☐ at the rate of *(specify):* percent per year from *(date):*
    c. ☐ attorney's fees
       (1) ☐ of: $
       (2) ☐ according to proof.
    d. ☐ other *(specify):*

11. ☐ The paragraphs of this pleading alleged on information and belief are as follows *(specify paragraph numbers)*:

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PLAINTIFF OR ATTORNEY)

(If you wish to verify this pleading, affix a verification.)

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.44 9. Form: Cause of Action--Breach of Contract (Judicial Council Form PLD-C-001(1))

§15.44 9. Form: Cause of Action—Breach of Contract (Judicial Council Form PLD-C-001(1))

Print

PLD-C-001(1)

SHORT TITLE:	CASE NUMBER:

CAUSE OF ACTION—Breach of Contract

(number)

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

BC-1. Plaintiff *(name):*

alleges that on or about *(date):*
a ☐ written ☐ oral ☐ other *(specify):*
agreement was made between *(name parties to agreement):*

☐ A copy of the agreement is attached as Exhibit A, or
☐ The essential terms of the agreement ☐ are stated in Attachment BC- 1 ☐ are as follows *(specify):*

BC-2. On or about *(dates):*
defendant breached the agreement by ☐ the acts specified in Attachment BC-2 ☐ the following acts *(specify):*

BC-3. Plaintiff has performed all obligations to defendant except those obligations plaintiff was prevented or excused from performing.

BC-4. Plaintiff suffered damages legally (proximately) caused by defendant's breach of the agreement
☐ as stated in Attachment BC-4 ☐ as follows *(specify):*

BC-5. ☐ Plaintiff is entitled to attorney fees by an agreement or a statute
☐ of $
☐ according to proof.

BC-6. ☐ Other:

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.45 10. Form: Cause of Action--Common Counts (Judicial Council Form PLD-C-001(2))

§15.45 10. Form: Cause of Action—Common Counts (Judicial Council Form PLD-C-001(2))

Print

PLD-C-001(2)

SHORT TITLE:	CASE NUMBER:

_____ **CAUSE OF ACTION—Common Counts**
(number)

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

CC-1. Plaintiff *(name):*

alleges that defendant *(name):*

became indebted to ☐ plaintiff ☐ other *(name):*

a. ☐ within the last four years
- (1) ☐ on an open book account for money due.
- (2) ☐ because an account was stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.

b. ☐ within the last ☐ two years ☐ four years
- (1) ☐ for money had and received by defendant for the use and benefit of plaintiff.
- (2) ☐ for work, labor, services and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff.
  - ☐ the sum of $
  - ☐ the reasonable value.
- (3) ☐ for goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff
  - ☐ the sum of $
  - ☐ the reasonable value.
- (4) ☐ for money lent by plaintiff to defendant at defendant's request.
- (5) ☐ for money paid, laid out, and expended to or for defendant at defendant's special instance and request.
- (6) ☐ other *(specify):*

CC-2. $, which is the reasonable value, is due and unpaid despite plaintiff's demand, plus prejudgment interest ☐ according to proof ☐ at the rate of _____ percent per year from *(date):*

CC-3. ☐ Plaintiff is entitled to attorney fees by an agreement or a statute
- ☐ of $
- ☐ according to proof.

CC-4. ☐ Other:

Page _____

Form Approved for Optional Use
Judicial Council of California
PLD-C-001(2) [Rev. January 1, 2009]

CAUSE OF ACTION—Common Counts

CEB

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.46 11. Form: Cause of Action--Fraud (Judicial Council Form PLD-C-001(3))

§15.46 11. Form: Cause of Action—Fraud (Judicial Council Form PLD-C-001(3))

Print

PLD-C-001(3)

SHORT TITLE:	CASE NUMBER:

CAUSE OF ACTION—Fraud

_____ (number)

ATTACHMENT TO ☐ Complaint ☐ Cross-Complaint

(*Use a separate cause of action form for each cause of action.*)

FR- 1. Plaintiff (*name*):

alleges that defendant *(name)*:

on or about (*date*): defrauded plaintiff as follows:

FR-2. ☐ **Intentional or Negligent Misrepresentation**

a. Defendant made representations of material fact ☐ as stated in Attachment FR-2.a ☐ as follows:

b. These representations were in fact false. The truth was ☐ as stated in Attachment FR-2.b ☐ as follows:

c. When defendant made the representations,
- ☐ defendant knew they were false, **or**
- ☐ defendant had no reasonable ground for believing the representations were true.

d. Defendant made the representations with the intent to defraud and induce plaintiff to act as described in item FR-5. At the time plaintiff acted, plaintiff did not know the representations were false and believed they were true. Plaintiff acted in justifiable reliance upon the truth of the representations.

FR-3. ☐ **Concealment**

a. Defendant concealed or suppressed material facts ☐ as stated in Attachment FR-3.a ☐ as follows:

b. Defendant concealed or suppressed material facts
- ☐ defendant was bound to disclose.
- ☐ by telling plaintiff other facts to mislead plaintiff and prevent plaintiff from discovering the concealed or suppressed facts.

c. Defendant concealed or suppressed these facts with the intent to defraud and induce plaintiff to act as described in item FR-5. At the time plaintiff acted, plaintiff was unaware of the concealed or suppressed facts and would not have taken the action if plaintiff had known the facts.

Page _____

Form Approved for Optional Use
Judicial Council of California
PLD-C-001(3) [Rev. January 1, 2007]

CEB
Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Print

PLD-C-001(3)

SHORT TITLE:	CASE NUMBER:

CAUSE OF ACTION—Fraud

_____ (number)

FR-4. ☐ **Promise Without Intent to Perform**

a. Defendant made a promise about a material matter without any intention of performing it ☐ as stated in Attachment FR-4.a ☐ as follows:

b. Defendant's promise without any intention of performance was made with the intent to defraud and induce plaintiff to rely upon it and to act as described in item FR-5. At the time plaintiff acted, plaintiff was unaware of defendant's intention not to perform the promise. Plaintiff acted in justifiable reliance upon the promise.

FR-5. In justifiable reliance upon defendant's conduct, plaintiff was induced to act ☐ as stated in Attachment FR-5 ☐ as follows:

FR-6. Because of plaintiff's reliance upon defendant's conduct, plaintiff has been damaged ☐ as stated in Attachment FR- 6 ☐ as follows:

FR-7. Other:

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.47 12. Form: Complaint--Unlawful Detainer (Judicial Council Form UD-100)

§15.47 12. Form: Complaint—Unlawful Detainer (Judicial Council Form UD-100)

Print

UD-100

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT: ☐ DOES 1 TO _____	
COMPLAINT — UNLAWFUL DETAINER*	CASE NUMBER:
☐ **COMPLAINT** ☐ **AMENDED COMPLAINT *(Amendment Number):*** _____	

Jurisdiction *(check all that apply):*

☐ **ACTION IS A LIMITED CIVIL CASE**
Amount demanded ☐ **does not exceed $10,000**
☐ **exceeds $10,000 but does not exceed $25,000**

☐ **ACTION IS AN UNLIMITED CIVIL CASE (amount demanded exceeds $25,000)**

☐ **ACTION IS RECLASSIFIED by this amended complaint or cross-complaint *(check all that apply):***
☐ **from unlawful detainer to general unlimited civil (possession not in issue)** ☐ **from limited to unlimited**
☐ **from unlawful detainer to general limited civil (possession not in issue)** ☐ **from unlimited to limited**

1. PLAINTIFF *(name each):*

   alleges causes of action against DEFENDANT *(name each):*

2. a. Plaintiff is (1) ☐ an individual over the age of 18 years. (4) ☐ a partnership.
   (2) ☐ a public agency. (5) ☐ a corporation.
   (3) ☐ other *(specify):*

   b. ☐ Plaintiff has complied with the fictitious business name laws and is doing business under the fictitious name of *(specify):*

3. Defendant named above is in possession of the premises located at *(street address, apt. no., city, zip code, and county):*

4. Plaintiff's interest in the premises is ☐ as owner ☐ other *(specify):*
5. The true names and capacities of defendants sued as Does are unknown to plaintiff.
6. a. On or about *(date):* defendant *(name each):*

   (1) agreed to rent the premises as a ☐ month-to-month tenancy ☐ other tenancy *(specify):*
   (2) agreed to pay rent of $ payable ☐ monthly ☐ other *(specify frequency):*
   (3) agreed to pay rent on the ☐ first of the month ☐ other day *(specify):*

   b. This ☐ written ☐ oral agreement was made with
   (1) ☐ plaintiff. (3) ☐ plaintiff's predecessor in interest.
   (2) ☐ plaintiff's agent. (4) ☐ other *(specify):*

*** NOTE:** Do not use this form for evictions after sale (Code Civ. Proc., § 1161a).

Form Approved for Optional Use
Judicial Council of California
UD-100 [Rev. July 1, 2005]

COMPLAINT—UNLAWFUL DETAINER

Civil Code, § 1940 et seq.
Code of Civil Procedure §§ 425.12, 1166
www.courtinfo.ca.gov

Print

PLAINTIFF *(Name):* DEFENDANT *(Name):*	CASE NUMBER:

6. c. ☐ The defendants not named in item 6a are
   (1) ☐ subtenants.
   (2) ☐ assignees.
   (3) ☐ other *(specify):*
   d. ☐ The agreement was later changed as follows *(specify):*

   e. ☐ A copy of the written agreement, including any addenda or attachments that form the basis of this complaint, is attached and labeled Exhibit 1. *(Required for residential property, unless item 6f is checked. See Code Civ. Proc., § 1166.)*
   f. ☐ *(For residential property)* A copy of the written agreement is **not** attached because *(specify reason):*
   (1) ☐ the written agreement is not in the possession of the landlord or the landlord's employees or agents.
   (2) ☐ this action is solely for nonpayment of rent (Code Civ. Proc., § 1161(2)).

7. ☐ a. Defendant *(name each):*

was served the following notice on the same date and in the same manner:

(1) ☐ 3-day notice to pay rent or quit
(2) ☐ 30-day notice to quit
(3) ☐ 60-day notice to quit
(4) ☐ 3-day notice to perform covenants or quit
(5) ☐ 3-day notice to quit
(6) ☐ Other *(specify):*

b. (1) On *(date):* the period stated in the notice expired at the end of the day.
(2) Defendants failed to comply with the requirements of the notice by that date.
c. All facts stated in the notice are true.
d. ☐ The notice included an election of forfeiture.
e. ☐ A copy of the notice is attached and labeled Exhibit 2. *(Required for residential property. See Code Civ. Proc., § 1166.)*
f. ☐ One or more defendants were served (1) with a different notice, (2) on a different date, or (3) in a different manner, as stated in Attachment 8c. *(Check item 8c and attach a statement providing the information required by items 7a–e and 8 for each defendant.)*

8. a. ☐ The notice in item 7a was served on the defendant named in item 7a as follows:
(1) ☐ by personally handing a copy to defendant on *(date):*
(2) ☐ by leaving a copy with *(name or description):*
a person of suitable age and discretion, on *(date):* at defendant's
☐ residence ☐ business AND mailing a copy to defendant at defendant's place of residence on *(date):* because defendant cannot be found at defendant's residence or usual place of business.
(3) ☐ by posting a copy on the premises on *(date):* ☐ AND giving a copy to a person found residing at the premises AND mailing a copy to defendant at the premises on *(date):*
(a) ☐ because defendant's residence and usual place of business cannot be ascertained OR
(b) ☐ because no person of suitable age or discretion can be found there.
(4) ☐ *(Not for 3-day notice; see Civil Code, § 1946 before using)* by sending a copy by certified or registered mail addressed to defendant on *(date):*
(5) ☐ *(Not for residential tenancies; see Civil Code, § 1953 before using)* in the manner specified in a written commercial lease between the parties.

b. ☐ *(Name):*
was served on behalf of all defendants who signed a joint written rental agreement.
c. ☐ Information about service of notice on the defendants alleged in item 7f is stated in Attachment 8c.
d. ☐ Proof of service of the notice in item 7a is attached and labeled Exhibit 3.

Print

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT*(Name)*:	

9. ☐ Plaintiff demands possession from each defendant because of expiration of a fixed-term lease.
10. ☐ At the time the 3-day notice to pay rent or quit was served, the amount of **rent due** was $
11. ☐ The fair rental value of the premises is $ per day.
12. ☐ Defendant's continued possession is malicious, and plaintiff is entitled to statutory damages under Code of Civil Procedure section 1174(b). *(State specific facts supporting a claim up to $600 in Attachment 12.)*
13. ☐ A written agreement between the parties provides for attorney fees.
14. ☐ Defendant's tenancy is subject to the local rent control or eviction control ordinance of *(city or county, title of ordinance, and date of passage):*

    Plaintiff has met all applicable requirements of the ordinances.
15. ☐ Other allegations are stated in Attachment 15.
16. Plaintiff accepts the jurisdictional limit, if any, of the court.
17. **PLAINTIFF REQUESTS**
    a. possession of the premises.
    b. costs incurred in this proceeding:
    c. ☐ past-due rent of $
    d. ☐ reasonable attorney fees.
    e. ☐ forfeiture of the agreement.
    f. ☐ damages at the rate stated in item 11 from *(date):* for each day that defendants remain in possession through entry of judgment.
    g. ☐ statutory damages up to $600 for the conduct alleged in item 12.
    h. ☐ other *(specify):*
18. ☐ Number of pages attached *(specify):* _____

UNLAWFUL DETAINER ASSISTANT (Bus. & Prof. Code, §§ 6400–6415)

19. *(Complete in all cases.)* An unlawful detainer assistant ☐ did **not** ☐ did for compensation give advice or assistance with this form. *(If plaintiff has received **any** help or advice for pay from an unlawful detainer assistant, state:)*
    a. Assistant's name:
    b. Street address, city, and zip code:
    c. Telephone No.:
    d. County of registration:
    e. Registration No.:
    f. Expires on *(date):*

Date:

_____ (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF PLAINTIFF OR ATTORNEY)

VERIFICATION

(Use a different verification form if the verification is by an attorney or for a corporation or partnership.)

I am the plaintiff in this proceeding and have read this complaint. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF PLAINTIFF)

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §15.34.

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Source: Civil Litigation/California Civil Procedure Before Trial/15 Complaints/§15.48 13. Form: Civil Case Cover Sheet (Judicial Council Form CM-010)

§15.48 13. Form: Civil Case Cover Sheet (Judicial Council Form CM-010)

Print

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	

CIVIL CASE COVER SHEET	**Complex Case Designation**	CASE NUMBER:
☐ **Unlimited** (Amount demanded exceeds $25,000) ☐ **Limited** (Amount demanded is $25,000 or less)	☐ **Counter** ☐ **Joinder** Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	JUDGE: DEPT:

Items 1–6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:

Auto Tort
- ☐ Auto (22)
- ☐ Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- ☐ Asbestos (04)
- ☐ Product liability (24)
- ☐ Medical malpractice (45)
- ☐ Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- ☐ Business tort/unfair business practice (07)
- ☐ Civil rights (08)
- ☐ Defamation (13)
- ☐ Fraud (16)
- ☐ Intellectual property (19)
- ☐ Professional negligence (25)
- ☐ Other non-PI/PD/WD tort (35)

Employment
- ☐ Wrongful termination (36)
- ☐ Other employment (15)

Contract
- ☐ Breach of contract/warranty (06)
- ☐ Rule 3.740 collections (09)
- ☐ Other collections (09)
- ☐ Insurance coverage (18)
- ☐ Other contract (37)

Real Property
- ☐ Eminent domain/Inverse condemnation (14)
- ☐ Wrongful eviction (33)
- ☐ Other real property (26)

Unlawful Detainer
- ☐ Commercial (31)
- ☐ Residential (32)
- ☐ Drugs (38)

Judicial Review
- ☐ Asset forfeiture (05)
- ☐ Petition re: arbitration award (11)
- ☐ Writ of mandate (02)
- ☐ Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)
- ☐ Antitrust/Trade regulation (03)
- ☐ Construction defect (10)
- ☐ Mass tort (40)
- ☐ Securities litigation (28)
- ☐ Environmental/Toxic tort (30)
- ☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- ☐ Enforcement of judgment (20)

Miscellaneous Civil Complaint
- ☐ RICO (27)
- ☐ Other complaint *(not specified above)* (42)

Miscellaneous Civil Petition
- ☐ Partnership and corporate governance (21)
- ☐ Other petition *(not specified above)* (43)

2. This case ☐ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
   a. ☐ Large number of separately represented parties
   b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. ☐ Substantial amount of documentary evidence
   d. ☐ Large number of witnesses
   e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
   f. ☐ Substantial postjudgment judicial supervision
3. Remedies sought *(check all that apply)*: a. ☐ monetary b. ☐ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action *(specify)*:
5. This case ☐ is ☐ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. *(You may use form CM-015.)*

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on **all** other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 [Rev. July 1, 2007]

CIVIL CASE COVER SHEET

Cal. Rules of Court, rules 2.30, 3.220, 3.400–3.403, 3.740;
Cal. Standards of Judicial Administration, std. 3.10
www.courtinfo.ca.gov

Print

CM-010

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you **must** complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than $25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort
- Auto (22)–Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

Other PI/PD/WD (Personal Injury/ Property Damage/Wrongful Death) Tort
- Asbestos (04)
  - Asbestos Property Damage
  - Asbestos Personal Injury/ Wrongful Death
- Product Liability *(not asbestos or toxic/environmental)* (24)
- Medical Malpractice (45)
  - Medical Malpractice–Physicians & Surgeons
  - Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
  - Premises Liability (e.g., slip and fall)
  - Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
  - Intentional Infliction of Emotional Distress
  - Negligent Infliction of Emotional Distress
  - Other PI/PD/WD

Non-PI/PD/WD (Other) Tort
- Business Tort/Unfair Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
  - Legal Malpractice
  - Other Professional Malpractice *(not medical or legal)*
- Other Non-PI/PD/WD Tort (35)

Employment
- Wrongful Termination (36)
- Other Employment (15)

Contract
- Breach of Contract/Warranty (06)
  - Breach of Rental/Lease Contract *(not unlawful detainer or wrongful eviction)*
  - Contract/Warranty Breach–Seller Plaintiff *(not fraud or negligence)*
  - Negligent Breach of Contract/ Warranty
  - Other Breach of Contract/Warranty
- Collections (e.g., money owed, open book accounts) (09)
  - Collection Case–Seller Plaintiff
  - Other Promissory Note/Collections Case
- Insurance Coverage *(not provisionally complex)* (18)
  - Auto Subrogation
  - Other Coverage
- Other Contract (37)
  - Contractual Fraud
  - Other Contract Dispute

Real Property
- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
  - Writ of Possession of Real Property
  - Mortgage Foreclosure
  - Quiet Title
  - Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

Unlawful Detainer
- Commercial (31)
- Residential (32)
- Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)*

Judicial Review
- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
  - Writ–Administrative Mandamus
  - Writ–Mandamus on Limited Court Case Matter
  - Writ–Other Limited Court Case Review
- Other Judicial Review (39)
  - Review of Health Officer Order
  - Notice of Appeal–Labor Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)
- Antitrust/Trade Regulation (03)
- Construction Defect (10)
- Claims Involving Mass Tort (40)
- Securities Litigation (28)
- Environmental/Toxic Tort (30)
- Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

Enforcement of Judgment
- Enforcement of Judgment (20)
  - Abstract of Judgment (Out of County)
  - Confession of Judgment *(non-domestic relations)*
  - Sister State Judgment
  - Administrative Agency Award *(not unpaid taxes)*
  - Petition/Certification of Entry of Judgment on Unpaid Taxes
  - Other Enforcement of Judgment Case

Miscellaneous Civil Complaint
- RICO (27)
- Other Complaint *(not specified above)* (42)
  - Declaratory Relief Only
  - Injunctive Relief Only *(non-harassment)*
  - Mechanics Lien
  - Other Commercial Complaint Case *(non-tort/non-complex)*
  - Other Civil Complaint *(non-tort/non-complex)*

Miscellaneous Civil Petition
- Partnership and Corporate Governance (21)
- Other Petition *(not specified above)* (43)
  - Civil Harassment
  - Workplace Violence
  - Elder/Dependent Adult Abuse
  - Election Contest
  - Petition for Name Change
  - Petition for Relief From Late Claim
  - Other Civil Petition

Copies: The cover sheet must accompany the first paper filed in an action or other proceeding. Copies need not be served on defendant.

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16

Amending Complaints

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I. INTRODUCTION

§16.1 A. Scope of Chapter

This chapter discusses the methods by which a plaintiff's attorney can alter or augment a complaint already filed. For an overview of the procedure, see §§16.3-16.6. It also discusses forms of written amendments (see §§16.7-16.10), procedures to amend (see §§16.11-16.17), and supplemental complaints (a supplemental complaint is an additional complaint that alleges facts that occurred after the original complaint was filed; see §16.18). Forms are set forth in §§16.19-16.25.

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§16.2 B. Governing Law

Amendments to complaints are governed by CCP §§469-475, and by Cal Rules of Ct 3.1324. Supplemental complaints are governed by CCP §464.

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II. OVERVIEW

§16.3 A. Reasons to Amend

Amendment is used to correct an erroneous name or allegation, to change a demand for relief (prayer), to add or correct a verification or a signature, and in some instances to add new parties and new or different allegations. See 5 Witkin, California Procedure, *Pleading* §1186 (5th ed 2008). However, amendment cannot be used to substitute an entirely different party for one described in the complaint. See *Diliberti v Stage Call Corp.* (1992) 4 CA4th 1468, 6 CR2d 563, in which an attorney who was retained by a car passenger injured in a collision mistakenly filed a complaint naming the driver, who was not injured, as the plaintiff and not mentioning a passenger.

Statutes may require that some claims be asserted by amended pleading. See, *e.g.,* CCP §425.13, requiring an amended pleading accompanied by a showing of the substantial probability of prevailing when punitive damages are claimed from a health care provider. The California Supreme Court has ruled that §425.13 does not require the court to weigh the merits of a punitive damage claim or deny a motion to amend if the claim does not appear likely to succeed at trial. *College Hosp. v Superior Court* (1994) 8 C4th 704, 34 CR2d 898. The court likened a motion to amend under §425.13 to a demurrer or a summary judgment motion in reverse. Such a motion may be granted only if the plaintiff "both states and substantiates a legally sufficient claim." 8 C4th at 719. The motion must be denied when the allegations of the proposed amended complaint are legally insufficient to support a punitive damages claim or when the evidence in the supporting and opposing affidavits negate or fail to show the actual existence of a triable claim.

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§16.4 B. Need for Leave of Court; Notice

In specific situations, a complaint may be amended or replaced without leave of court, or with leave but without notice to other parties. CCP §§472-474, 576; see §§16.11-16.17. Otherwise, amending a complaint is accomplished by filing and serving a notice of motion with accompanying papers, which must include the proposed amended complaint or amendment to the complaint. See Cal Rules of Ct 3.1324(a); §§16.16, 16.24. For further requirements for the notice of motion, see §16.17.

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§16.4A C. Limits on Amendments

The liberal policy in favor of amendments is subject to limitations. See CCP §473(a)(1); Fed R Civ P 15(a). Leave to amend is not appropriate if the "amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." *Madeja v Olympic Packers* (9th Cir 2002) 310 F3d 628, 636 (applying Fed R Civ P 15(a)). For example, plaintiff medical provider was not permitted to amend its complaint to add 23 new defendants when it would cause prejudice to defendants. See *Spindex Physical Therapy USA, Inc. v State of Ariz. Dep't of Ins.* (D Ariz, Nov. 9, 2005, No. 04-1576) 2005 US Dist Lexis 27841.

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D. Effect on Limitation Periods

§16.5 1. Statute of Limitations and Failure to Prosecute

Except for an amendment that states a wholly different cause of action or that names an entirely new defendant, the time that the original complaint was filed is deemed the time when the action was commenced for purposes of tolling the statute of limitations. *Grudt v City of Los Angeles* (1970) 2 C3d 575, 583, 86 CR 465. See also *Hightower v Roman Catholic Bishop of Sacramento* (2006) 142 CA4th 759, 48 CR3d 420 (giving notice of intent to sue by motion does not qualify as complaint for statute of limitations purposes); the original filing time also determines when the action may be dismissed for failure to prosecute under CCP §§581-583. See *Rosefield Packing Co. v Superior Court* (1935) 4 C2d 120, 124, 47 P2d 716. See generally 5 Witkin, California Procedure, *Pleading* §1188 (5th ed 2008).

If the amendment or amended complaint names new parties, or states causes of action that are fundamentally different in nature from those in the original complaint, the action against those defendants or on those causes commences, for statute of limitations purposes, at the time of the filing of the amendment or of the notice of motion to amend to which the amendment is attached. *Wiener v Superior Court* (1976) 58 CA3d 525, 130 CR 61.

For an amended complaint naming a new party to relate back to the date of filing of the original complaint, the amending party must demonstrate that it was genuinely ignorant of the new party's identity at the time of filing the complaint. See *Woo v Superior Court* (1999) 75 CA4th 169, 89 CR2d 20 (plaintiff's amended complaint naming new doctor as defendant did not relate back when her deposition testimony indicated she knew of defendant's identity and his possible participation in her injuries before she filed original complaint). But see *McOwen v Grossman* (2007) 153 CA4th 937, 945, 63 CR3d 615 (plaintiff knew doctor when complaint was filed but only learned of doctor's role in injury after deposition). On dismissal for want of prosecution, see chap 39.

A motion to amend may be denied, or an amendment filed without leave can be stricken, if the statute of limitations has run for a newly named party or a newly stated cause of action. For a discussion of situations in which new parties can be brought in and new allegations made against new or existing defendants, see 5 Witkin, Procedure, *Pleading* §§1217-1237.

WARNING: Filing an amended complaint that embodies substantial changes from the original may require defendant to file a new answer or demurrer to avoid a default. See *Darsie v Darsie* (1942) 49 CA2d 491, 122 P2d 64. On the other hand, a defendant in default on the original complaint must be served with, and has a right to answer, an amended complaint and be relieved from the default. *Ford v Superior Court* (1973) 34 CA3d 338, 342, 109 CR 844.

A defendant omitted from an amended complaint is no longer a party in the action and has no right to answer the superseded complaint. See generally 5 Witkin, Procedure, *Pleading* §§1187-1189.

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§16.5A 2. Relation-Back Doctrine

Under the relation-back doctrine, the amended complaint may relate back to the original complaint for statute of limitations purposes if it

- Rests on the same general facts as the original;
- Involves the same injury; and
- Refers to the same instrumentality.

Norgart v Upjohn Co. (1999) 21 C4th 383, 408, 87 CR2d 453. For example, the amendment in *Quiroz v Seventh Ave. Ctr.* (2006) 140 CA4th 1256, 45 CR3d 222, did not relate back because two different injuries were involved; the original survivor claim pled injury to plaintiff, while the amendment pled elder abuse as injury to the decedent. In *San Diego Gas & Elec. Co. v Superior Court* (2007) 146 CA4th 1545, 1552, 53 CR3d 722, the court held that in a wrongful death action, the relation-back doctrine does not allow the addition of a party barred by the statute of limitations.

The relation-back doctrine was successfully applied in *Lamont v Wolfe* (1983) 142 CA3d 375, 190 CR 874 (amendment to loss-of-consortium lawsuit, alleging action for wrongful death, was not time barred), and recognized as available under appropriate circumstances in *Branick v Downey Sav. & Loan Ass'n* (2006) 39 C4th 235, 46 CR3d 66 (plaintiffs could seek to amend unfair competition suit to satisfy Proposition 64 standing requirements under ordinary relation-back rules). See *Cryoport Sys. v CNA Ins. Cos.* (2007) 149 CA4th 627, 633, 57 CR3d 358 (trial court allowed plaintiff to amend complaint filed 1 day before passage of Proposition 64 to allege standing).

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§16.6 E. Prompt Service

Service of an amended pleading should be made as promptly as possible—especially in those lawsuits subject to trial delay reduction requirements. On delay reduction rules, see chap 40. An amendment that is substantive in nature must be served on other parties in the action, including defendants who have defaulted on a preceding complaint. *Ford v Superior Court* (1973) 34 CA3d 338, 342, 109 CR 844; see CCP §1010. When the complaint is amended to add a defendant, that defendant must be served and proof of service must be filed within 30 days after the amended complaint is filed. Cal Rules of Ct 3.110(a)-(b) (not applicable to unlawful detainer, family law proceedings, or proceedings with different service requirements prescribed by law).

NOTE: An amendment that changes the complaint in form only (*i.e.,* that would not affect the contents or form of an answer) need not be served. However, it is good practice to serve all amendments. A substantive amendment must be personally served before a default can be entered. See *Engebretson & Co. v Harrison* (1981) 125 CA3d 436, 441, 178 CR 77. See generally 5 Witkin, California Procedure, *Pleading* §§1187, 1242-1245, (5th ed 2008).

Service may be on the adverse party or his attorney, as a pleading subsequent to the complaint. CCP §465; see chap 18. Newly named defendants must be served with a summons as well as the amended complaint or complaint as amended.

When service of an amended complaint precedes its filing, the time within which to plead to the amended complaint runs from the date of filing. *Baker v Anderson* (1981) 119 CA3d 1000, 174 CR 307. See chap 17. Service on defendants whose true name has been substituted for a fictitious name is discussed in §16.14.

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III. FORMS OF WRITTEN AMENDMENTS

A. Amended Complaint

§16.7 1. Defined; Uses

An amended complaint is a pleading complete in itself; when served and filed, it supersedes the original complaint and any preceding amended complaint. See *Cohen v Superior Court* (1966) 244 CA2d 650, 657, 53 CR 378. An amended complaint differs from a supplemental complaint (see §16.18) in that it alleges facts that existed when the original complaint in the action was filed.

The amended complaint format is usually preferred to an amendment to the complaint (see §16.9) if a cause of action or count is to be substantially restated.

PRACTICE TIP: Filing an amended complaint permits plaintiff to state all allegations in logical order in a single document, without highlighting the matter that has been added, deleted, or altered.

An amended complaint can specifically incorporate by reference allegations from a prior complaint (see *Ogier v Pacific Oil & Gas Dev. Co.* (1955) 132 CA2d 496, 499, 282 P2d 574), although it is usually better to replead all good allegations in the amended complaint. Unless specifically incorporated by reference, allegations of prior complaints are not considered in determining the sufficiency of an amended complaint. See *Karp v Dunn* (1964) 229 CA2d 186, 190, 40 CR 93.

WARNING: A judge may strike an amended complaint as sham on the basis of allegations from a prior complaint that have been changed or omitted without a satisfactory explanation. On motions to strike, see chap 24. See generally 5 Witkin, California Procedure, *Pleading* §§1187, 1190-1191 (5th ed 2008).

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Source: Civil Litigation/California Civil Procedure Before Trial/16 Amending Complaints/§16.8 2. Format

§16.8 2. Format

The caption of an amended complaint is the same as the caption of an original complaint, except:

- If the amended complaint brings in new parties, they are named in the title of the case.
- The case number assigned when the original complaint was filed is typed on the amended complaint.
- The nature of the paper for a first amended complaint is given as AMENDED COMPLAINT (or FIRST AMENDED COMPLAINT), and for subsequent amended complaints as, *e.g.,* SECOND AMENDED COMPLAINT.

The introductory line "Plaintiff alleges:" is usually sufficient for an amended complaint, but it is helpful to state the occasion for filing the pleading, *e.g.*:

Pursuant to leave of court, following an order sustaining a demurrer to _ _[*his/her/their/its*]**_ _ _ _**[*e.g., original/first amended*]**_ _ complaint in this action, plaintiff files this _ _**[*e.g., amended/second-amended*]**_ _ complaint, and alleges:**

The body of the amended complaint should contain allegations sufficient to state plaintiff's causes of action and theories, and there should be a demand for relief and signature as on an original complaint. CCP §425.10. The same considerations on deciding whether to verify a complaint apply in deciding whether to verify an amended complaint. On complaints and verification of complaints, see chap 15.

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B. Amendment to Complaint

§16.9 1. Defined; Uses

An amendment to a complaint is an addition to or change in part of the complaint currently pending in the action. See *Cohen v Superior Court* (1966) 244 CA2d 650, 657, 53 CR 378. Because it is based on facts as they existed when the original complaint was filed, it differs from a supplemental complaint (see §16.18).

Amendments are not normally made by altering the face of a com plaint that is on file, but by filing a separate paper that lists the additions, deletions, and changes to be made. Thus, an amendment to a complaint is not a pleading in itself, but must be read in conjunction with the complaint it amends. See form in §16.19.

NOTE: A court can permit amendment by alteration on the face of the complaint that has already been filed, but the alterations must be initialed by the court or clerk. Cal Rules of Ct 3.1324(d).

A court can require a party to file an amended complaint rather than an amendment to the complaint. CCP §471.5. It is probably the better practice to file an amended complaint, rather than an amendment, unless the amendments are few in number or scope.

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§16.10 2. Format

An amendment to a complaint is usually in the form of a court paper. See chap 11 for general form and format requirements. The format shown in §16.19 incorporates the following features:

- The title of the action shows only the first party on each side, although the names of any new parties added by the amendment should also be shown. The character of the action need be stated only if the amendment changes the character shown on the complaint.
- The amendment must designate the amended page and lines of the prior pleading; a motion to amend must include a copy of the proposed amendment or amended pleading. Cal Rules of Ct 3.1324(a)-(b). For further discussion of the contents of the motion to amend, see §16.17.
- The signature should be the same as the signature on the original complaint.

If the original was verified, the amendment should be verified. For forms, see chap 15. A form of order permitting the amendment to be filed, if required, can be typed below the signature on the amendment or on the request for the order; however, many courts require a separate order (see §§16.21, 16.25).

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IV. PROCEDURES TO AMEND

§16.11 A. Amendment of Course: Before Answer Filed or Demurrer Heard

A complaint may be amended once "of course," *i.e.,* without permission of court or other parties and without costs, at any time before an answer or demurrer has been filed, or before the hearing on the demurrer if a demurrer but no answer has been filed. CCP §472. Plaintiff has the right to amend a complaint before a responsive pleading is filed, and after a responsive pleading is filed, before a hearing on the demurrer. *Barton v Khan* (2007) 157 CA4th 1216, 1220, 69 CR3d 238 (trial court erred in refusing to accept amended complaint before hearing on demurrer). An amendment may include new parties without having to seek leave of court, notwithstanding the provisions of CCP §473. *Gross v Department of Transp.* (1986) 180 CA3d 1102, 226 CR 49. Amendment-of-course is accomplished by filing an amended complaint or an amendment to the complaint, and serving a copy on the defendants affected by it. CCP §§471.5, 472.

The defendant has 30 days, or such other time as a court may direct, after service of the amendments or amended complaint to file an answer (CCP §471.5) and may also demur or use other responsive motions to prevent the plaintiff's taking a default (see CCP §586).

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§16.12 B. Amendment by Stipulation

An amendment may be filed by stipulation of all parties affected by the amendment. See generally §16.20. If the other parties will stipulate to filing the amendment, the plaintiff's attorney is spared the need to prepare motion papers and attend a hearing on the motion to amend even though the time to amend-of-course (see §16.11) has expired.

Code of Civil Procedure §473(a)(1) states that the court in its discretion may allow an amendment to a pleading. It is not clear whether a court could deny permission to file an amendment to which all parties agree, or could later ignore the amendment, but it is good practice to ask a judge to sign a written order or enter a minute order permitting the amendment.

Opposing counsel should be given a copy of the proposed amendment to the complaint or amended complaint along with the stipulation form to be signed. The stipulation can specify that allegations in the amendment are deemed denied, or can provide for the time within which an answer or other responsive papers may be filed. (Note: In light of the Trial Court Delay Reduction Act, the practitioner should consult the rules applicable to that court which may modify the parties' stipulation. On delay reduction rules, see chap 40.)

The written stipulation may be a separate paper attached to and filed with the amendment, or it may be typed at the end of the amended complaint or amendment to the complaint.

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Source: Civil Litigation/California Civil Procedure Before Trial/16 Amending Complaints/§16.13 C. Amendment to Correct Mistake or Add or Delete Name of Party

§16.13 C. Amendment to Correct Mistake or Add or Delete Name of Party

Code of Civil Procedure §473(a)(1) provides that a court may, in furtherance of justice and on such terms as may be proper, allow a party to amend a pleading by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect. See also CCP §576. See *Hawkins v Pacific Coast Bldg. Prod., Inc.* (2004) 124 CA4th 1497, 22 CR3d 453 (amendment of complaint to correct name of corporate defendant in wrongful termination action relates back to filing of original complaint for statute of limitations purposes); *Cuadros v Superior Court* (1992) 6 CA4th 671, 8 CR2d 18 (trial court should have permitted amendment to add correct name of business entity that owned leased car).

When an amendment does not add a new defendant but merely corrects a misnomer, such as to correct a name, the amendment may relate back to the date of the original complaint under the "misnomer exception" to the "no relation back" rule in California. *Hawkins v Pacific Coast Bldg. Prod., Inc., supra*.

The judge may sign an order permitting the filing of this kind of amendment without a noticed hearing. However, whenever practical, plaintiff should serve a copy of the proposed amendment on all defendants affected by it before asking the judge to sign the order. See generally 5 Witkin, California Procedure, *Pleading* §§1242-1245 (5th ed 2008).

The original of the proposed amendment can be presented to a judge with an oral request that he or she sign an attached order permitting the amendment to be filed.

NOTE: Also presenting a written request for order allowing amendment (see §16.21) is useful to signal the judge that it is the kind of amendment that can be allowed without a noticed hearing.

To obtain permission to file an amendment without notice, the plaintiff should:

- Prepare a written amendment to the complaint (see §16.19), a request for order allowing amendment (see §16.21), and an order permitting the amendment (see §16.25);
- Serve a copy of the amendment, request, and order on each affected party;
- Present the amendment, request, order, and attached proof of service, to the judge for signature of the order; and
- Serve the amendment and signed order on each party and file with proof of service.

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§16.14 D. Substituting True Name for Fictitious Name

Code of Civil Procedure §474 provides that a plaintiff who is ignorant of the defendant's true name can designate that defendant by any name, and then when the true name is discovered amend the complaint accordingly. The action against the defendant is deemed to have been commenced when the complaint was filed, not when the substitution was made. *Hoffman v Keeton* (1901) 132 C 195, 64 P 264. See *Guenter v Lomes & Nettleton Co.* (1983) 140 CA3d 460, 189 CR 470 (amendment adding additional plaintiffs should be permitted and would relate back to filing of complaint, as new plaintiffs were members of a class that the named plaintiff sought to represent in original pleading). See chap 14 for reasons to use fictitious names and the form of a fictitious name allegation. A person may object to being joined as a defendant under CCP §474 by demurrer (see chap 23) or motion to quash service (see chap 19).

Courts differ on whether leave of court, *i.e.,* an order signed by a judge or commissioner, must be obtained before an amendment substituting a true name will be accepted for filing by the clerk. When a signature is required, it is normally given pro forma and ex parte. See *Brock v Martinovitch* (1880) 55 C 516.

NOTE: Counsel preparing an amendment to substitute a true name should check with the clerk of the court in which the complaint was filed to determine whether an order form should be appended to the amendment. The clerk can also say whether the court has a printed form for the amendment and what must be included in a typed form.

An amendment that not only substitutes a name, but also contains new allegations against the now truly named defendant should normally be made with leave of court after notice. See generally 5 Witkin, California Procedure, *Pleading* §§1219, 1228 (5th ed 2008).

Code of Civil Procedure §474 states that the complaint must be amended to show the true name, but does not say when the amendment must be made or what harm to plaintiff might ensue if the amendment is not filed. See *Fuller v Tucker* (2000) 84 CA4th 1163, 101 CR2d 776 (court used incorrect standard in determining whether plaintiff's amendment of complaint to identify Doe defendant was timely). It has been held, however, that CCP §474 implicitly requires the plaintiff to amend the complaint to add the true names of the Doe defendants within a reasonable period of time after learning of their identity. *A.N. v County of Los Angeles* (2009) 171 CA4th 1058, 1066, 90 CR3d 293 (2-year delay in filing and serving Doe amendments caused undue prejudice to defendants brought into litigation less than 1 month before trial).

Service of a copy of the original summons and complaint can be made on defendant if the summons bears on its face a notice stating in substance:

You are hereby served in this action as the person sued under the fictitious name _ _ _ _ _ _.

On service, see chap 17. Default judgment can be taken if a defendant so served does not answer. CCP §474. Filing the amendment and serving it on all parties gives them notice of the true identity of the defendant. However, service of the amendment appears not to be required. See *Drotleff v Renshaw* (1949) 34 C2d 176, 181, 208 P2d 969.

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§16.15 E. Amendment After Demurrer Sustained

After a demurrer to a complaint has been sustained with leave to amend, plaintiff may file an amended complaint or amendment to the complaint without further motion. See chap 23. The time within which the amendment must be filed may be specified in the order sustaining the demurrer. See CCP §472a. If there is no specification of time in the order, plaintiff is considered to have been granted ten days within which to answer or amend (Cal Rules of Ct 3.1320(g)), beginning on the day notice of the ruling was served or waived (CCP §472b), unless the action is for forcible entry or detainer or unlawful detainer.

An order granting leave to amend after a demurrer is sustained is not a sanction of the amendment filed, which may be challenged by a further demurrer or motion. See *People ex rel Dep't of Pub. Works v Clausen* (1967) 248 CA2d 770, 785, 57 CR 227.

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§16.16 F. Oral Motion to Amend; Motions at Trial

When all parties are before the court, even at trial, the court can order a complaint amended at the oral request of the plaintiff. See *McKee v Mires* (1952) 110 CA2d 517, 522, 242 P2d 954 (amendment at trial to conform to proof).

NOTE: The court probably has power to effect amendment by minute order, although it is usual for a plaintiff to file and serve a written amendment or amended complaint. See *Conroy v Perez* (1944) 64 CA2d 217, 148 P2d 680 (order permitting amendment not itself an amendment).

If a motion granted during trial affects the manner in which the case is tried, or the theories on which it rests, the opposing party may be estopped from complaining of plaintiff's failure to file the amendment. *Campagna v Market St. Ry.* (1944) 24 C2d 304, 149 P2d 281. See also *Steele v Conway* (1955) 135 CA2d 363, 287 P2d 189.

For a discussion of motions to amend at trial to conform the allegations to the complaint to the proof made, see 5 Witkin, California Procedure, *Pleading* §§1209-1216 (5th ed 2008).

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§16.17 G. Noticed Motion for Leave to Amend

Code of Civil Procedure §473(a)(1) provides that an amendment may be permitted by a court on such terms as may be just after notice to adverse parties. But see CCP §576, which does not mention notice in stating that a court may allow a pleading or pretrial order to be amended at any time in furtherance of justice. See also §16.13 on amendment without notice to correct formal mistakes.

Leave of court to file an amended complaint or amendment to a complaint is obtained by filing and serving a notice of motion for leave to amend accompanied by the proposed amendment; a supporting memorandum facts that justify the motion and the time it is made; and a form of the order sought. On noticed motion procedures, see chap 12.

If the purpose or grounds for the amendment are not evident from the nature or content of the amendment, a declaration containing the necessary information may be attached to show the facts that would support filing the amendment, although CCP §473 does not require a declaration or affidavit of merits. See *Plummer v Superior Court* (1963) 212 CA2d 841, 28 CR 294. See generally 5 Witkin, California Procedure, *Pleading* §1240 (5th ed 2008).

A motion to amend must (Cal Rules of Ct 3.1324(a)):

- Include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments;
- State what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located; and
- State what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located.

A separate declaration must accompany the motion and must specify (Cal Rules of Ct 3.1324(b)):

- The effect of the amendment;
- Why the amendment is necessary and proper;
- When the facts giving rise to the amended allegations were discovered; and
- The reasons the request for amendment was not made earlier.

The court may deem a motion to file an amendment to a pleading to be a motion to file an amended pleading and require the filing of the entire previous pleading with the approved amendments incorporated into it. Cal Rules of Ct 3.1324(c).

An amendment to a pleading must not be made by alterations on the face of a pleading except by permission of the court. All alterations must be initialed by the court or the clerk. Cal Rules of Ct 3.1324(d).

Motions to amend should be made promptly on discovery of the need to amend the complaint; the nearer to the trial the notice of motion is filed, the more reluctant the court may be to allow the amendment. Failure to ask for and to obtain leave to amend when leave is required is a ground for striking an amendment or an amended pleading. *Stafford v Ballinger* (1962) 199 CA2d 289, 297, 18 CR 568. See chap 24.

The court may not condition a leave to amend on the requirement that the moving party present evidence sufficient to withstand summary judgment in support of the amendment. *Sanai v Saltz* (2009) 170 CA4th 746, 769, 88 CR3d 673.

NOTE: Under CCP §425.13(a) (punitive damages in medical malpractice actions), motions to amend must be brought within 2 years after the filing of the complaint or less than 9 months before trial. See *Freedman v Superior Court* (2008) 166 CA4th 198, 82 CR3d 563.

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§16.18 V. SUPPLEMENTAL COMPLAINT

A supplemental complaint brings to the notice of the court and other parties things that occurred after commencement of the action and that affect the rights asserted and relief asked in the action. CCP §464; *California Farm & Fruit Co. v Schiappa-Pietra* (1907) 151 C 732, 742, 91 P 593. See *Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767 (amendment to original complaint not proper; supplemental complaint necessary to set forth matters occurring after complaint filed), disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638.

Unlike an amended complaint, a supplemental complaint does not supersede the original complaint; it adds new allegations that are to be considered in conjunction with the allegations of the previous complaint. See generally 5 Witkin, California Procedure, *Pleading* §§1246-1253 (5th ed 2008).

While CCP §464 requires leave of court for filing a supplemental complaint, the section does not specify that notice of motion must be given. Nonetheless, a plaintiff should, in all but exceptional cases, proceed by noticed motion. If the supplemental complaint alleges when the facts it avers occurred, there is no need to attach to the motion papers a declaration stating that the facts occurred after the original complaint was filed or that they are true.

A supplemental complaint should be captioned as was the original complaint (see chap 15), but an abbreviated title of the action can be used (see chap 11). The nature of the paper is given as SUPPLEMENTAL COMPLAINT. If the new facts alleged entitle plaintiff to different or greater relief, a demand for relief (prayer) can be included. A possible source of resistance to the filing of the supplemental complaint can be avoided if the signature is the same as on the original complaint and the complaint is verified or not as was the original complaint. On complaints and the verification of complaints, see chap 15.

When a supplemental complaint is filed, the court clerk issues an amended or supplemental summons. The supplemental summons and complaint must be served in the same manner as required for initial service of a summons. CCP §464(c).

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Source: Civil Litigation/California Civil Procedure Before Trial/16 Amending Complaints/ VI. FORMS/§16.19 A. Form: Amendment to Complaint

VI. FORMS

§16.19 A. Form: Amendment to Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**AMENDMENT TO COMPLAINT**
vs	)	
	)	**Hearing:** _ _[*date; time*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Plaintiff, _ _[*name*]_ _, amends the complaint in this action as follows:

[*Set forth amendments, designating page, paragraph, and line number, e.g.*]

1. On page 2, line 12, April 1, 2004, is changed to March 15, 2004.

2. On page 3, lines 20-26, paragraph 8 is deleted and plaintiff alleges in its stead: _ _[*Specify*]_ _.

3. On page 4, paragraph 12, at line 10, the following paragraph 12.5 is added: _ _[*Set out new paragraph 12.5*]_ _.

4. Plaintiff has learned the true name of defendant designated in the complaint as _ _[*e.g., Doe 1*]_ _ and substitutes the true name, _ _[*specify*]_ _, for the fictitious name _ _[*wherever it appears in the complaint/on, e.g., page 1, lines 12 and 24*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (submit with notice of motion or request if leave of court is required; file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§16.10, 16.17.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/16 Amending Complaints/§16.20 B. Form: Stipulation for Filing Amended Complaint or Amendment to Complaint; Order

§16.20 B. Form: Stipulation for Filing Amended Complaint or Amendment to Complaint; Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**STIPULATION FOR FILING**
vs	)	_ _[*AMENDED/ AMENDMENT TO*]_ _
	)	**COMPLAINT; ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The undersigned stipulate that plaintiff, _ _[*name*]_ _**, may file the** _ _[*attached/above*]_ _ _ _[*amended/amendment to the*]_ _ **complaint in this action, and acknowledge service of a copy.**

It is further agreed that:

1. All the allegations are deemed to be denied by defendants.

2. Each defendant has _ _ **days from the date of signing this stipulation to plead or otherwise respond to** _ _[*this amended complaint/these amendments*]_ _**.**

3. _ _[*Add other terms*]_ _**.**

Date: _ _ _ _ _ _	**Date:** _ _ _ _ _ _
__[*Signature*]__	__[*Signature*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
Attorney for _ _ _ _ _ _ _ _	**Attorney for** _ _ _ _ _ _ _ _

ORDER

Under the terms of the _ _[*above/attached*]_ _ **stipulation,**

IT IS ORDERED that the _ _[*above/attached*]_ _ _ _[*amended complaint/amendments to the complaint*]_ _ **be filed in this action.**

Date: _ _ _ _ _ _ __[*Signature*]__

Judge

Copies: Original (file with court clerk with amended complaint or amendment to complaint); ___ copies for service (one for each other party); ___ office copies.

Comment: The attorney's ability to stipulate to amend may be curtailed or modified by trial court delay reduction rules. See chap 40.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/16 Amending Complaints/§16.21 C. Form: Request for Order Allowing Amendment to Complaint

§16.21 C. Form: Request for Order Allowing Amendment to Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**REQUEST FOR ORDER**
vs	)	**ALLOWING AMENDMENT TO**
	)	**COMPLAINT**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*; PROPOSED ORDER*]_ _
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Plaintiff, _ _[*name*]_ _**, requests that the Court grant an order allowing the filing of the attached amendment to the complaint.**

The amendment _ _[*e.g., adds the name of a party/strikes out the name of a party/corrects a mistake in the name of a party*]_ _ **and may be allowed under Code of Civil Procedure §473 in furtherance of justice and on such terms as may be proper without a hearing on notice.**

Date: _ _ _ _ _ _

Respectfully submitted,

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (present to judge with order, then file); ___ copies for service (one for each other party; two for each other party if service both before and after signing is contemplated); ___ office copies.

Comment: See §16.13.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, "pleading paper" (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§16.22 D. Form: Order Allowing Amendment to Complaint

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER ALLOWING**
vs	)	**AMENDMENT TO COMPLAINT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Good cause appearing and in furtherance of justice,

IT IS ORDERED that plaintiff, _ _[*name*]_ _, be allowed to file _ _[*his/her/its*]_ _ _ _[*amended complaint/amendment to the complaint*]_ _, a copy of which was attached to plaintiff's request for order allowing amendment.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party; two for each other party if service both before and after signing is contemplated); ___ office copies.

Comment: See §16.13.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134, and the discussion in §11.27.

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§16.23 E. Form: Amendment Substituting True Name for Fictitious Name; Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**AMENDMENT SUBSTITUTING**
vs	)	**TRUE NAME FOR FICTITIOUS**
	)	**NAME (CCP §474); ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Plaintiff, _ _[*name*]_ _, has learned the true name of the defendant designated in the complaint as _ _[*e.g., Doe 1*]_ _ and substitutes the true name, _ _[*specify*]_ _, for the fictitious name wherever it appears in the complaint.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

ORDER

Good cause appearing,

IT IS ORDERED that plaintiff, _ _[*name*]_ _, be allowed to file the attached amendment to the complaint.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Judge*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §16.14.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/16 Amending Complaints/§16.24 F. Form: Notice of Motion to Amend Complaint

§16.24 F. Form: Notice of Motion to Amend Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO FILE**
	)	_ _[*AMENDED/AMENDMENT*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*TO*]_ _ **COMPLAINT**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court for an order** _ **permitting plaintiff to file** _ _[*an amended complaint/amendment to the complaint*]_ _ **under CCP §473 on the grounds that the amendment is in furtherance of justice and** _ _[*state grounds*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.
Comment: A motion to amend must (Cal Rules of Ct 3.1324(a)):

- Include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments;
- State what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located; and
- State what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are to be inserted.

A separate declaration must accompany the motion. For content requirements, see Cal Rules of Ct 3.1324(b);

discussion in §16.17. A minimum of 15 days' notice is required, absent an order shortening the time within which to file a motion to amend. Proof of service must be filed with the court. CCP §465. A supporting memorandum must be served and filed with this notice of motion. See Cal Rules of Ct 3.1110-3.1113.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/16 Amending Complaints/§16.25 G. Form: Order Allowing Amendment of Complaint

§16.25 G. Form: Order Allowing Amendment of Complaint

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER ALLOWING**
vs	)	**AMENDMENT OF COMPLAINT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of plaintiff, _ _[*name*]_ _, for an order allowing amendment of the complaint was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. Plaintiff is granted leave to file _ _[*within _ _ days/on or before _ _[date]_ _]_ _ _ _[his/her/its]_ _ _ _[amended complaint/amendment to the complaint]_ _, a copy of which was attached to plaintiff's notice of motion _ _[*and is attached to this order*]_ _.

2. _ _[*State any further conditions on filing of amendment*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: Service of copies of the amended complaint is required, and conformed copies of the signed order can be served at the same time.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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17

Service of Summons

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I. INTRODUCTION

§17.1 A. Scope of Chapter

This chapter covers the initial service of process in a civil action. The primary focus is the proper preparation and service of a summons. An overview is presented in §§17.3-17.5. Preparing summons is discussed in §§17.6-17.10, issuance of summons in §§17.11-17.13, serving summons in §§17.14-17.46, and return of service in §§17.47-17.61. A comprehensive procedural checklist is presented in §17.62, and forms in §§17.63-17.71.

NOTE: Technically, the word "process" signifies "a writ or summons issued in the course of judicial proceedings." CCP §17(b)(6). The word "writ" signifies "an order or precept in writing, issued in the name of the people, or of a court or judicial officer." CCP §17(b)(6). Thus, the word "process" includes such writs as subpoenas, temporary restraining orders, preliminary and permanent injunctions, and extraordinary writs and does not include complaints. Nevertheless, this chapter refers interchangeably to service of "process," service of a "summons," and service of a "summons and complaint." The chapter does not refer to writs, because a summons and complaint are generally the initial documents served in a civil action.

Related topics covered elsewhere in this book are serving papers after a party has been properly served with a summons or has appeared in an action (see chap 18) and challenging jurisdiction over the person (see chap 19).

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§17.2 B. Governing Law

California's statutory requirements are usually found in the Jurisdiction and Service of Process Act (CCP §§410.10-418.11), but provisions regarding service may be found in other statutes addressing specific situations (see, *e.g.,* Govt C §955.4 on service of process in actions against the state).

California's statutory requirements are generally more stringent than constitutional due process requirements. Consequently, constitutional issues regarding the sufficiency of the method of service seldom arise in California. See, *e.g., Milliken v Meyer* (1940) 311 US 457, 463, 85 L Ed 278, 61 S Ct 339.

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II. OVERVIEW

§17.3 A. Relationship Between Service of Process and Jurisdiction

The service of process requirements constitute only one of the three basic jurisdictional prerequisites for a judgment entitled to full faith and credit under US Const art IV, §1:

- The court rendering the judgment must have jurisdiction over the subject matter of the action, *i.e.,* the power or competence by statute or constitutional provision to hear and determine the particular case. On jurisdiction, see chap 6.
- The court must have personal jurisdiction over the defendant, *i.e.,* the defendant either has made a general appearance or has had "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (*International Shoe Co. v Washington* (1945) 326 US 310, 316, 90 L Ed 95, 66 S Ct 154). See chap 6 on bases for asserting personal jurisdiction and for discussion of general appearances.
- Service of process must have been accomplished in a manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. *Milliken v Meyer* (1940) 311 US 457, 463, 85 L Ed 278, 61 S Ct 339.

This chapter covers the third requirement, *i.e.,* service of process that meets constitutional standards for fair notice and opportunity to respond.

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§17.4 B. Requirements for Valid Service

In California, valid service of process requires satisfying both

- The minimum requirements under the United States Constitution; and
- California's statutory requirements.

The constitutional requirements for service of process derive from the Fourteenth Amendment's due process clause, which provides that a state may not deprive any person of life, liberty, or property without due process of law. This general requirement has spawned the specific rule that the means of service used must be reasonably calculated to give a defendant actual notice of the proceedings and an opportunity to be heard. *Milliken v Meyer* (1940) 311 US 457, 463, 85 L Ed 278, 61 S Ct 339.

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§17.5 C. Effect of Failure to Make Proper Service

Failure to properly effect service is a jurisdictional defect. A defendant may raise this defect by:

- Moving to quash service of summons under CCP §418.10 (on motions to quash, see chap 19);
- Moving to vacate any resulting default or default judgment on lack of jurisdiction grounds;
- Moving for mandatory dismissal for failure to serve or to return summons (on dismissal, see chap 39); or
- Collaterally attacking the judgment.

When a defendant properly challenges service of process, the burden is on the plaintiff to prove the facts that give the court jurisdiction. Until the plaintiff makes at least a prima facie showing, the defendant need not offer any evidence whatever. *Floveyor Int'l, Ltd. v Superior Court* (1997) 59 CA4th 789, 69 CR2d 457.

When actual notice of the litigation has been received, however, courts have upheld jurisdiction notwithstanding a technically deficient manner of service at least when defendant had notice of the lawsuit and the time limitation for service had not passed. The provisions of CCP §§413.10-417.40 were intended by the legislature to be "liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint." Report of the Judicial Council's Special Committee on Jurisdiction 14-15 (1968), quoted with approval in *Pasadena Medi-Center Assocs. v Superior Court* (1973) 9 C3d 773, 778, 108 CR 828; *Hammer Collections Co. v Ironsides Computer Corp.* (1985) 172 CA3d 899, 218 CR 627. When notice was not the relevant deficiency, however, courts have reached a contrary conclusion. See *e.g., Renoir v Redstar Corp.* (2004) 123 CA4th 1145, 1154, 20 CR3d 603 ("[b]ecause no summons was served on any of the defendants and the defendants did not generally appear in the proceeding, the trial court had no jurisdiction over them"); *Schering Corp. v Superior Court* (1975) 52 CA3d 737, 125 CR 337 (service defective when summons failed to indicate that defendant was being served on behalf of corporation and indicated instead that he was being served as Doe 1, who complaint alleged was physician).

NOTE: In *Bishop v Silva* (1991) 234 CA3d 1317, 285 CR 910, the court questioned whether service statutes were subject to a liberal construction, as stated in *Pasadena Medi-Center Assocs. v Superior Court, supra,* after the amendment of CCP §583.240 in 1982. The *Bishop* court, however, was faced with technical service deficiencies *and* the passage of time for accomplishing service of process. *Bishop* ultimately decided that it lacked jurisdiction because the time limits of CCP §583.240 (not CCP §§413.10-417.40) must be strictly construed. Regardless, the lesson of *Bishop* and *Pasadena Medi-Center Assocs.* is that attorneys should make strict compliance with both service requirements and service time limitations a top priority.

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III. PREPARING SUMMONS

§17.6 A. Use of Judicial Council Forms

The content of a summons in a civil action is ordinarily governed by CCP §412.20. In practice, Judicial Council forms are generally used and are considered to comply with CCP §412.20 (CCP §412.20(c)).

The Judicial Council has adopted five summons forms for mandatory use by all courts whenever applicable (see Cal Rules of Ct 1.31(a); Cal Rules of Ct Appendix A):

- A summons for general use in most actions (see form in §17.63);
- A summons for use in joint debtor proceedings (see form in §17.66);
- A summons for use in unlawful detainer actions (see form in §17.67);
- A summons for use in marital proceedings under the Family Code (see form in §17.68); and
- A summons for joinder in marital proceedings under the Family Law Act (see form in §17.70).

These forms are generally available from court clerks, in the California Judicial Council Forms Manual (Cal CEB 1981), and in forms drafting software, such as CEB's SmartLaserä CD-ROM, which allows the user to view, print, and save the forms electronically.

For Judicial Council summons forms and comments on their preparation, see §§17.63, 17.66-17.70.

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§17.7 B. Use of Attorney-Drafted Forms

Although the mandatory Judicial Council summons forms must be used "wherever applicable" (Cal Rules of Ct 1.31(a)), they are not designed for certain circumstances, *e.g.,* eminent domain proceedings. The forms may not provide sufficient space when there are numerous plaintiffs or defendants, in which case an addendum to the printed form or a completely new form may be prepared. Practice in this regard, however, varies from court to court.

When preparing an original form, the drafter should ensure compliance with CCP §412.20 and conformity, to the extent possible, with the Judicial Council's printed summons form for general use (see §17.63). The original form should include the Judicial Council form's Spanish instruction, capitalization, and boldface type (or underlining). Although minor deviations from the requirements of CCP §412.20 or the Judicial Council form may not render service invalid (see Comment to CCP §412.20; *Clark v Palmer* (1891) 90 C 504, 27 P 375), every effort should be made to achieve strict compliance to avoid a potentially costly challenge by a served defendant.

The same number of copies should be prepared for an attorney-drafted form as for a Judicial Council form (see §17.63).

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§17.8 C. Requirements in Particular Actions

The content of a summons in a civil action is governed by CCP §412.20 "[e]xcept as otherwise required by statute." The list below, which is not exhaustive, identifies some common statutes that vary from the usual form by requiring inclusion of different or additional matter in particular actions. A practitioner preparing a complaint based on a cause of action created by statute should consult the applicable code for any special requirements governing the form of summons.

- Fam C §§200, 2330(a), 2331, 2250 (marital dissolution, legal separation, or nullity proceedings; for mandatory Judicial Council form, see §17.68).
- CCP §751.05 (action to reestablish destroyed land records).
- CCP §801.6 (action to determine interest in, or liens or clouds on title to, real property affected by public improvement assessment).
- CCP §861.1 (action by public agency for validation of matters within its jurisdiction).
- CCP §§872.310-872.330 (action for partition of real or personal property).
- CCP §§990-991 (proceedings against joint debtors; for prescribed Judicial Council form, see §17.66).
- CCP §1167 (unlawful detainer proceedings; for prescribed Judicial Council form, see §17.67).
- CCP §§1250.120-1250.125 (eminent domain proceedings).
- Health & S C §17990 (10-day period for filing responsive pleadings in actions brought under State Housing Law (Health & S C §§17910-17995.5)).
- Rev & T C §3957 (action by purchaser of tax-deeded property to determine claims on property).
- Veh C §17462 (60-day time limit for defendant to appear in action for negligence against nonresident motorist served outside California; best practice in such an action appears to be for plaintiff's attorney to change summons to indicate that the defendant has 60 days in which to appear, instead of usual 30 days).
- Wat C §7008 (action for declaration of rights in jointly used wells, pumping plants, or conduits).

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D. Additional Requirements for Particular Parties

§17.9 1. Action Against Corporation or Unincorporated Association

When a copy of a summons and complaint is served on a corporation or an unincorporated association (including a partnership), the summons must contain a notice informing the person served that he or she is being served on behalf of the business or other entity and, if the person is also being served individually, a notice that he or she is being served in both capacities. CCP §412.30.

The provisions of this statute are mandatory; service of a summons that does not comply is ineffective (*Tresway Aero, Inc. v Superior Court* (1971) 5 C3d 431, 96 CR 571 (decided under former CCP §410)), and no default may be entered against either the entity or the individual (CCP §412.30). A technically deficient service will be valid, however, when there is substantial compliance. For a case in which the court found substantial compliance, see *Cory v Crocker Nat'l Bank* (1981) 123 CA3d 665, 177 CR 150. For cases in which the courts acknowledged that substantial compliance is sufficient but found that the standard was not met on the facts presented, see *MJS Enters. v Superior Court* (1984) 153 CA3d 555, 200 CR 286; *Schering Corp. v Superior Court* (1975) 52 CA3d 737, 125 CR 337.

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§17.10 2. Action Against Fictitiously Named Defendants

A copy of a summons served on a fictitiously named defendant under CCP §474 must contain a notice informing the person served that he or she is being served as, or on behalf of, the fictitiously named defendant, *e.g.,* Doe 1. See *Pelayo v J.J. Lee Mgmt. Co., Inc.* (2009) 174 CA4th 484, 495, 94 CR3d 784. A default judgment may not be entered against the defendant unless such notice has been given. CCP §474. On requirements for proof of service on fictitiously named defendants, see §17.61.

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IV. ISSUANCE OF SUMMONS

§17.11 A. On Original Complaint

At any time after the complaint has been filed and any required filing fee has been paid, the court clerk will issue the original summons on the plaintiff's request. CCP §412.10.

The summons is prepared by counsel and submitted for issuance to the clerk, who inserts the issuance date and affixes his or her signature or stamp. The court seal may also be affixed at the time of issuance. Many courts supply blank Judicial Council forms, however, with the court seal already imprinted. The clerk conforms copies of the summons, generally by stamping his or her signature and the date of issuance on each. The plaintiff may also have an additional summons issued at any time during the action.

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§17.12 B. On Amended or Supplemental Complaint

Because the jurisdiction of the court in which the action is pending over a defendant who has been properly served with summons continues throughout subsequent proceedings in the action (CCP §410.50), the plaintiff need not obtain an additional summons to serve on the defendant when the complaint is amended. In such cases, service is made without summons, usually by mailing a copy of the amended complaint to the defendant or the defendant's attorney. See CCP §§465, 1010-1020. When the complaint is amended to add a new defendant (not substituting the defendant's true name for a "Doe"), however, the plaintiff must obtain a summons on amended complaint for service on the new defendant because the original summons does not name the defendant. *W.H. Marston Co. v Kochritz* (1926) 80 CA 352, 251 P 959. See *Gillette v Burbank Community Hosp.* (1976) 56 CA3d 430, 128 CR 636 (summons on amended complaint unnecessary when amended complaint was identical to original and added no new parties). In addition, if the defendant's name is changed in any manner in the amended complaint (*e.g.,* by omitting a middle initial), some courts require the plaintiff to obtain a new summons in which the defendant's name matches that stated in the amended complaint.

It is uncertain whether a summons on an amended complaint is required for a previously named defendant when a complaint is amended before any service. See *Dowling v Comerford* (1893) 99 C 204, 33 P 853. Hence, the safer practice is for the plaintiff to have such a summons issued for service with the amended pleading. See Comment to CCP §412.10. See also *Gillette v Burbank Community Hosp., supra*.

When a supplemental complaint is filed, CCP §465 does not apply, because the court clerk is required to issue an amended or supplemental summons. CCP §464(c). The supplemental summons and complaint must be served in the same manner as required for initial service of a summons. CCP §464(c).

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§17.13 C. Lost Summons

The clerk is instructed to keep the original summons in the court records, and provide a copy of each summons issued to the plaintiff who made the issuance request. CCP §412.10. Thus, when a summons is lost before service, the plaintiff should have retained a copy of the original summons under CCP §412.10. The former distinction between an original summons and a substitute or "alias" summons has been eliminated. See Comment to CCP §412.10.

On loss of summons *after* service, see §17.49.

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V. SERVING SUMMONS

§17.14 A. Persons Who May Serve Summons

A summons may be served by any person who is at least age 18 and is not a party to the action. CCP §414.10. Thus, service may be made by any duly qualified and acting sheriff or marshal of any county in the state (Govt C §26665); a professional process server; or even the plaintiff's attorney or other agent (*Shee-han v All Persons* (1926) 80 CA 393, 252 P 337). The practice of using the plaintiff's attorney, employee, or other agent, however, is not recommended.

Service by a registered process server has one advantage over other methods. Evidence Code §647 provides that a registered process server's return establishes a presumption of the facts stated in the return.

A professional process server is governed by certain statutes concerning registration and business conduct. See Bus & P C §§22350-22360. Failure to comply with any of these requirements, however, will not invalidate an otherwise proper service. CCP §413.40.

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.15 B. Fees

§17.15 B. Fees

A sheriff or marshal may charge $35 for service of process. Govt C §§26720.9, 26721, 26721.1. Other process servers' fees are not limited and are often higher. Fees for service are recoverable as costs. CCP §1033.5(a)(4)(A)-(B), (D).

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§17.16 C. Time for Service

Before the introduction of delay reduction rules under the Trial Court Delay Reduction Act (Govt C §§68600-68620), timing of service was limited only by mandatory dismissal under CCP §583.210 (service not made within 3 years after commencement of action against defendant) and discretionary dismissal under CCP §583.420(a)(1) (2 years). It has not yet been decided whether these time periods on an amended complaint run from the date on which the amended complaint is filed. See *Washington v Nelson* (1979) 100 CA3d 47, 160 CR 644 (under former CCP §581a, 3-year period for service of amended complaint ran from date amended complaint filed).

Time during which the defendant was not amenable to service of process is not included in the 3-year period. CCP §583.240(a). Time during which the action is stayed is not included if the stay affects service. CCP §583.240(b). Likewise, time during which the validity of the service is being litigated (CCP §583.240(c)) and time during which service was impossible, impracticable, or futile for reasons beyond the plaintiff's control (CCP §583.240(d)) are not included.

Under authority of Govt C §§68608 and 68612, courts have published local rules on the timing of service of process. Local rules cannot reduce the time for service of the complaint to fewer than 60 days after the complaint is filed. Govt C §68616(a). Exceptions for longer periods must be granted when the plaintiff shows that service could not reasonably be accomplished within the delay reduction deadlines, despite diligent efforts consistent with the amount in controversy. Govt C §68616(a).

Before filing a complaint, counsel should consult the local rules on the timing of service of process. Juvenile, probate, and family law cases are generally exempt, but the specific exemptions vary from county to county. If local delay reduction rules will apply, counsel must become familiar with them or engage local counsel for this purpose. The general thrust of these rules is to speed up litigation, including the time for service. Thus, counsel filing a complaint subject to delay reduction rules should anticipate any potential difficulties with service of process and attempt to minimize them before filing the complaint (*e.g.,* ascertain any unknown names, addresses, capacities, or business statuses of defendants and confirm any uncertain ones). Counsel should ensure that the process server is diligent in attempting service and maintains records sufficient to demonstrate diligence, if necessary. On delay reduction generally, see chap 40.

The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the complaint is filed. When the complaint is amended to add a defendant, that defendant must be served and proof of service must be filed within 30 days after the amended complaint is filed. Cal Rules of Ct 3.110(a)-(b) (not applicable to unlawful detainer, family law proceedings, or proceedings with different service requirements prescribed by law). The court, on its own motion or on the application of a party, may extend or otherwise modify the time provided in Cal Rules of Ct 3.110(b).

A cross-complaint against a party who has appeared in the action must be accompanied by proof of service of the cross-complaint at the time it is filed. Cal Rules of Ct 3.110(c). An application for a court order extending the time to serve a pleading must be filed before the time for service has elapsed. The application must be accompanied by a declaration showing why service has not been effected, documenting the efforts that have been made to effect service, and specifying the date by which service is proposed to be effected. Cal Rules of Ct 3.110(e). Unless the court has granted an order extending the time to serve a complaint or cross-complaint, the failure to serve and file pleadings as required under this rule may result in an Order to Show Cause (OSC) being issued as to why sanctions shall not be imposed. Cal Rules of Ct 3.110(f). When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less than 5 calendar days before the hearing. Cal Rules of Ct 3.110(i).

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D. Persons and Entities on Whom Summons May Be Served

1. Individuals

§17.17 a. Basic Rule

A summons may be served on an individual by delivering a copy of the summons and complaint to the individual or to someone else authorized by the individual to receive service of process. CCP §416.90. On service on minors and conservatees, see §17.24.

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§17.18 b. Determination of Agency for Purposes of Service

Whether a person has been authorized by a defendant to receive service of summons under CCP §416.90 is determined by common law agency principles of actual and ostensible authority and of ratification (see generally 3 Witkin, Summary of California Law, Agency and Employment §§130-149 (10th ed 2005)) and is unrelated to statutory agents for service of process under Corp C §2105.

An attorney is not necessarily considered an agent for service of process on behalf of a client simply because of present or prior representation of the client related to the subject matter of the litigation. See *Wilson v Eddy* (1969) 2 CA3d 613, 82 CR 826. Service by delivery to an attorney is valid, however, when the facts establish the necessary authority or ratification. See *Warner Bros. Records v Golden W. Music Sales* (1974) 36 CA3d 1012, 1017, 112 CR 71 (specific appointment not required when nature of relationship makes it highly probable defendant will receive actual notice).

Service of documents on an agent unauthorized to receive service however, does not constitute effective service, even though the documents eventually "make their way to counsel." *Summers v McClanahan* (2006) 140 CA4th 403, 44 CR3d 338. In *Summers*, the summons and complaint were left with defendant's personal manager who, although not authorized to receive service, forwarded the documents to counsel. The court, reversing the trial court's decision that notice was given because the documents made it to the defendant, held that even though the service provisions of CCP §416.90 should be liberally construed (*Pasadena Medi-Center Assocs. v Superior Court* (1973) 9 C3d 773, 108 CR 828), service on a person unauthorized to receive service did not substantially comply with the statute. The court rejected plaintiff's reliance on *Warner Bros. Records v Golden W. Music Sales*, *supra*; the two cases were similar only because service ultimately resulted in notice of the action in both cases. The court was not aware of any California case that upheld service of process "solely on the ground that defendant received actual notice when there was a complete failure to comply with the statutory requirements." *Summers*, 140 CA4th at 414.

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§17.19 2. Corporations

A domestic or foreign corporation may be served with a summons by delivering a copy of the summons and complaint:

- To the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, chief executive officer, controller, chief financial officer, or a person authorized by the corporation to receive service of process (CCP §416.10(b));
- To the person designated as agent for service of process as provided in Corp C §§1502(b), 2105(a)(4)-(5), 2105(c), and 2107(d) (or in former Corp C §§3301-3303 and 6500-6504 as in effect on December 31, 1976, with respect to corporations to which they remain applicable) (CCP §416.10(a));
- To a cashier or assistant cashier if the corporation is a bank (CCP §416.10(c)); or
- As authorized and provided by Corp C §§1701-1702 and 2110-2111 (or by former Corp C §§3301-3303 and 6500-6504 as in effect on December 31, 1976, with respect to corporations to which they remain applicable) (CCP §416.10(d)).

Service of summons on a corporation by delivery to one of the individuals specified in CCP §416.10(b) or Corp C §2110(a) may be made even when the individual is not actually the holder of the title as long as he or she is the *ostensible* holder. See *Pasadena Medi-Center Assocs. v Superior Court* (1973) 9 C3d 773, 108 CR 828 (service held valid on corporate employee who, although not secretary-treasurer, was held out as such to public by corporation).

Corporations Code §1502(a) requires each domestic corporation to file and update the names and addresses of its principal officers as well as the address of the corporation's principal office. This information is available from the Secretary of State's office. Although foreign corporations are not required to file such a list, those that transact intrastate business must designate a local agent to receive service of process. Corp C §2105(a)(4).

Although the cases defining "general manager" are not entirely consistent, the courts probably will view the term somewhat broadly, especially when the particular person is the only corporate representative available to accept service within California. Compare *Cosper v Smith & Wesson Arms Co.* (1959) 53 C2d 77, 346 P2d 409 (manufacturer's representative was general manager), with *General Motors Corp. v Superior Court* (1971) 15 CA3d 81, 93 CR 148 (customer relations manager was not general manager). Thus, for example, a corporation that was suspended by the Secretary of State, and had no designated agent for service of process, but operated as an ongoing business was validly served by service on the general manager of its regional office. *Gibble v Car-Lene Research, Inc.* (1998) 67 CA4th 295, 78 CR2d 892. Similarly, service on the agent for service of process for a foreign corporation's wholly-owned subsidiary and exclusive importer and distributor in California was proper service on parent's "general manager in the state" under Corp C §2110(a). *Yamaha Motor Co., LTD v Superior Court* (2009) 174 CA4th 264, 94 CR3d 494.

Because of the variety of means by which service of process may be made on a corporation under CCP §416.10, it should rarely be necessary to serve the corporation by serving the Secretary of State. See 3 Witkin, California Procedure, *Actions* §§1048, 1050 (5th ed 2008), for discussion of procedures for such service.

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§17.20 3. Defunct Corporations

A corporation that has forfeited its charter or right to do business or that has dissolved may be served with a summons by delivering a copy of the summons and complaint:

- To a person who is a trustee of the corporation and of its stockholders or members (CCP §416.20(a); *North Am. Asbestos Corp. v Superior Court* (1982) 128 CA3d 138, 142, 179 CR 889, 890); or
- As authorized and provided by Corp C §§2011 and 2114 (or by former Corp C §§3301-3303 and 6500-6504 as in effect on December 31, 1976, with respect to corporations to which they remain applicable) (CCP §416.20(b)).

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§17.21 4. Joint Stock Companies

A joint stock company or association may be served with a summons by delivering a copy of the summons and complaint as provided by CCP §416.10 (governing service on corporations; see §17.19) or by CCP §416.20 (governing service on defunct corporations; see §17.20). CCP §416.30.

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§17.22 5. Partnerships and Other Unincorporated Associations

The rules governing service of summons on an unincorporated association, including a partnership, closely parallel those governing service of summons on a corporation (see §17.19). On the definition of "unincorporated association," see Corp C §18035(a). See also *White v Cox* (1971) 17 CA3d 824, 95 CR 259 (condominium is unincorporated association).

A general or limited partnership may be served with a summons by delivering a copy of the summons and complaint to the person designated as agent for service of process under Corp C §15800 or to a general partner or the general manager of the partnership. CCP §416.40(a). See §17.19 for discussion of who is a general manager.

If it is shown satisfactorily by affidavit that process cannot be served with reasonable diligence on the designated agent for a partnership by hand, the court may order that service be made on a partnership by delivering the summons and complaint, accompanied by the order authorizing service, to the Secretary of State or any deputy or assistant in the Secretary of State's office. Corp C §16310(d). Service must be complete on the 10th day after delivery to the Secretary of State. Corp C §16310(d).

An association that is not a partnership may be served with a summons by delivering a copy of the summons and complaint to its designated agent for service of process under Corp C §18200, the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process. CCP §416.40(b).

When an agent has not been designated, or when the agent cannot with reasonable diligence be found at the address provided by the association to the Secretary of State, and it is satisfactorily shown by affidavit that process cannot be served with reasonable diligence on either the agent by hand or the association under CCP §§415.10, 415.20(a), or 415.30, service may be made under court order by delivering a copy of the summons and complaint to any one or more of the association's members designated in the order and by mailing copies to the association at its last known address. CCP §416.40(c); Corp C §18220.

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§17.23 6. Public Entities

A public entity may be served with a summons by delivering a copy of the summons and complaint to the clerk, secretary, president, presiding officer, or other head of its governing body. CCP §416.50(a). The term "public entity" includes the state and any office, department, division, bureau, board, commission, or agency of the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in California. CCP §416.50(b).

Names, titles, and addresses of the officials to whom delivery may be made for all public entities except the state, cities, and counties are required to be submitted to the Secretary of State and county clerks and are available from them in a Roster of Public Agencies. Govt C §§53050-53051. If an entity fails to furnish this information in proper form, or if the persons to be served cannot be personally served with due diligence, the court may permit service to be made on the Secretary of State. Govt C §§960.2-960.3. On manner of service, see Govt C §960.3.

Certain statutes provide for service of summons in specific actions to be made on a public entity in a manner other than as prescribed by CCP §416.50, *e.g.,* by delivery to the Attorney General (see Govt C §955.4) or to the State Controller (see Rev & T C §16252). See §17.45 for a list of these statutes. For a holding that Govt C §955.4, as a specific statute, controls over the more general provisions of CCP §416.50, see *House v State* (1981) 119 CA3d 861, 873 n9, 174 CR 279. For discussion of the relationship between such statutes and provisions of Jurisdiction and Service of Process Act (CCP §§410.10-418.11) generally, see §17.44.

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§17.24 7. Minors and Conservatees

A summons may be served on a minor by delivering a copy of the summons and complaint to:

- His or her parent or to his or her guardian or similar fiduciary; or
- If no such person can be found with reasonable diligence, any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed.

CCP §416.60. A minor is any person under age 18. Fam C §6500. If the minor is at least age 12, a copy of the summons and complaint must also be delivered to him or her. CCP §416.60.

A summons may be served on an adult for whom a conservator or similar fiduciary has been appointed by delivering a copy of the summons and complaint to both the conservator or similar fiduciary and the individual. CCP §416.70. When good cause is shown (*e.g.,* when the individual is unable to comprehend the nature of the documents being served or would suffer severe mental harm from the service), the court may dispense with the requirement that delivery be made to him or her. CCP §416.70. Compare CCP §416.70 with Prob C §1210, which permits service on the conservator of the estate alone of any process, notice, or court order concerning a decedent's estate in which a conservatee has an interest.

The attorney should keep in mind that whenever delivery of a copy of a summons and complaint to two or more persons is required for valid service, as it may be under CCP §§416.60-416.70, different methods of service may be used. For example, under CCP §416.60, a parent may be served personally (see §§17.27-17.29) and a minor by substituted service (see §17.31) without affecting the validity of service. See Comment to CCP §415.20.

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§17.25 8. Political Candidates

When the action is unrelated to running for office, a candidate for public office may be served in the same manner as any other individual. When the action relates to election laws or the candidate's campaign, however, Elec C §12 (former Elec C §49; CCP §416.80, which incorporated by reference former §49, was amended incorrectly to refer to Elec C §11 instead of §12) permits service under court order on a candidate in a California election who cannot be personally served with process after reasonable diligence by delivery of a copy of the summons and complaint to the Secretary of State or a county clerk.

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§17.25A 9. Prisoners

A prisoner may be served with summons by serving the sheriff or jailer who has custody of the prisoner. *Sakaguchi v Sakaguchi* (2009) 173 CA4th 852, 858, 92 CR3d 717. See CCP §416.90 (service on person's agent effectuates service on person if agent authorized to receive service of process); Pen C §4013 (sheriff or jailer authorized to receive service of process on behalf of person in his or her custody). Service on the sheriff or jailer may be made by mail under §CCP 415.30. 173 CA4th at 859. See §17.35.

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E. Manner of Service

1. Within California

§17.26 a. Available Methods

Ordinarily, service of summons is made within California by personal service (CCP §415.10; see §§17.27-17.29), substituted service (CCP §415.20; see §§17.30-17.31), service by mail and acknowledgment of receipt (CCP §415.30; see §§17.32-17.35), or service by publication when the plaintiff cannot with reasonable diligence serve the defendant by any of the other methods listed here (CCP §415.50; see §17.36). Other provisions, however, apply in particular circumstances. See §§17.41-17.42 (unlawful detainer actions), 17.43 (no procedure provided), 17.44-17.46 (statutory provisions outside Jurisdiction and Service of Process Act).

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§17.27 b. Personal Service

A summons may be served by personal delivery of a copy of the summons and complaint to the person to be served. CCP §415.10. Personal service is considered to be complete at the time of delivery, so that the 30-day period for filing a responsive pleading (see CCP §412.20(a)(3)) begins to run from that date. The date on which service is made is required to be entered on or attached to the face of the copy of the summons at the time of service, but a summons served without the date is nevertheless valid and effective. CCP §415.10.

There is no requirement that the process server identify himself or herself to the person being served or disclose the nature of the documents being delivered (*Sorrell v Superior Court* (1946) 73 CA2d 194, 201, 166 P2d 80), but the better practice is to do so, particularly when serving an agent on behalf of his or her principal (see §17.18). A representative of the county sheriff or marshal or a registered process server must now be permitted to enter a gated community for a reasonable period to serve process or a subpoena. CCP §415.21. See §17.28 on disclosure when actual physical delivery is prevented by person being served.

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§17.28 (1) Sufficiency of Attempted Delivery

"Personal delivery" as used in CCP §415.10 usually requires actual physical delivery of the summons and complaint by the process server to the person served while in each other's presence. *Sternbeck v Buck* (1957) 148 CA2d 829, 832, 307 P2d 970. Actual delivery is not necessary, however, when the person to be served is in physical proximity to the process server but refuses to accept delivery. In such cases, CCP §415.10 is sufficiently complied with if the process server reasonably attempts to make actual delivery but is prevented from doing so. The summons and complaint should be left in as close proximity to the person as is feasible under the circumstances and he or she should be made aware of their location. The process server should also attempt to inform the person served of the nature of the documents. See, *e.g., Trujillo v Trujillo* (1945) 71 CA2d 257, 162 P2d 640 (process server attempted to inform defendant of nature of documents through window of defendant's car and placed papers under windshield wiper); *In re Ball* (1934) 2 CA2d 578, 38 P2d 411 (process server, who had previously served defendant at same location, approached within 12 feet of defendant and stated "I have here another one of those things for you," then tossed papers toward defendant as defendant walked away).

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§17.29 (2) Effect of Concealment

Sometimes a defendant conceals himself or herself from the person attempting personal service (*e.g.,* separated by a door that the defendant refuses to open), perhaps making it difficult to prove his or her identity if the papers are left nearby.

PRACTICE TIP: When a defendant is concealed from the process server, substituted service (CCP §415.20; see §§17.30-17.31) may be used (*i.e.,* leaving the papers at the residence or business of the person to be served).

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c. Substituted Service

§17.30 (1) On Business and Other Entities

Code of Civil Procedure §415.20(a) sets forth a method for effecting "substituted service" of a summons and complaint (*i.e.,* a substitute for personal delivery under CCP §415.10; see §§17.27-17.29) on business and other entities, including corporations (see CCP §416.10), defunct corporations (see CCP §416.20), joint stock companies (see CCP §416.30), partnerships and unincorporated associations (see CCP §416.40), and public entities (see CCP §416.50).

Substituted service under CCP §415.20(a) is effected by:

- Leaving a copy of the summons and complaint during usual office hours in the office of the person to be served or, if no physical address is known, at his or her usual mailing address, other than a United States Postal Service post office box, with the person apparently in charge of the office; and
- Mailing a copy of the summons and complaint (by first-class mail, postage prepaid), addressed to the person to be served at the place where a copy of the summons and complaint was left.

When service is effected by leaving a copy of the summons and complaint at a mailing address, it must be left with a person at least 18 years of age, who must be informed of its contents. CCP §415.20(a).

Properly effected substituted service is considered to be complete on the tenth day after the date of mailing (CCP §415.20(a)), and therefore a responsive pleading must be filed by the defendant within 40 days (10 plus 30) after the date of mailing (see CCP §412.20(a)(3)). The provisions of CCP §1013 extending the time for filing a responsive pleading when service of papers is made by mail do not apply to computation of this time period. CCP §413.20.

The office of the person to be served, referred to in CCP §415.20(a), is not necessarily the office of the entity. The term "usual office hours" means that delivery must be made during the hours that the person to be served is normally at his or her office or during the normally functioning hours of the office. The "person who is apparently in charge" (CCP §415.20(a)) of the office need not be the person *actually* in charge as long as he or she reasonably appears to the process server to be in charge. The person may under certain circumstances be the personal secretary of the person to be served (see Comment to CCP §415.20) or may even be a receptionist or similar employee in situations in which access to the personal secretary is denied. See *Ludka v Memory Magnetics Int'l* (1972) 25 CA3d 316, 101 CR 615 (service proper under CCP §415.20 when process server left papers on table in common reception area of corporate defendant and mailed copy to same place).

A summons may be served on a business organization, form unknown, by leaving a copy of the summons and complaint during usual office hours with the person who is apparently in charge of the office of that business organization, and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid, to the person to be served at the place where a copy of the summons and complaint was left. Service of a summons in this manner is considered complete on the 10th day after mailing. CCP §415.95(a).

Service of a summons under CCP §415.95 is not valid for a corporation with a registered agent for service of process listed with the Secretary of State. CCP §415.95(b).

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§17.31 (2) On Natural Persons

The method for effecting substituted service on natural persons (*i.e.,* those persons specified in CCP §§416.60-416.90) is set forth in CCP §415.20(b) and, with one major exception, is similar to that for effecting substituted service on business and other entities (see §17.30). The major exception is that natural persons may not be served in this manner unless the plaintiff has, "with reasonable diligence," first attempted to effect personal service (see §§17.27-17.29).

If a defendant challenges substituted service, the burden is on the plaintiff to show that reasonable attempts to effect personal service were made; each case must be judged on its own facts. *Evartt v Superior Court* (1979) 89 CA3d 795, 801, 152 CR 836. Compare *Espindola v Nunez* (1988) 199 CA3d 1389, 245 CR 596 (substituted service permitted when, after three unsuccessful attempts to serve defendant at his residence shortly after plaintiff learned where defendant lived, process server left papers at residence with defendant's wife), with *Evartt v Superior Court, supra* (substituted service rejected when plaintiff waited until three days before expiration of three-year period under former CCP §581a (substance continued in CCP §583.210(a)) to attempt service and, finding defendant away on vacation, left papers with defendant's house sitter). Ordinarily, three attempts at personal service at a proper place should fully satisfy the requirement of reasonable diligence and allow substituted service to be made. However, if a process server attempts to serve defendants at an address and notices that the mail is addressed to a different party and the guard tells him that the defendants have moved, it would be futile for the process server to return to that address two more times to attempt service. *Ellard v Conway* (2001) 94 CA4th 540, 545, 114 CR2d 399.

Substituted service under CCP §415.20(b) is effected by:

- Leaving a copy of the summons and complaint at the dwelling house, usual place of abode, usual place of business, or usual mailing address (other than a United States Postal Service post office box) of the person to be served, in the presence of a person at least age 18 who is either a competent member of the household or a person apparently in charge of the office, place of business, or mailing address, and informing the person of the contents; and
- Mailing a copy of the summons and complaint (by first-class mail, postage prepaid), addressed to the person to be served at the place where a copy of the summons and complaint was left.

Substituted service is authorized at a private/commercial post office box rental store. *Hearn v Howard* (2009) 177 CA4th 1193, 1203, 99 CR3d 642, citing *Ellard v Conway* (2001) 94 CA4th 540, 546, 114 CR2d 399.

Properly effected substituted service is considered to be complete on the tenth day after the date of mailing (CCP §415.20(b)), and the time for filing a responsive pleading is the same as for substituted service on business and other entities (see §17.30).

On the meaning of terms used in CCP §415.20(b), see Note, *Substituted Service of Process on Individuals: Code of Civil Procedure Section 415.20(b)*, 21 Hastings LJ 1257, 1261 (1970).

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d. Service by Mail and Acknowledgment of Receipt

§17.32 (1) Procedure

Code of Civil Procedure §415.30 sets forth how a plaintiff may effect service by mailing a copy of the summons and complaint to the person to be served. This method should not be confused with service by mail and return receipt under CCP §415.40 (see §17.38), which is available only when the person to be served is outside California. Service under CCP §415.30 is effected by:

- Mailing (by first-class mail, postage prepaid) a copy of the summons and complaint, two copies of a notice and acknowledgment of receipt (see form in §17.65), and a self-addressed, stamped envelope to the person to be served; and
- Having the person to be served complete and sign one copy of the acknowledgment of receipt and return it to the sender.

If the person to be served completes and signs the acknowledgment of receipt and returns it to the sender, service is considered to be complete on the date of signing. CCP §415.30(c). Thus, a defendant who is served in this manner must file a responsive pleading within 30 days after the date of execution of the form. See CCP §412.20(a)(3). The provisions of CCP §1013, which would otherwise extend the time for filing a responsive pleading, do not apply to the computation of this time period. CCP §413.20.

PRACTICE TIP: In most instances, it is sound to attempt service initially by mail and acknowledgment of receipt because the approach saves costs if the defendant cooperates and may facilitate recovery of expenses of service if the defendant does not cooperate. The approach should not be used, however, (a) when prompt service is essential or (b) when the person to be served is unaware of the filing of the action and likely to make service difficult after being informed of the action by receipt of the notice form.

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§17.33 (2) Form of Notice and Acknowledgment of Receipt

The form and content of the notice required when summons is served by mail under CCP §415.30 (see §17.32) are governed by CCP §415.30(b). Counsel should routinely use the form of Notice and Acknowledgement of Receipt (Judicial Council Form POS-015) (see §17.65) because it must be used whenever applicable (Cal Rules of Ct 1.31) and is considered to be in compliance with the requirements of CCP §415.30(b) (CCP §415.30(e)).

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§17.34 (3) Effect of Execution and Return

The execution and return of an acknowledgment of receipt simply acknowledges receipt of the documents. It should not be viewed as an acknowledgment that service has been properly made or as constituting a general appearance (see CCP §1014). By executing and returning the acknowledgment of receipt, a party does not consent to the court's personal jurisdiction over him or her. *Marriage of Merideth* (1982) 129 CA3d 356, 180 CR 909.

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§17.35 (4) Effect of Failure to Respond

When the person to be served does not execute and return the acknowledgment of receipt, the plaintiff must resort to another means of service. When a defendant does not complete, sign, and return the acknowledgment to the plaintiff within 20 days after mailing, however, the defendant is liable to the plaintiff for the reasonable expenses incurred in serving or attempting to serve the summons in any other permissible manner. Except for good cause shown, such expenses are recoverable on a motion, with or without notice and whether or not the moving party is otherwise entitled to recover costs in the action. CCP §415.30(d).

NOTE: In *Sakaguchi v Sakaguchi* (2009) 173 CA4th 852, 859, 92 CR3d 717, the court found that a prisoner's failure to return the acknowledgment of receipt did not affect the validity of the service in view of Pen C §4013, which expressly authorizes service by mail on the sheriff or jailer having custody of the prisoner.

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.36 e. Service by Publication

§17.36 e. Service by Publication

A plaintiff may effect service by publication when it appears to the satisfaction of the court that the party to be served cannot with reasonable diligence be served by another method specified in CCP §§415.10-415.50. CCP §415.50. Reasonable diligence requires an effort such as a reasonable person who truly desired to give notice would have made under the circumstances. *Donel, Inc. v Badalian* (1978) 87 CA3d 327, 333, 150 CR 855. As a condition of establishing that the party to be served cannot with reasonable diligence be served in another manner specified in this article (CCP §§415.10-415.50, providing for manner of service of summons), the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database, including, but not limited to, voter registration rolls and records of the department of motor vehicles. CCP §415.50(e).

WARNING: Failure to conduct a reasonably diligent search to ascertain the defendant's address, *e.g.*, by investigating city and county directories, utility companies, employers, friends, acquaintances, and relatives is grounds for setting aside the default and default judgment. *Slusher v Durrer* (1977) 69 CA3d 747, 138 CR 265. A party who has not received actual notice may move to set aside a default or default judgment up to 2 years after entry of the default judgment under CCP §473.5. If the defendant simultaneously moves to quash service because the publication order was not based on sufficient evidence of "reasonable diligence," and the motion is granted more than 3 years after the filing of the complaint, the complaint will be subject to mandatory dismissal under CCP §583.210. However, courts are reluctant to grant such motions since the court already has made a finding of reasonable diligence when it granted the publication order.

In addition to the reasonable diligence requirement, the court must find that:

- A cause of action exists against the party to be served or the party is a necessary or proper party to the action (CCP §415.50(a)(1)); or
- The party has or claims an interest in real or personal property in California that is subject to the court's jurisdiction or the relief demanded would exclude the party from any interest in such property (CCP §415.50(a)(2)).

A plaintiff seeking an order permitting service by publication should prepare an ex parte application for an order for publication of summons, a declaration in support of the application, a brief memorandum, and an order for publication of summons. The declaration must set forth facts establishing both the requisite reasonable diligence and that the requirement of CCP §415.50(a) noted above is met. *Harris v Cavasso* (1977) 68 CA3d 723, 137 CR 410 (affidavit for order for publication of summons insufficient for failure to show that cause of action exists).

WARNING: The order permitting service by publication should be obtained early enough so that service can be completed before the three-year period for service of process expires. The finding required for service by publication, that a party cannot with reasonable diligence be served by another method, is not the same as a finding that the "defendant was not amenable to the process of the court" for purposes of computing the time within which service must be made under CCP §583.240(a), and does not toll the time to bring the case to trial under CCP §583.340. *Watts v Crawford* (1995) 10 C4th 743, 42 CR2d 81 (case dismissed for failure to serve within 3 years when order for publication issued one day before expiration of 3-year period).

The order allowing service by publication must (1) order the summons published in a named California newspaper that is most likely to give notice to the party to be served and (2) direct that a copy of the summons, the complaint, and the publication order be mailed "forthwith" to the party if his or her address is determined before the end of the publication period. If the party to be served resides or is located out of state, the court may also order the summons to be published in a named newspaper outside this state that is most likely to give actual notice to that party. CCP §415.50(b). As a practical matter, most attorneys choose to have the notice published in a legal newspaper. On the meaning of "forthwith," see *Anderson v Goff* (1887) 72 C 65, 73, 13 P 73.

Except as otherwise provided by statute, the summons must be published once a week for four successive weeks unless the court orders a longer period. CCP §415.50(b); Govt C §6064. The publication notice period starts with the first day of publication and consists of 28 consecutive days, including the first day of publication. Govt C §6064. Service is considered to be complete on the 28th day. CCP §415.50(c); Govt C §6064. A responsive pleading must be filed within 30 days after that date. See CCP §412.20(a)(3).

If it becomes possible to serve the defendant by another method specified in CCP §§415.10-415.50, the plaintiff may do so and the service will supersede any published summons. CCP §415.50(d).

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2. Outside California

a. Within United States

§17.37 (1) Basic Rule

Service of a summons and complaint in connection with a California action may be made outside California but within the United States (CCP §413.10(b)):

- In any manner provided by CCP §§415.10-415.50, including personal service (see §§17.27-17.29), substituted service (see §§17.30-17.31), service by mail and acknowledgment of receipt (see §§17.32-17.35), service by mail and return receipt (see §17.38), and service by publication (see §17.36); or
- As prescribed by the law of the place where the person is served (see §17.39).

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§17.38 (2) Service by Mail and Return Receipt

Service by mail and return receipt under CCP §415.40 is probably the most widely used method for service outside California. This method should not be confused with service by mail and acknowledgment of receipt under CCP §415.30 (see §§17.32-17.35), available whether the person to be served is within or outside California. Service under CCP §415.40 is attempted by sending a copy of the summons and complaint to the person to be served by first-class mail requiring a return receipt.

If the return receipt is returned without signature because the mail was not accepted, service under CCP §415.40 will not have been made. *Stamps v Superior Court* (1971) 14 CA3d 108, 92 CR 151.

If the return receipt is signed, the signer need not necessarily be the person to be served. See *Cruz v Fagor Am., Inc.* (2007) 146 CA4th 488, 496, 52 CR3d 862 (return receipt signed by employee authorized to receive corporate mail addressed to chairman); *Marriage of Tusinger* (1985) 170 CA3d 80, 215 CR 838 (mother of party to be served signed return receipt and party's attorney indicated in letter to opposing counsel that party had received papers); *Neadeau v Foster* (1982) 129 CA3d 234, 180 CR 806 (return receipt was signed by office manager of party to be served who was authorized to sign for and accept mail addressed to party).

Service is considered to be complete on the tenth day after the date of mailing (CCP §415.40), and the defendant must file a responsive pleading within 40 days (10 plus 30) after the date of mailing (see CCP §412.20(a)(3)). The provisions of CCP §1013 do not apply to further extend the time. CCP §413.20.

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.39 (3) Service as Prescribed by Local Law

§17.39 (3) Service as Prescribed by Local Law

Code of Civil Procedure §413.10(b) permits service to be made outside California but within the United States in accordance with the law of the place where service is made.

PRACTICE TIP: In some instances, service in another state may be easier to effect in accordance with the law of that state than under California law. Consequently, when service is to be made in another state, counsel should check, and consider using, the law of that state.

Four points should be made in connection with CCP §413.10(b):

- If local law provides less stringent service requirements, California counsel may wish to take advantage of them. For example, in some states a plaintiff may effect substituted service on an individual without first attempting personal service with reasonable diligence. Compare CCP §415.20(b), discussed in §17.31.
- The person to be served in other jurisdictions may differ from California requirements. For example, California counsel can take advantage of local law that permits service to be made on a limited partnership by serving a limited partner even though such service would not be valid under California law (see §17.22).
- The location of the person to whom delivery of a copy of the summons and complaint is made determines which local law may be invoked, not the location of the defendant or even of the person to be served. If, for example, the defendant is a California corporation and the person to be served is a corporate employee who resides in California but maintains an office outside the state, service on someone at that office in accordance with the law of the place where the office is located would be valid if permissible under local law, even if the particular service would not be valid under California law.
- It is unclear whether the language in CCP §413.10(b) permitting service on a person "as prescribed by the law of the place where the person is served" extends to determining persons who are permitted to serve summons as well as persons on whom summons may be served and the manner of service. Until California courts resolve this problem, the plaintiff should consult local law governing persons who are permitted to serve process because, unlike CCP §414.10, some state statutes permit private persons to act as process servers only when a court has expressly authorized them to do so. In such situations, the plaintiff may be able to move for such an order in the California court in which the action is pending if a professional process server will not be used.

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§17.40 b. Outside United States

When effecting service of process outside the United States in a California action, CCP §§413.10(c) permits a plaintiff to proceed:

- In any manner provided by CCP §§415.10-415.50, including personal service (see §§17.27-17.29), substituted service (see §§17.30-17.31), service by mail and acknowledgment of receipt (see §§17.32-17.35), service by mail and return receipt (see §17.38), and service by publication (see §17.36);
- As directed by the court in which the action is pending; or
- If the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory.

The flexibility of these procedures is important when service is made outside the United States because a number of foreign jurisdictions refuse to recognize a foreign judgment unless service has been made in accordance with their own laws. See Comment to CCP §413.10.

The provisions of CCP §413.10(c) are expressly made subject to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS 6638). The convention governs service of process abroad for the signatory nations (the United States, Japan, and most Western European countries are signatories). See, *e.g., Dr. Ing H.C. F. Porsche A.G. v Superior Court* (1981) 123 CA3d 755, 177 CR 155 (California court had no jurisdiction over German automobile manufacturer when Hague Convention service requirements not observed). Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters allows service of process by registered mail on plaintiffs who reside and work in Hong Kong. *Denlinger v Chinadotcom Corp.* (2003) 110 CA4th 1396, 1398, 2 CR3d 530. Failure to properly serve a party who resides outside the country under the Hague Service Convention renders all subsequent proceedings void for that person. This is true even when the party indisputably had notice of the action. *In re Alyssa F.* (2003) 112 CA4th 846, 852, 6 CR3d 1.

A copy of the convention may be found following Fed R Civ P 4 in Title 28 of United States Code Annotated.

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3. Unlawful Detainer Actions

§17.41 a. Service by Posting

Service by posting ("nail and mail") may be used in an unlawful detainer action when the court is shown that the party to be served cannot with reasonable diligence be served in any manner specified in CCP §§415.10-415.50 except publication. CCP §415.45(a). The court must also find that:

- A cause of action exists against the party to be served or that the party is a necessary or proper party to the action (CCP §415.45(a)(1)); or
- The party has or claims an interest in real property in California that is subject to the court's jurisdiction or that the relief demanded would exclude the party from any interest in such property (CCP §415.45(a)(2)).

PRACTICE TIP: Sometimes in unlawful detainer actions a landlord is faced with a tenant who has left the rented premises and cannot be located, making it difficult to serve him or her by the usual methods. Before the enactment of CCP §415.45, the landlord's only alternative in this situation was service by publication. Now, the posting procedure, which is less expensive and time consuming than publication, is clearly preferable.

The order allowing service by posting must:

- Order the summons posted on the premises in a manner most likely to give actual notice to the party to be served; and
- Direct that a copy of the summons and complaint be mailed "forthwith" by certified mail to the party at his or her last-known address.

CCP §415.45(b). On the meaning of "forthwith," see *Anderson v Goff* (1887) 72 C 65, 73, 13 P 73.

Service is considered to be complete on the tenth day after posting and mailing. CCP §415.45(c). A responsive pleading must be filed within 15 days (10 plus 5) after the date of posting and mailing. See CCP §1167.3. The provisions of CCP §1013 extending the time for filing a responsive pleading when service of papers is effected by mail do not apply. CCP §413.20.

If the party is served by another method specified in CCP §§415.10-415.50, except publication, that service supersedes any posted summons. CCP §415.45(d).

For Judicial Council summons form for unlawful detainer actions, see §17.67.

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§17.42 b. Abandonment

Under CC §1951.3, leased real property is considered to be abandoned by the lessee and the lease terminated when:

- The lessor gives the lessee the required notice in writing of the lessor's belief of abandonment; and
- The lessee fails to give the lessor written notice, before the date of termination specified in the lessor's notice, of the lessee's intent not to abandon the premises.

The lessee's notice must also state an address at which the lessee may be served by certified mail in any unlawful detainer action.

When the lessee has given the lessor notice of the lessee's intent not to abandon the premises, the lessor may serve the summons and complaint on the lessee in any manner authorized by CCP §§415.10-415.50 (CCP §415.47(c)) or by certified mail, postage prepaid, addressed to the lessee at the address given in the notice of intent not to abandon if the summons is mailed within 60 days after the notice is received by the lessor (CCP §415.47(a)).

When the lessee's notice fails to include an address at which the lessee may be served, the summons and complaint may be served on the lessee by certified mail, postage prepaid, addressed to the lessee at either:

- The address or addresses to which the lessor's notice of belief of abandonment was addressed if given by mail; or
- The address of the leased premises if the notice of belief of abandonment was personally served on the lessee.

CCP §415.47(b). As with CCP §415.47(a), service of process may not be made under CCP §415.47(b) unless the summons is mailed to the lessee within 60 days after the lessor's receipt of the lessee's notice of intent not to abandon.

Service of process under either CCP §415.47(a) or CCP §415.47(b) is considered to be complete on the 10th day after the summons is mailed. A responsive pleading must be filed within 15 days (10 plus 5) after mailing. See CCP §1167.3. The provisions of CCP §1013 extending the time for filing a responsive pleading when service of papers is effected by mail do not apply. CCP §413.20.

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§17.43 4. Manner of Service When No Procedure Provided

When no provision for service of summons has been made in CCP §§413.10-417.40 or under any other law, the court in which the action is pending may direct that service be made in a manner reasonably calculated to give actual notice to the party to be served and may prescribe the manner in which proof of service is to be made. CCP §413.30.

Situations for which no statutory procedure for service of summons is provided may appear to be rare, but CCP §413.30 may have broader use than its literal language suggests. In *Cohen v Board of Supervisors* (1971) 20 CA3d 236, 97 CR 550, indigent petitioners in marital actions sought to have their county board of supervisors and the State Controller ordered to pay costs of publication to serve respondents who could not be found for other means of service specified in CCP §§415.10-415.50. The court of appeal held that an indigent petitioner could be permitted under CCP §413.30 to serve the summons at the respondent's last known address by mail and posting because, although publication was theoretically possible, it was not a practical method under the circumstances.

PRACTICE TIP: The analysis used in *Cohen* may serve plaintiffs in other situations. A plaintiff might argue, for example, that *Cohen* provides authority under which a court may fashion an appropriate manner of service when the defendant is avoiding service by other statutorily provided means and the circumstances do not allow sufficient time for service by publication. The plaintiff should propose a specific procedure to be ordered for service of summons and argue that the suggested procedure is in fact more likely than publication to provide the defendant with actual notice.

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§17.44 F. Statutory Provisions Outside Jurisdiction and Service of Process Act

Code of Civil Procedure §413.10 expressly recognizes the validity of specific statutory provisions outside the Jurisdiction and Service of Process Act (CCP §§410.10-418.11) that apply to service of process in particular actions (see §§17.45-17.46).

The Judicial Council Comments to CCP §§413.10, 415.10, and 416.50 seem to view such specific provisions as supplementary rather than exclusive, which suggests that the general rules regarding service prescribed in the Act may be used in all civil actions, including those for which a statute provides a different approach for service. See *Anderson v Sherman* (1981) 125 CA3d 228, 237, 178 CR 38 (Judicial Council comments underscore plain meaning of statutory language, *i.e.,* that Code of Civil Procedure service provisions have universal application). But see *House v State* (1981) 119 CA3d 861, 873 n9, 174 CR 279 (more specific statute prevails over more general provisions of CCP §416.50). Although service in accordance with the Act may withstand challenge when another statute provides a different approach for service in a particular instance, the safer course is to use the specifically provided approach.

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§17.45 1. Statutes Governing Service on State and Certain State Agencies

The following statutes contain provisions governing service of process on the state and certain state agencies in particular situations. The list, which is not exhaustive, contains some commonly used statutes. An attorney preparing to serve a complaint based on a cause of action created by statute should determine whether the applicable code contains any special service provisions.

- CC §2931a (action involving real property on which state agency claims lien).
- CCP §1250.140 (eminent domain proceeding in which state is defendant).
- Govt C §955.4(a) (all actions on claims against state).
- Govt C §955.6(a) (inverse condemnation action arising out of work by Department of Transportation).
- Govt C §955.8(a) (inverse condemnation action arising out of work by Department of Water Resources).
- Govt C §956 (certain actions involving real property in which state has interest).
- Pub Res C §6462 (action against state to quiet title to real property situated in former bed of navigable river or stream).
- Pub Res C §7555 (action against state to establish boundaries of and quiet title to swamp and overflowed land sold by state).
- Rev & T C §160 (action against county to quiet title arising from property tax dispute).
- Rev & T C §14573 (inheritance tax quiet title action against state).
- Rev & T C §16252 (action against state for refund of gift taxes).
- Rev & T C §26104 (action against Franchise Tax Board for refund of tax imposed under Bank and Corporation Tax Law).
- Veh C §24.5 (all actions against Department of Motor Vehicles and its director).

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§17.46 2. Statutes Governing Service in Particular Actions

The following statutes contain provisions governing service of process in particular actions. The list, which is not exhaustive, contains some commonly used statutes. An attorney preparing to serve a complaint based on a cause of action created by statute should determine whether the applicable code contains any special service provisions.

- CCP §116.340 (small claims actions).
- CCP §§751.06, 751.08, 751.10 (in rem action by persons claiming interest in real property to establish title in case of destroyed property records).
- Ins C §1620.5 (action against foreign insurer under Unfair Trade Practices Act (Ins C §§790-790.15)).
- Veh C §§17454-17455 (action against nonresident motorist arising out of automobile accident that occurred in state).

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VI. FILING PROOF OF SERVICE OF SUMMONS

§17.47 A. Requirement of Filing Proof of Service of Summons

The amendment of CCP §417.30 in 2005 dispensed with language that the summons must be "returned." After service of process is made, proof of service of the summons must be "filed" with the court as provided in CCP §417.10 (service in California) or CCP §417.20 (service outside California), unless the defendant has made a general appearance. CCP §417.30. Proof of service should be made on a Judicial Council form whenever possible. See CCP §417.10(f). See also forms in §§17.63-17.64, 17.66-17.70.

Because "returned" meant filing with the court clerk (*Drinnon v Oliver* (1972) 24 CA3d 571, 584, 101 CR 120), previous cases interpreting "return of service" may still have validity under the present "filing" requirement of CCP §417.30. See, *e.g., City of Los Angeles v Morgan* (1951) 105 CA2d 726, 731, 234 P2d 319 (return of service in proper form is prima facie evidence that service of process has been made, but the presumption may be overcome by other evidence).

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§17.48 B. Time for Filing Proof of Service

Under CCP §583.210(b), proof of service must be filed within 60 days after the 3-year period of CCP §583.210(a) during which the summons and complaint must be served. This time limit is mandatory unless an exception is provided by statute. CCP §583.250(b). See §17.16 on time for service of process.

It is not clear whether dismissal would be required for failure to file proof of service of summons under CCP §583.210(b) when the service itself was timely under CCP §583.210(a). The provisions requiring dismissal are currently in CCP §583.250(a), which requires that the complaint be dismissed only if service is not made in a timely fashion; a timely filed proof of service of summons to avoid dismissal is not an express part of §583.250(a). Nevertheless, counsel is advised to avoid litigating the matter by filing the proof of service in every instance within the 3 years and 60 days from the time the complaint is filed.

Time requirements for filing a proof of service may differ radically from the requirements outlined above under the Trial Court Delay Reduction Act (Govt C §§68600-68620). These delay reduction rules typically require that the proof of service be filed within the time for service or within five days afterwards. See §17.16 on the time for service of process, which is typically between 30 and 60 days under local rules. On delay reduction programs generally, see chap 40.

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§17.49 C. Procedure When Original Summons Lost

By amendment in 2005, CCP §417.30 omitted procedures to follow if the original summons was lost after service of a copy had been made but before the summons has been "returned." This procedure no longer appears necessary because the original summons is now to be retained by the court clerk in the court records and only copies of summons are to be issued to the plaintiff who requests issuance of the summons. See CCP §412.10. See §17.47.

On loss of summons *before* service, see §17.13.

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§17.50 D. Content of Proof of Service

Proof of service should be made on a Judicial Council form whenever possible. See CCP §417.10(f). See also forms in §§17.63-17.64, 17.66-17.70. When a professional process server is used, the proof of service must indicate the county of registration and registration number of the server. CCP §417.40.

Regardless of the method of service used, a written admission of service by the party to be served may be used as proof of service. CCP §§417.10(d), 417.20(d).

A problem may arise if the person to whom a copy of the summons and complaint is delivered refuses to divulge his or her name. Code of Civil Procedure §417.10(a) requires that the person's name be shown. It is possible that a proof of service without the name may be found valid if it includes an affidavit or declaration setting forth the refusal with additional facts from which it appears likely that service was properly made (*e.g.,* for substituted service, that a copy of the summons and complaint was left during usual office hours at a corporate headquarters with a person who appeared to be in charge of the office). It often happens, however, that when a person served refuses to identify himself or herself, the defendant has actually moved and the person served is unconnected with the defendant.

In this situation, it is safer to get a court order authorizing service under CCP §413.30, which permits the court to direct the manner of service in certain circumstances. The court could provide for service on an individual identified by physical description or other appropriate means.

However, the easiest solution is to have service carried out by a peace officer in counties where it is still available. Under Govt C §26662, service by a peace officer is presumed to be valid and in fact is less likely to be defective. A peace officer is more likely to get identification from the person served and less likely to serve a person who has nothing to do with the defendant.

On specific requirements for proofs of service according to place and manner of service, see §§17.51-17.61.

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§17.51 1. Service Within California

Code of Civil Procedure §417.10 provides that, when service of process is made on a person within California, the content of the proof of service depends on the manner of service.

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.52 a. Personal or Substituted Service; Service by Mail

§17.52 a. Personal or Substituted Service; Service by Mail

The declaration of the person making service must show (CCP §417.10(a)):

- The time, place, and manner of service;
- Facts showing that the service was made in accordance with CCP §§413.10-417.40 (including a statement that the server was at least age 18 and was not a party to the action (see CCP §414.10) and, for substituted service on a natural person, facts establishing reasonable diligence in attempting personal service (see CCP §415.20(b)));
- The name of the person to whom a copy of the summons and complaint was delivered (this may not be required when the person refuses to divulge his or her name; see §17.50) and, if appropriate, the person's title or the capacity in which he or she was served; and
- For an action against a corporation or unincorporated association, that the notice required by CCP §412.30 appeared on the copy of the summons served, if in fact it did.

For service by mail and acknowledgment of receipt, the proof of service must be accompanied by the written acknowledgment. CCP §417.10(a).

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.53 b. Service by Publication

§17.53 b. Service by Publication

The proof of service must be accompanied by an affidavit or declaration from the publisher or printer, or his or her foreman or principal clerk, showing the time and place of publication, and, if a copy of the summons and complaint was mailed to the party to be served, an affidavit or declaration showing the time and place of mailing. CCP §417.10(b).

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§17.54 c. Service by Posting

The proof of service must be accompanied by an affidavit or declaration from the person who posted the summons, showing the time and place of posting, and, if a copy of the summons and complaint was mailed to the party to be served, an affidavit or declaration showing the time and place of mailing. CCP §417.10(e).

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.55 d. Service by Other Methods

§17.55 d. Service by Other Methods

The proof of service must comply with the requirements of the particular statute or, if no manner of proof is prescribed, the requirements of CCP §417.10 for proof of a similar manner of service. CCP §417.10(c).

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§17.56 2. Service Outside California

Code of Civil Procedure §417.20 provides that, when service of process is made on a person outside California, the content of the proof of service depends on the manner of service.

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§17.57 a. Personal or Substituted Service, or Other Methods

If served under CCP §415.10, §415.20, or §415.30, proof of service must be as prescribed by CCP §417.10 for service within California (see §17.51). CCP §417.20(a).

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§17.58 b. Service by Mail and Return Receipt

The proof of service must include satisfactory evidence, by a signed receipt or other evidence, establishing actual delivery to the person served. CCP §417.20(a). See *Bolkiah v Superior Court* (1999) 74 CA4th 984, 1000, 88 CR2d 540. The return receipt need not necessarily be signed, however, by the person to be served. See §17.38.

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.59 c. Service as Prescribed by Court Order

§17.59 c. Service as Prescribed by Court Order

The proof of service must be as directed in the court order. CCP §417.20(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.60 d. Service in Accordance With Foreign Law

§17.60 d. Service in Accordance With Foreign Law

The proof of service must be in the manner prescribed by the law of the place where the person is served, subject to any other requirements imposed by the court in which the action is pending. CCP §417.20(c).

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§17.61 3. Service on Fictitiously Named Defendants

When a fictitiously named defendant is served with process under CCP §474, the proof of service must state the fictitious name under which the defendant was served and the fact that the summons gave notice to the person served that he or she was served as (or on behalf of) the person sued under the specified fictitious name. See §17.10 on content of summons for fictitiously named defendant. A default judgment may not be entered unless these requirements are met. CCP §474; *Pelayo v J.J. Lee Mgmt. Co., Inc.* (2009) 174 CA4th 484, 496, 94 CR3d 784 (plaintiff must comply with requirements both for endorsement of summons and recitals in proof of service on fictitiously named defendant; entry of default set aside when proof of service lacked proper recitals). See also *Armstrong v Superior Court* (1956) 144 CA2d 420, 301 P2d 51 (court has no jurisdiction over defendant sued under fictitious name unless summons contains notice required by CCP §474).

The Judicial Council forms for summons and proof of service should be used for service on fictitiously named defendants. The entry for the defendant's name should include both the defendant's true name and fictitious name, *e.g.,* Richard Smith sued as Doe 1.

NOTE: In *Pelayo v J.J. Lee Mgmt. Co., Inc., supra,* no actual amended proof of service was offered; the court did not decide whether such a procedure would have been proper. 174 CA4th at 498 n 10.

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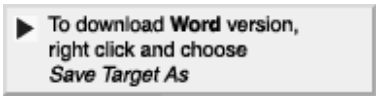
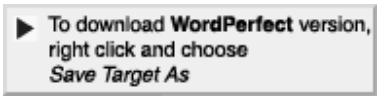
§17.62 VII. CHECKLIST: PROCEDURE FOR SERVING SUMMONS ON PARTIES





Determine party on whom summons is to be served

If party is individual, ascertain

- Full name and any aliases
- Residence address
- Employment address
- Age (service must be made on minors at least age 12), and name and address(es) of parent or other adult to whom summons will be delivered, if individual is minor (see §17.24)
- If individual is conservatee, name and address(es) of conservator and whether to seek order dispensing with requirement of delivery to conservatee (see §17.24)

If party is entity, ascertain

- Whether it is corporation, defunct corporation, joint stock company, partnership or other unincorporated association, or public entity
- To what individuals delivery may be made on entity's behalf (see §§17.19-17.23), their names and addresses, and which would be easiest to serve

Whether party is individual or entity

- Determine which Judicial Council summons form to use (see §17.6), or whether an attorney-drafted form will be required (see §17.7), and whether any special requirements apply to preparation of summons (see §§17.8-17.10)
- Determine whether service by Notice and Acknowledgment of Receipt may be appropriate (see §§17.32-17.35)
- Prepare summons (see §§17.6-17.10, 17.63, 17.66-17.70)
- Have summons issued (see §17.11)
- Determine time requirements for service of summons (see §17.16)
- Determine who will serve summons and manner of service (see §§17.14, 17.26-17.46)
- Have summons served
- Determine time requirements for filing of return of service (see §17.48)
- Prepare proof of service (see §§17.50-17.61, 17.63-17.70)
- File return of service (see §17.47)

If serving individual directly may be difficult, determine name and address(es) of agent, if any, authorized by individual to receive service of process (see §17.18).

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/ VIII. FORMS/§17.63 A. Form: Summons (Judicial Council Form SUM-100)

VIII. FORMS

§17.63 A. Form: Summons (Judicial Council Form SUM-100)

SUM-100

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.
¡AVISO! *Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.*

*Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (*www.sucorte.ca.gov*), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

*Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (*www.lawhelpcalifornia.org*), en el Centro de Ayuda de las Cortes de California, (*www.sucorte.ca.gov*) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.*

The name and address of the court is:
(El nombre y dirección de la corte es):

CASE NUMBER:
(Número del Caso):

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

DATE: *(Fecha)*
Clerk, by *(Secretario)* _____, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify):*
3. ☐ on behalf of *(specify):*
   under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
   ☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
   ☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
   ☐ other *(specify):*
4. ☐ by personal delivery on *(date):*

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. July 1, 2009]

SUMMONS

CEB

Code of Civil Procedure §§ 412.20, 465
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each party to be served); ___ office copies.

Comment: All defendants and plaintiffs should be listed on the summons. See CCP §412.20(a)(2). The notice to the person served, found on the summons at Items 1-4, is generally not filled out before the summons is issued, because the contents of Items 1-3 may vary for multiple defendants and the date of personal delivery (Item 4), if any, will not yet be known. Counsel should complete Items 1-3 for each copy before the copies are sent for service. On specific requirements, see §§17.9 (action against corporation or unincorporated association), 17.10 (action against fictitiously named defendants). Item 4 should be completed by the process server if service is made by personal delivery. See

CCP §415.10.

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.64 B. Form: Proof of Service of Summons (Judicial Council Form POS-010)

§17.64 B. Form: Proof of Service of Summons (Judicial Council Form POS-010)

Print

POS-010

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*.	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:
PROOF OF SERVICE OF SUMMONS	Ref. No. or File No.:

(Separate proof of service is required for each party served.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of:
   a. ☐ summons
   b. ☐ complaint
   c. ☐ Alternative Dispute Resolution (ADR) package
   d. ☐ Civil Case Cover Sheet *(served in complex cases only)*
   e. ☐ cross-complaint
   f. ☐ other *(specify documents)*:
3. a. Party served *(specify name of party as shown on documents served)*:

   b. ☐ Person (other than the party in item 3a) served on behalf of an entity or as an authorized agent (and not a person under item 5b on whom substituted service was made) *(specify name and relationship to the party named in item 3a)*:
4. Address where the party was served:
5. I served the party *(check proper box)*
   a. ☐ **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on *(date)*: (2) at *(time)*:
   b. ☐ **by substituted service.** On *(date)*: at *(time)*: I left the documents listed in item 2 with or in the presence of *(name and title or relationship to person indicated in item 3)*:
      (1) ☐ **(business)** a person at least 18 years of age apparently in charge at the office or usual place of business of the person to be served. I informed him or her of the general nature of the papers.
      (2) ☐ **(home)** a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party. I informed him or her of the general nature of the papers.
      (3) ☐ **(physical address unknown)** a person at least 18 years of age apparently in charge at the usual mailing address of the person to be served, other than a United States Postal Service post office box. I informed him or her of the general nature of the papers.
      (4) ☐ I thereafter mailed (by first-class, postage prepaid) copies of the documents to the person to be served at the place where the copies were left (Code Civ. Proc., § 415.20). I mailed the documents on *(date)*: from *(city)*: **or** ☐ a declaration of mailing is attached.
      (5) ☐ I attach a **declaration of diligence** stating actions taken first to attempt personal service.

Print

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

5. c. ☐ **by mail and acknowledgment of receipt of service.** I mailed the documents listed in item 2 to the party, to the address shown in item 4, by first-class mail, postage prepaid,
   (1) on *(date):* (2) from *(city):*
   (3) ☐ with two copies of the *Notice and Acknowledgment of Receipt* and a postage-paid return envelope addressed to me. *(Attach completed* Notice and Acknowledgement of Receipt.*)* (Code Civ. Proc., § 415.30.)
   (4) ☐ to an address outside California with return receipt requested. (Code Civ. Proc., § 415.40.)

   d. ☐ **by other means** *(specify means of service and authorizing code section):*

   ☐ Additional page describing service is attached.

6. The "Notice to the Person Served" (on the summons) was completed as follows:
   a. ☐ as an individual defendant.
   b. ☐ as the person sued under the fictitious name of *(specify):*
   c. ☐ as occupant.
   d. ☐ On behalf of *(specify):*
   under the following Code of Civil Procedure section:

☐ 416.10 (corporation)	☐ 415.95 (business organization, form unknown)
☐ 416.20 (defunct corporation)	☐ 416.60 (minor)
☐ 416.30 (joint stock company/association)	☐ 416.70 (ward or conservatee)
☐ 416.40 (association or partnership)	☐ 416.90 (authorized person)
☐ 416.50 (public entity)	☐ 415.46 (occupant)
	☐ other:

7. **Person who served papers**
   a. Name:
   b. Address:
   c. Telephone number:
   d. **The fee** for service was: $
   e. I am:
      (1) ☐ not a registered California process server.
      (2) ☐ exempt from registration under Business and Professions Code section 22350(b).
      (3) ☐ a registered California process server:
         (i) ☐ owner ☐ employee ☐ independent contractor.
         (ii) Registration No.:
         (iii) County:

8. ☐ **I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

   or

9. ☐ **I am a California sheriff or marshal and** I certify that the foregoing is true and correct.

Date:

(NAME OF PERSON WHO SERVED PAPERS/SHERIFF OR MARSHAL) (SIGNATURE)

Copies: Original (file with court clerk); ___ office copies.

Comment: Notwithstanding the adoption of the mandatory form Proof of Service of Summons (Judicial Council Form POS-010), a form for proof of service of summons and complaint prepared entirely by word processor, typewriter, or similar process may be used for proof of service in any applicable action or proceeding if certain conditions are met. See Cal Rules of Ct 2.150.

© The Regents of the University of California

Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.65 C. Form: Notice and Acknowledgment of Receipt--Civil (Judicial Council Form POS-015)

§17.65 C. Form: Notice and Acknowledgment of Receipt—Civil (Judicial Council Form POS-015)

Print

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
NOTICE AND ACKNOWLEDGMENT OF RECEIPT—CIVIL	CASE NUMBER:

TO *(insert name of party being served):* _____

NOTICE

The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of ***(to be completed by sender before mailing)***:

1. ☐ A copy of the summons and of the complaint.
2. ☐ Other *(specify):*

(To be completed by recipient):

Date this form is signed:

_____ ▶ _____

(TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY, ON WHOSE BEHALF THIS FORM IS SIGNED) (SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

Form Adopted for Mandatory Use
Judicial Council of California
POS-015 [Rev. January 1, 2005]

NOTICE AND ACKNOWLEDGMENT OF RECEIPT — CIVIL

Code of Civil Procedure,
§§ 415.30, 417.10
www.courtinfo.ca.gov

Copies: Original and one copy (mail with summons and complaint to person to be served); ___ office copies.
Comment: See §§17.32-17.35.

© The Regents of the University of California

Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.66 D. Form: Summons (Joint Debtor) (Judicial Council Form SUM-120)

§17.66 D. Form: Summons (Joint Debtor) (Judicial Council Form SUM-120)

Print

SUM-120

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY (SOLO PARA USO DE LA CORTE)*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
SUMMONS (JOINT DEBTOR) ***(CITACIÓN (DEUDOR CONJUNTO))***	CASE NUMBER: *(Número del Caso)*

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

¡AVISO! *Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.*

*Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (*www.sucorte.ca.gov*), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

*Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (*www.lawhelpcalifornia.org*), en el Centro de Ayuda de las Cortes de California, (*www.sucorte.ca.gov*) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.*

1. TO THE DEFENDANT *(name)*:
(AL DEMANDADO):
You are hereby directed to file in this court, within **30** days after this summons is served on you, a written response to the Declaration or Affidavit accompanying this summons, giving any legal reason why you should not be required to pay the unpaid amount of: $ on the judgment rendered by this court on (*date*):
against (*name each*):

Date: *(Fecha)* Clerk, by *(Secretario)* _____ , Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

(SEAL)

2. **NOTICE TO THE PERSON SERVED:** You are served
a. ☐ as an individual defendant.
b. ☐ as the person sued under the fictitious name of (*specify*):
c. ☐ on behalf of (*specify*):
under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other (*specify*):
d. ☐ by personal delivery on (*date*):

Form Adopted for Mandatory Use
Judicial Council of California
SUM-120 [Rev. July 1, 2009]

SUMMONS (JOINT DEBTOR)

CEB

Code of Civil Procedure § 989
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each party to be served); ___ office copies.

Comment: On joint debtor proceedings generally, see Debt Collection Practice in California §§7.58-7.64 (2d ed Cal CEB 1999).

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.67 E. Form: Summons--Unlawful Detainer--Eviction (Judicial Council Form SUM-130)

§17.67 E. Form: Summons—Unlawful Detainer—Eviction (Judicial Council Form SUM-130)

Print

SUM-130

SUMMONS
(CITACION JUDICIAL)
UNLAWFUL DETAINER—EVICTION
(RETENCIÓN ILÍCITA DE UN INMUEBLE—DESALOJO)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

You have 5 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. (To calculate the five days, count Saturday and Sunday, but do not count other court holidays. If the last day falls on a Saturday, Sunday, or a court holiday then you have the next court day to file a written response.) A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

*Tiene 5 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. (Para calcular los cinco días, cuente los sábados y los domingos pero no los otros días feriados de la corte. Si el último día cae en sábado o domingo, o en un día en que la corte esté cerrada, tiene hasta el próximo día de corte para presentar una respuesta por escrito). Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (*www.sucorte.ca.gov*), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

*Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (*www.lawhelpcalifornia.org*), en el Centro de Ayuda de las Cortes de California, (*www.sucorte.ca.gov*) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.*

1. The name and address of the court is:
(El nombre y dirección de la corte es):

CASE NUMBER:
(Número del caso):

2. The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

3. *(Must be answered in all cases)* An **unlawful detainer assistant (Bus. & Prof. Code, §§ 6400–6415)** ☐ did **not** ☐ did for compensation give advice or assistance with this form. *(If plaintiff has received **any** help or advice for pay from an unlawful detainer assistant, complete item 6 on the next page.)*

Date:
(Fecha)

Clerk, by
(Secretario) _____ , Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

[SEAL]

4. **NOTICE TO THE PERSON SERVED:** You are served
   a. ☐ as an individual defendant.
   b. ☐ as the person sued under the fictitious name of *(specify):*
   c. ☐ as an occupant
   d. ☐ on behalf of *(specify):*
   under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
   ☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
   ☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
   ☐ CCP 415.46 (occupant) ☐ other *(specify):*
5. ☐ by personal delivery on *(date):*

Form Adopted for Mandatory Use
Judicial Council of California
SUM-130 [Rev. July 1, 2009]

SUMMONS—UNLAWFUL DETAINER—EVICTION

CEB
Code of Civil Procedure, §§ 412.20, 415.456, 1167
www.courtinfo.ca.gov

Print

SUM-130

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

6. **Unlawful detainer assistant** *(complete if plaintiff has received any help or advice for pay from an unlawful detainer assistant)*:
   a. Assistant's name:
   b. Telephone no.:
   c. Street address, city, and zip:
   d. County of registration:
   e. Registration no.:
   f. Registration expires on *(date)*:

Copies: Original (file with court clerk); ___ copies for service (one for each party to be served); ___ office copies.

Comment: On unlawful detainer proceedings generally, see California Landlord-Tenant Practice, chaps 9-13 (2d ed Cal CEB 1997).

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.68 F. Form: Summons (Family Law) (Judicial Council Form FL-110)

§17.68 F. Form: Summons (Family Law) (Judicial Council Form FL-110)

Print

FL-110

SUMMONS (Family Law)

CITACIÓN (Derecho familiar)

FOR COURT USE ONLY
(SÓLO PARA USO DE LA CORTE)

NOTICE TO RESPONDENT ***(Name):***

AVISO AL DEMANDADO (Nombre):

You are being sued. ***Lo están demandando.***

Petitioner's name is:

Nombre del demandante:

CASE NUMBER *(NÚMERO DE CASO)*:

You have **30 calendar days** after this *Summons* and *Petition* are served on you to file a *Response* (form FL-120 or FL-123) at the court and have a copy served on the petitioner. A letter or phone call will not protect you.	*Tiene **30 días corridos** después de haber recibido la entrega legal de esta* Citación *y* Petición *para presentar una* Respuesta *(formulario FL-120 ó FL-123) ante la corte y efectuar la entrega legal de una copia al demandante. Una carta o llamada telefónica no basta para protegerlo.*
If you do not file your *Response* on time, the court may make orders affecting your marriage or domestic partnership, your property, and custody of your children. You may be ordered to pay support and attorney fees and costs. If you cannot pay the filing fee, ask the clerk for a fee waiver form.	*Si no presenta su* Respuesta *a tiempo, la corte puede dar órdenes que afecten su matrimonio o pareja de hecho, sus bienes y la custodia de sus hijos. La corte también le puede ordenar que pague manutención, y honorarios y costos legales. Si no puede pagar la cuota de presentación, pida al secretario un formulario de exención de cuotas.*
If you want legal advice, contact a lawyer immediately. You can get information about finding lawyers at the California Courts Online Self-Help Center *(www.courtinfo.ca.gov/selfhelp)*, at the California Legal Services Web site *(www.lawhelpcalifornia.org)*, or by contacting your local county bar association.	*Si desea obtener asesoramiento legal, póngase en contacto de inmediato con un abogado. Puede obtener información para encontrar a un abogado en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en el sitio Web de los Servicios Legales de California (www.lawhelpcalifornia.org) o poniéndose en contacto con el colegio de abogados de su condado.*

NOTICE: The restraining orders on page 2 are effective against both spouses or domestic partners until the petition is dismissed, a judgment is entered, or the court makes further orders. These orders are enforceable anywhere in California by any law enforcement officer who has received or seen a copy of them.

AVISO: *Las órdenes de restricción que figuran en la página 2 valen para ambos cónyuges o pareja de hecho hasta que se despida la petición, se emita un fallo o la corte dé otras órdenes. Cualquier autoridad de la ley que haya recibido o visto una copia de estas órdenes puede hacerlas acatar en cualquier lugar de California.*

NOTE: If a judgment or support order is entered, the court may order you to pay all or part of the fees and costs that the court waived for yourself or for the other party. If this happens, the party ordered to pay fees shall be given notice and an opportunity to request a hearing to set aside the order to pay waived court fees.

AVISO: *Si se emite un fallo u orden de manutención, la corte puede ordenar que usted pague parte de, o todas las cuotas y costos de la corte previamente exentas a petición de usted o de la otra parte. Si esto ocurre, la parte ordenada a pagar estas cuotas debe recibir aviso y la oportunidad de solicitar una audiencia para anular la orden de pagar las cuotas exentas.*

1. The name and address of the court are *(El nombre y dirección de la corte son)*:

2. The name, address, and telephone number of the petitioner's attorney, or the petitioner without an attorney, are:
   (El nombre, dirección y número de teléfono del abogado del demandante, o del demandante si no tiene abogado, son):

Date *(Fecha)*: Clerk, by *(Secretario, por)*_____, Deputy *(Asistente)*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
AVISO A LA PERSONA QUE RECIBIÓ LA ENTREGA: *Esta entrega se realiza*

a. ☐ as an individual. *(a usted como individuo.)*
b. ☐ on behalf of respondent who is a *(en nombre de un demandado que es)*:
   (1) ☐ minor *(menor de edad)*
   (2) ☐ ward or conservatee *(dependiente de la corte o pupilo)*
   (3) ☐ other *(specify) (otro – especifique)*:

(Read the reverse for important information.) ***(Lea importante información al dorso.)***

Form Adopted for Mandatory Use
Judicial Council of California
FL-110 [Rev. July 1, 2009]

SUMMONS
(Family Law)

CEB

Family Code §§ 232, 233, 2040,7700;
Code of Civil Procedure, §§ 412.20, 416.60–416.90
Government Code, § 68637
www.courtinfo.ca.gov

Print

WARNING—IMPORTANT INFORMATION

WARNING: California law provides that, for purposes of division of property upon dissolution of a marriage or domestic partnership or upon legal separation, property acquired by the parties during marriage or domestic partnership in joint form is presumed to be community property. If either party to this action should die before the jointly held community property is divided, the language in the deed that characterizes how title is held (i.e., joint tenancy, tenants in common, or community property) will be controlling, and not the community property presumption. You should consult your attorney if you want the community property presumption to be written into the recorded title to the property.

STANDARD FAMILY LAW RESTRAINING ORDERS

Starting immediately, you and your spouse or domestic partner are restrained from

1. Removing the minor child or children of the parties, if any, from the state without the prior written consent of the other party or an order of the court;
2. Cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties and their minor child or children;
3. Transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life; and
4. Creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court. Before revocation of a nonprobate transfer can take effect or a right of survivorship to property can be eliminated, notice of the change must be filed and served on the other party.

You must notify each other of any proposed extraordinary expenditures at least five business days prior to incurring these extraordinary expenditures and account to the court for all extraordinary expenditures made after these restraining orders are effective. However, you may use community property, quasi-community property, or your own separate property to pay an attorney to help you or to pay court costs.

ADVERTENCIA – INFORMACIÓN IMPORTANTE

ADVERTENCIA: De acuerdo a la ley de California, las propiedades adquiridas por las partes durante su matrimonio o pareja de hecho en forma conjunta se consideran propiedad comunitaria para los fines de la división de bienes que ocurre cuando se produce una disolución o separación legal del matrimonio o pareja de hecho. Si cualquiera de las partes de este caso llega a fallecer antes de que se divida la propiedad comunitaria de tenencia conjunta, el destino de la misma quedará determinado por las cláusulas de la escritura correspondiente que describen su tenencia (por ej., tenencia conjunta, tenencia en común o propiedad comunitaria) y no por la presunción de propiedad comunitaria. Si quiere que la presunción comunitaria quede registrada en la escritura de la propiedad, debería consultar con un abogado.

ÓRDENES DE RESTRICCIÓN NORMALES DE DERECHO FAMILIAR

En forma inmediata, usted y su cónyuge o pareja de hecho tienen prohibido:

1. *Llevarse del estado de California a los hijos menores de las partes, si los hubiera, sin el consentimiento previo por escrito de la otra parte o una orden de la corte;*
2. *Cobrar, pedir prestado, cancelar, transferir, deshacerse o cambiar el nombre de los beneficiarios de cualquier seguro u otro tipo de cobertura, tal como de vida, salud, vehículo y discapacidad, que tenga como beneficiario(s) a las partes y su(s) hijo(s) menor(es);*
3. *Transferir, gravar, hipotecar, ocultar o deshacerse de cualquier manera de cualquier propiedad, inmueble o personal, ya sea comunitaria, cuasicomunitaria o separada, sin el consentimiento escrito de la otra parte o una orden de la corte, con excepción las operaciones realizadas en el curso normal de actividades o para satisfacer las necesidades de la vida; y*
4. *Crear o modificar una transferencia no testamentaria de manera que afecte el destino de una propiedad sujeta a transferencia, sin el consentimiento por escrito de la otra parte o una orden de la corte. Antes de que se pueda eliminar la revocación de una transferencia no testamentaria, se debe presentar ante la corte un aviso del cambio y hacer una entrega legal de dicho aviso a la otra parte.*

Cada parte tiene que notificar a la otra sobre cualquier gasto extraordinario propuesto, por lo menos cinco días laborales antes de realizarlo, y rendir cuenta a la corte de todos los gastos extraordinarios realizados después de que estas órdenes de restricción hayan entrado en vigencia. No obstante, puede usar propiedad comunitaria, cuasicomunitaria o suya separada para pagar a un abogado o para ayudarle a pagar los costos de la corte.

Copies: Original (file with court clerk); ___ copies for service (one for each party to be served); ___ office copies.
Comment: See Cal Rules of Ct 5.110(a) (family law summons filed, served, and enforced as is any civil summons).

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.69 G. Form: Proof of Service of Summons (Family Law--Uniform Parentage--Custody and Support) (Judicial Council Form FL-115)

§17.69 G. Form: Proof of Service of Summons (Family Law—Uniform Parentage—Custody and Support) (Judicial Council Form FL-115)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
PROOF OF SERVICE OF SUMMONS	CASE NUMBER:

1. At the time of service I was at least 18 years of age and not a party to this action. **I served the respondent with copies of:**
   a. ☐ Family Law: *Petition* (form FL-100), *Summons* (form FL-110), and blank *Response* (form FL-120)

   –or–

   b. ☐ Family Law—Domestic Partnership: *Petition—Domestic Partnership* (form FL-103), *Summons* (form FL-110), and blank *Response—Domestic Partnership* (form FL-123)

   –or–

   c. ☐ Uniform Parentage: *Petition to Establish Parental Relationship* (form FL-200), *Summons* (form FL-210), and blank *Response to Petition to Establish Parental Relationship* (form FL-220)

   –or–

   d. ☐ Custody and Support: *Petition for Custody and Support of Minor Children* (form FL-260), *Summons* (form FL-210), and blank *Response to Petition for Custody and Support of Minor Children* (form FL-270)

   and

   e. ☐ (1) ☐ Completed and blank *Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act* (form FL-105)
   (2) ☐ Completed and blank *Declaration of Disclosure* (form FL-140)
   (3) ☐ Completed and blank *Schedule of Assets and Debts* (form FL-142)
   (4) ☐ Completed and blank *Income and Expense Declaration* (form FL-150)
   (5) ☐ Completed and blank *Financial Statement (Simplified)* (form FL-155)
   (6) ☐ Completed and blank *Property Declaration* (form FL-160)
   (7) ☐ *Order to Show Cause* (form FL-300), *Application for Order and Supporting Declaration* (form FL-310), and blank *Responsive Declaration to Order to Show Cause or Notice of Motion* (form FL-320)
   (8) ☐ Other *(specify):*

2. Address where respondent was served:

3. I served the respondent by the following means *(check proper box):*
   a. ☐ **Personal service.** I personally delivered the copies to the respondent (Code Civ. Proc., § 415.10) on *(date):* at *(time):*
   b. ☐ **Substituted service.** I left the copies with or in the presence of *(name):* who is *(specify title or relationship to respondent):*
      (1) ☐ **(Business)** a person at least 18 years of age who was apparently in charge at the office or usual place of business of the respondent. I informed him or her of the general nature of the papers
      (2) ☐ **(Home)** a competent member of the household (at least 18 years of age) at the home of the respondent. I informed him or her of the general nature of the papers

Form Approved for Optional Use
Judicial Council of California
FL-115 [Rev. January 1, 2005]

PROOF OF SERVICE OF SUMMONS
(Family Law—Uniform Parentage—Custody and Support)

Code of Civil Procedure, § 417.10
www.courtinfo.ca.gov

Print

PETITIONER:	CASE NUMBER:
RESPONDENT:	

3. b. *(cont.)* on *(date):* *at (time):*

I thereafter mailed additional copies (by first class, postage prepaid) to the respondent at the place where the copies were left (Code Civ. Proc., § 415.20b) on *(date):*

A **declaration of diligence** is attached, stating the actions taken to first attempt personal service.

c. ☐ **Mail and acknowledgment service.** I mailed the copies to the respondent, addressed as shown in item 2, by first-class mail, postage prepaid, on *(date):* from *(city):*

(1) ☐ with two copies of the *Notice and Acknowledgment of Receipt (Family Law)* (form FL-117) and a postage-paid return envelope addressed to me. **(Attach completed *Notice and Acknowledgment of Receipt (Family Law)* (form FL-117).)** (Code Civ. Proc., § 415.30.)

(2) ☐ to an address outside California (by registered or certified mail with return receipt requested). **(Attach signed return receipt or other evidence of actual delivery to the respondent.)** (Code Civ. Proc., § 415.40.)

d. ☐ **Other** *(specify code section):*

☐ Continued on Attachment 3d.

4. The "NOTICE TO THE PERSON SERVED" on the *Summons* was completed as follows (Code Civ. Proc., §§ 412.30, 415.10, 474):

a. ☐ As an individual **or**

b. ☐ On behalf of respondent who is a

(1) ☐ minor. (Code Civ. Proc., § 416.60.)

(2) ☐ ward or conservatee. (Code Civ. Proc., § 416.70.)

(3) ☐ other *(specify):*

5. **Person who served papers**

Name:

Address:

Telephone number:

This person is

a. ☐ exempt from registration under Business and Professions Code section 22350(b).

b. ☐ not a registered California process server.

c. ☐ a registered California process server: ☐ an employee or ☐ an independent contractor

(1) Registration no.:

(2) County:

d. **The fee** for service was *(specify):* $

6. ☐ **I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

–or–

7. ☐ **I am a California sheriff, marshal, or constable,** and I certify that the foregoing is true and correct.

Date:

(NAME OF PERSON WHO SERVED PAPERS)

(SIGNATURE OF PERSON WHO SERVED PAPERS)

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.70 H. Form: Summons (Joinder) (Judicial Council Form FL-375)

§17.70 H. Form: Summons (Joinder) (Judicial Council Form FL-375)

Print

FL-375

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO. *(Optional):* FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
MARRIAGE OF PETITIONER: RESPONDENT:	
CLAIMANT:	
SUMMONS (JOINDER)	CASE NUMBER:

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your response or pleading, if any, may be filed on time.

¡AVISO! Usted ha sido demandado. El tribunal puede decidir contra Ud. sin audiencia a menos que Ud. responda dentro de 30 dias. Lea la información que sigue.

Si Usted desea solicitar el consejo de un abogado en este asunto, debería hacerlo inmediatamente, de esta manera, su respuesta o alegación, si hay alguna, puede ser registrada a tiempo.

1. ☐ TO THE ☐ PETITIONER ☐ RESPONDENT ☐ CLAIMANT
A pleading has been filed under an order joining *(name of claimant):*

as a party in this proceeding. If you fail to file an appropriate pleading within **30** days of the date this summons is served on you, your default may be entered and the court may enter a judgment containing the relief requested in the pleading, court costs, and such other relief as may be granted by the court, which could result in the garnishment of wages, taking of money or property, or other relief.

2. ☐ TO THE CLAIMANT EMPLOYEE BENEFIT PLAN
A pleading on joinder has been filed under the clerk's order joining *(name of employee benefit plan):*

as a party claimant in this proceeding. If the employee benefit plan fails to file an appropriate pleading within **30** days of the date this summons is served on it, a default may be entered and the court may enter a judgment containing the relief requested.

Dated: Clerk, By _____, Deputy

(SEAL)

3. NOTICE TO THE PERSON SERVED: You are served
a. ☐ As an individual.
b. ☐ As (or on behalf of) the person sued under the fictitious name of:
c. ☐ On behalf of:

Under:
☐ CCP 416.10 (Corporation)
☐ CCP 416.20 (Defunct Corporation)
☐ CCP 416.40 (Association or Partnership)
☐ Other:
☐ CCP 416.60 (Minor)
☐ CCP 416.70 (Incompetent)
☐ CCP 416.90 (Individual)
☐ FC 2062 (Employee Benefit Plan)

d. ☐ By personal delivery on *(date):*

Form Adopted for Mandatory Use
Judicial Council of California
FL-375 [Rev. January 1, 2003]

www.courtinfo.ca.gov.

Print

PROOF OF SERVICE—SUMMONS (JOINDER)

(Use separate proof of service for each person served)

1. I served the
   a. *Summons and (1)* ☐ *Request for Joinder of Employee Benefit Plan and Order, Pleading on Joinder-Employee Benefit Plan, blank Notice of Appearance and Response of Employee Benefit Plan*
      (2) ☐ *Notice of Motion and Declaration for Joinder* (3) ☐ Order re Joinder
      (4) ☐ *Pleading on Joinder* (specify title):
      (5) ☐ Other:
   b. On *(name of party or claimant):*
   c. By serving (1) ☐ Party or claimant. (2) ☐ Other *(name and title or relationship to person served):*
   d. ☐ By delivery at ☐ home ☐ business (1) Date of:
      (2) Time of: (3) Address:
   e. ☐ By mailing (1) Date of: (2) Place of:
2. Manner of service: *(check proper box)*
   a. ☐ **Personal service.** By personally delivering copies. (CCP 415.10)
   b. ☐ **Substituted service on corporation, unincorporated association (including partnership), or public entity.** By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 41 5.20(a))
   c. ☐ **Substituted service on natural person, minor, incompetent, or candidate.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) **(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)**
   d. ☐ **Mail and acknowledgment service.** By mailing (by first-class mail or airmail) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) **(Attach completed acknowledgment of receipt.)**
   e. ☐ **Certified or registered mail service.** By mailing to address outside California (by registered or certified airmail with return receipt requested) copies to the person served. (CCP 415.40) **(Attach signed return receipt or other evidence of actual delivery to the person served.)**
   f. ☐ Other *(specify code section):*
      ☐ Additional page is attached.
3. The notice to the person served (item 3 on the copy of the summons served) was completed as follows (CCP 412.30, 415.10, and 474):
   a. ☐ As an individual.
   b. ☐ As the person sued under the fictitious name of:
   c. ☐ On behalf of:
      Under: ☐ CCP 416.10 (Corporation) ☐ CCP 416.60 (Minor)
      ☐ CCP 416.20 (Defunct Corporation) ☐ CCP 416.70 (Incompetent)
      ☐ CCP 416.40 (Association or partnership) ☐ CCP 416.90 (Individual)
      ☐ FC 2062 (Employee Benefit Plan)
   d. By personal delivery on *(date):*
4. At the time of service I was at least 18 years of age and not a party to this action.
5. Fee for service: $ . . . . . .
6. Person serving
   a. ☐ Not a registered California process server.
   b. ☐ Registered California process server.
   c. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).
   d. ☐ California sheriff, marshal, or constable.
   e. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on *(date):* at *(place):* , California.

(Signature)

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct and that this certificate is executed on *(date):* at *(place):* , California.

(Signature)

Copies: Original (file with court clerk); ___ copies for service (one for each party to be served); ___ office copies.

Comment: On joinder of parties generally in marital proceedings under the Family Code, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity, chap 12 (Cal CEB Annual).

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Source: Civil Litigation/California Civil Procedure Before Trial/17 Service of Summons/§17.71 I. Form: Ex Parte Application for Extension of Time to Serve Pleading and Orders (Judicial Council Form CM-020)

§17.71 I. Form: Ex Parte Application for Extension of Time to Serve Pleading and Orders (Judicial Council Form CM-020)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
EX PARTE APPLICATION FOR EXTENSION OF TIME TO SERVE PLEADING AND ☐ ORDER EXTENDING TIME TO SERVE AND ☐ ORDER CONTINUING CASE MANAGEMENT CONFERENCE	CASE NUMBER:
Note: This ex parte application will be considered without a personal appearance. (See Cal. Rules of Court, rule 3.1207(2).)	HEARING DATE: DEPT.: TIME:

1. Applicant *(name)*:
   is
   a. ☐ plaintiff
   b. ☐ cross-complainant
   c. ☐ petitioner
   d. ☐ defendant
   e. ☐ cross-defendant
   f. ☐ respondent
   g. ☐ other *(describe)*:
2. The complaint or other initial pleading in this action was filed on *(date)*:
3. Applicant requests that the court grant an order extending time for service of the following pleading:
   a. ☐ Complaint
   b. ☐ Cross-complaint
   c. ☐ Petition
   d. ☐ Answer or other responsive pleading
   e. ☐ Other *(describe)*:
4. Service and filing of the pleading listed in item 3 is presently required to be completed by *(date)*:
5. Previous applications, orders, or stipulations for an extension of time to serve and file in this action are:
   a. ☐ None
   b. ☐ The following *(describe all, including the length of any previous extensions)*:
6. Applicant requests an extension of time to serve and file the pleading listed in item 3 on the following parties *(name each)*:

Form Approved for Optional Use
Judicial Council of California
CM-020 [Rev. January 1, 2008]

EX PARTE APPLICATION FOR EXTENSION OF TIME TO SERVE PLEADING AND ORDERS

Cal. Rules of Court,
rules 3.110, 3.1200–3.1207
www.courtinfo.ca.gov

Print

CASE NAME:	CASE NUMBER:

7. The pleading has not yet been filed and served on the parties listed in item 6 for the following reasons *(describe the efforts that have been made to serve the pleading and why service has not been completed):*

☐ Continued on Attachment 7.

8. An extension of time to serve and file the pleading should be granted for the following reasons:

☐ Continued on Attachment 8.

9. If an extension of time is granted, filing and service on the parties listed in item 6 will be completed by *(date):*

10. Notice of this application under rules 3.1200–3.1207 ☐ has been provided as required *(describe all parties or counsel to whom notice was given; the date, time, and manner of giving notice; what the parties or counsel were told and their responses; and whether opposition is expected)* or ☐ is not required *(state reasons):*

☐ Continued on Attachment 10.

11. Number of pages attached: ____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(TYPE OR PRINT NAME OF APPLICANT OR ATTORNEY FOR APPLICANT) (SIGNATURE OF APPLICANT OR ATTORNEY FOR APPLICANT)

Order on Application is ☐ below ☐ on a separate document.

ORDER

1. The application for an order extending time to serve and file the pleading is ☐ granted ☐ denied.
2. The pleading must be served and filed no later than *(date):*
3. ☐ The case management conference is rescheduled to:
   a. Date:
   b. Time:
   c. Place:
4. Other orders:
5. A copy of this application and order must be served on all parties or their counsel that have appeared in the case.

Date:

_____
JUDICIAL OFFICER

Comment: This is the optional form of Ex Parte Application for Extension of Time to Serve Pleading and Orders (Judicial Council Form CM-020). See Cal Rules of Ct 3.110, 3.1200-3.1207.

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18

Service of Papers

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I. INTRODUCTION

§18.1 A. Scope of Chapter

This chapter covers the methods for service of notices and other papers on a party after the party has been properly served with a summons or has made a general appearance. It gives an overview of procedure (see §18.3), discusses time for service (see §18.4), manner of service (see §§18.5-18.17), proof of service (see §§18.18-18.20), and forms for use (see §§18.21-18.24).

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§18.2 B. Governing Law

Unless otherwise prescribed by the Code of Civil Procedure, the notices and other papers may be served in the manner prescribed by CCP §§1010-1020. CCP §1010.

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§18.3 II. OVERVIEW

As a rule, service of notices and other papers is accomplished by mail sent to the party or the party's attorney under CCP §1012. See §§18.5-18.6. Under CCP §1011, however, the party may also be served personally or by substituted service (see §§18.8-18.10), and under CCP §1013, the party also may be served by facsimile transmission (see §§18.11-18.16).

Code of Civil Procedure §§1010-1020 cover "notices and other papers." CCP §1010. The term "other papers" includes, *e.g.,* a cross-complaint against a party who has already appeared (see *Lyydikainen v Industrial Acc. Comm'n* (1939) 36 CA2d 298, 303, 97 P2d 993), an order to show cause after personal jurisdiction has been obtained (*In re Morelli* (1970) 11 CA3d 819, 838, 91 CR 72, disapproved on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287 n6, 100 CR2d 320), and a variety of types of discovery requests (*e.g.,* interrogatories (*Frates v Treder* (1967) 249 CA2d 199, 201, 57 CR 383)).

Note that when an unserved defendant appears by way of an answer to a cross-complaint, it does not constitute a general appearance that will permit the plaintiff to serve the original complaint under §§1010-1020. *Glenwood Homeowners Ass'n v Prosher Dev. Ltd.* (1980) 111 CA3d 1002, 169 CR 48.

Sections 1010-1020 do not apply to service of a summons or other process, or to service of any paper necessary to bring a party into contempt, *e.g.,* a subpoena. CCP §1015-1016. These papers must ordinarily be served on the party personally. See *In re Morelli* (1970) 11 CA3d 819, 835, 91 CR 72.

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§18.4 III. TIME FOR SERVICE

The date by which a paper must be served may depend on either of two types of requirements. First, a statute or rule may specify the time period after an event within which the paper must be served. For example, responses to interrogatories must normally be served within 30 days after service of the interrogatories. CCP §2030.260. Second, a statute or rule may specify the number of days before an event that a paper must be served. A written notice of motion, for example, along with all supporting papers, must normally be served at least 16 court days before the date set for hearing. CCP §1005(b).

The time period for service of some papers may be extended if service is by mail. Under CCP §1013(a), if service is by mail, any period of notice and any right or duty to perform an act or make a response, within a period or on a certain date prescribed by statute or court rule, is extended by 5 calendar days if the recipient's mailing address and place of mailing is in California; 10 calendar days if either the place of mailing or the place of address is outside California but within the United States; and 20 calendar days if either the place of mailing or place of address is outside the United States. The CCP §1013 extension applies in the absence of a specific exception provided for by statute or rule of court. *Department of Indus. Relations v Atlantic Baking Co.* (2001) 89 CA4th 891, 894, 108 CR2d 44 (when time period is extended by act other than service, such as "mailing" of findings issued by Labor Commissioner, §1013 does not extend filing deadline). Nor does §1013 apply to notices of motion, opposition papers, or reply papers governed by CCP §1005. CCP §1005(b). Section 1005(b) contains similar provisions for service of notices of motion. On noticed motions, see chap 12.

See §§18.5-18.6 on service by mail generally. In *Injectronics, Inc. v Commodore Bus. Machs.* (1979) 100 CA3d 185, 160 CR 667, the court held that when a memorandum of decision is served by mail, CCP §1013(a) adds 5 days to the 10-day period specified by Cal Rules of Ct 3.1590(e) within which to request findings of fact and conclusions of law (now called a "statement of decision"). In *Baker v Anderson* (1981) 119 CA3d 1000, 174 CR 307, the court held that CCP §1013 extends for 5 days the 30-day period provided by CCP §471.5(a) within which to plead to an amended complaint served by mail.

If the last day for performance of an act in a lawsuit, after service of the paper that requires it, is a Saturday, Sunday, or judicial holiday, the time to do the act is normally extended by law to the close of the next day that is not a holiday. CCP §§10, 12a-12b, 135. Note, however, that CCP §12a (extending time if the last day to perform is a holiday) does not apply to acts governed solely by contractual provisions. *Gans v Smull* (2003) 111 CA4th 985, 988, 4 CR3d 353 (option to extend lease).

NOTE: Under Govt C §68106 (b)(1), effective July 28, 2009, and operative through June 30, 2010, if a court is closed as the result of a budget reduction measure in response to the state fiscal crisis, the day is considered a holiday.

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IV. MANNER OF SERVICE

A. Service by Mail

§18.5 1. When Permitted

Service of notices and other papers may be made by mail when (a) the person on whom service is to be made resides or has his or her office at a place where there is a delivery service by mail, or (b) the person making service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail. CCP §1012. Thus, service by mail on a party or on his or her attorney is permissible even when the person making service and the person being served reside or have their offices in the same city, as long as mail delivery is available. See *Marsden v Collins* (1937) 23 CA2d 148, 72 P2d 247.

Because service may almost always be made by mail under CCP §1012, notices and other papers (see §18.3) are usually served in this manner. Currently, electronic service, *i.e.,* serving papers by e-mail, is available only in federal court. See, *e.g., Calderon v IBEW Local 47* (9th Cir 2007) 508 F3d 883. In fact, some district courts require parties to file all documents electronically (see, *e.g.,* ED Cal Local R 5-134). On service by fax, see §§18.11-18.16.

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§18.6 2. Procedures

Under CCP §1013(a), a notice or other paper is served by mail by depositing a copy in a regularly maintained post office, mailbox, or mail chute in a sealed envelope with postage prepaid. The envelope must be addressed to the person on whom the papers are to be served, at:

- The office address given on the last document filed by him or her in the case and served on the party making service; or
- His or her residence.

CCP §1013(a).

The papers must state the date and place of mailing or be accompanied by an affidavit or certificate of mailing (see forms in §§18.21-18.24), which need not be signed. CCP §1013(b). However, because CCP §1013(g) states that §1013(b) is directory only, noncompliance does not invalidate service. On proof of service by mail, see §§18.18-18.19.

Service by mail is complete at the time of deposit, but in some situations, the deposit must be made a given number of days earlier than would be required if service were personal: 5 calendar days if the papers are mailed from within California to an address within California, 10 calendar days if either the place of address or place of mailing is outside California, and 20 calendar days if either the place of mailing or the place of address is outside the United States. CCP §1013(a).

Mail sent to a former address is considered properly served for up to 1 year after the change of address. *Whitehead v Habig* (2008) 163 CA4th 896, 903, 77 CR3d 679.

When the time period is commenced by an act other than service, CCP §1013 does not operate to extend the filing deadline. *Department of Indus. Relations v Atlantic Baking Co.* (2001) 89 CA4th 891, 894, 108 CR2d 44 (no §1013 extension for filing when 45-day period of Lab C §3725 runs from "mailing" of findings issued by Labor Commissioner).

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§18.7 B. Service by Express Mail or Overnight Delivery

Under CCP §1013(c), a notice or other paper may be served by depositing a copy, in a sealed envelope with Express Mail postage paid, in a mailbox or other United States Postal Service facility for receipt of Express Mail. A notice or other paper may be served by "another method of delivery providing for overnight delivery" by depositing the envelope in a box or other facility regularly maintained by the express service carrier or delivering it to the carrier's authorized courier with delivery fees paid or provided for. Rules applicable to service by mail, *e.g.,* for addressing the envelope and for the certificate of mailing (see §§18.5-18.6), also apply to Express Mail or overnight delivery. CCP §1013(c)-(d). Section 1013(d) is directory only. CCP §1013(g). See §18.6.

Like service by mail, service by Express Mail and by overnight delivery is complete at the time of deposit, but any right or duty to do an act or make a response is extended by only *2* court days. This extension does not apply to a notice of intention to move for a new trial or to vacate judgment or a notice of appeal. CCP §1013(e).

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§18.8 C. Personal and Substituted Service

Code of Civil Procedure §1011 provides a procedure for personal or substituted service of notices and other papers on an adverse attorney (see §18.9) or party (see §18.10), although service by mail (see §§18.5-18.6) is usually more convenient and less expensive. If the party has appeared and has an attorney, all papers other than a summons or other process or any paper necessary to bring a party into contempt should be served on the attorney, rather than on the party. See §18.9.

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§18.9 1. On Attorney; Exceptions

Service of a notice or other paper on a party who has been served with a summons or has appeared in the action (see CCP §1014), and who is represented by an attorney, may be made under CCP §1011 by personally serving the attorney or, if the attorney is absent from his or her office, by leaving the papers (CCP §1011(a)):

- At the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or person having charge of the office. See *King v Wilson* (1950) 101 CA2d 242, 225 P2d 270 (switchboard operator in reception room, even though not attorney's secretary and not authorized by him to accept service, is person in charge under CCP §1011).
- When neither a receptionist nor a person having charge is present, in a conspicuous place in the office between 9 a.m. and 5 p.m.
- If the office is not open, at the attorney's residence with some person of not less than 18 years of age, as long as the attorney's residence and office are located in the same county. If there is no one at the residence who is 18 years of age or older, the attorney's residence is not known, or the residence and office are not in the same county, the papers may be mailed to the attorney's office address, if known, and otherwise to the residence address, if known.
- If neither the attorney's office address nor residence address is known, at the address of the attorney or the party of record as designated on the court papers, or with the court clerk (or the judge, if there is no clerk).

In a few situations, *e.g.,* when the party is a nonresident and his or her attorney has no known office in the state (see CCP §1015), service is not made on the attorney. For discussion, see 6 Witkin, California Procedure, *Proceedings Without Trial* §14 (5th ed 2008).

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§18.10 2. On Party

Service of a notice or other paper on a party who has been served with a summons or has appeared in the action (see CCP §1014) may be made under CCP §1011 by personally serving the party or serving "in the manner specifically provided in particular cases" (CCP §1011(b)). If no specific provision is made, the papers may be left at the party's residence between 8 a.m. and 6 p.m. with a person of not less than 18 years of age. If no such person can be found, the papers may be served by mail. If the party's residence is unknown, they may be delivered to the court clerk (or the judge if there is no clerk). CCP §1011(b). Papers delivered to the clerk or the judge must be placed in an envelope addressed to the party in care of the clerk or judge. Cal Rules of Ct 3.252. The following information must be included on the back of the envelope:

> Service is being made under Code of Civil Procedure section 1011(b) on a party whose residence address is unknown.
>
> [Name of party whose residence address is unknown]
>
> [Case name and number]

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D. Service and Filing by Facsimile Transmission (Fax)

§18.11 1. Service by Fax

Papers may be served by fax if the parties agree and the agreement is confirmed in writing. CCP §1013(e); Cal Rules of Ct 2.306(a). In addition, the court may serve notices by fax if the parties agree. Cal Rules of Ct 2.306(c). An attorney or party who agrees to receive service by fax must have a fax machine available to receive documents between the hours of 9 a.m. and 5 p.m. on weekdays, except for court holidays (see CCP §136). Cal Rules of Ct 2.306(f).

Specific provisions applicable to fax service, many of them paralleling provisions for service by mail, express mail, and overnight delivery (see §§18.5-18.7) are in CCP §1013(e)-(g) and Cal Rules of Ct 2.306, 2.304(b). The Judicial Council has adopted a printed form, the Facsimile Transmission Cover Sheet, that parties must use when serving documents by fax. Cal Rules of Ct 2.304(b). A copy of the form is reproduced in §18.24. See also California Judicial Council Forms Manual (Cal CEB 1981). Contact the local clerk's office to learn its particular procedures.

Service by fax is complete when the entire document has been received by the receiving party's fax machine. Service after 5 p.m. is considered to have occurred on the next court day. Cal Rules of Ct 2.306(g).

The time for exercising any right or performing any duty to do an act or make a response is extended by only 2 court days. The time for filing a notice of intention to move for a new trial or to vacate judgment or a notice of appeal is not extended. CCP §1013(e).

Proof of service by fax may be made by any method specified in CCP §1013(a). Cal Rules of Ct 2.306(h). See also §18.19. The time, date, and sending machine's telephone number must be used instead of the date and place of deposit in the mail (Cal Rules of Ct 2.306(h)(1)), and a copy of the transmission report generated by the sender's fax machine must be attached (Cal Rules of Ct 2.306(h)(4)). For other required alterations in the proof of service, see Cal Rules of Ct 2.306(h)(2)-(5).

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§18.12 2. Filing by Fax

Fax filing of court papers is authorized by CCP §1010.5 and governed by Cal Rules of Ct 2.300-2.306, 2.304(b). The rules of court permit two kinds of fax filing: filing through a "fax-filing" agency, and "direct filing."

The fax-filing rules in Cal Rules of Ct 2.300-2.306, 2.304(b) apply to civil, probate, and family law proceedings in all trial courts. Cal Rules of Ct 2.300. (Fax filing in juvenile court proceedings is governed by Cal Rules of Ct 5.522.) Any pleading, motion, or other document in any of those proceedings may be fax filed, except a will, codicil, bond, or undertaking. Nor may the court issue by fax any document "intended to carry the original seal of the court." Cal Rules of Ct 2.300(b).

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§18.13 a. Format of Fax-Filed Documents

The format of documents transmitted by fax must comply with Cal Rules of Ct 2.100-2.119. Cal Rules of Ct 2.302. On format of court papers, see chap 11. Each document filed by fax, whether through a fax-filing agency or filed directly, must include the phrase "By fax" immediately below the title. Cal Rules of Ct 2.303(f), 2.304(c). If a document to be filed by a fax-filing agency does not include this phrase, the fax-filing agency must add it before it files the documents with the court. Cal Rules of Ct 2.303(f).

An exhibit that is larger than 8½ by 11 inches must be reduced to that size before it is transmitted by fax. The court may require a party to produce and file the original of an exhibit filed by fax. Cal Rules of Ct 2.302.

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§18.14 b. Filing Through Fax-Filing Agency

A party may fax a document to a "fax-filing agency" for filing with any trial court. The filing agency must prepare the document to be filed so that it conforms with rules in Div 2, Ch 1 of Title 2 of the Cal Rules of Ct, transport the document to the court, file it, and pay any filing fee. Cal Rules of Ct 2.303(b)(1)-(3). By filing a document with the court, the agency certifies that it has complied with the applicable rules and that the document it files is the full and unaltered document it received. Cal Rules of Ct 2.303(e).

The party filing the document must have made "appropriate arrangements" for paying the filing fee and any service charges, in advance, with the filing agency. If prior arrangements have not been made, the agency may discard any documents it receives by fax, *without notice to the sending party*. Cal Rules of Ct 2.303(c).

The filing agency must keep all documents it receives confidential. Cal Rules of Ct 2.303(d). The agency acts as the agent of the filing party and not as an agent of the court (Cal Rules of Ct 2.303(a)), so presumably the responsibility for any errors lies with the filing party.

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§18.15 c. Direct Fax Filing

Direct fax filing is permitted in courts that have adopted local rules providing for such filing. See, *e.g.,* Los Angeles Ct R 18.0. The local rules must provide the court's fax number. Cal Rules of Ct 2.304(a). The Judicial Council facsimile filing cover sheet must accompany documents filed by direct fax filing. See §18.24. The cover sheet is not filed or served in the case. Cal Rules of Ct 2.304(b).

The filing party must make a fax transmission record of each filing by fax. Then, if there are errors in transmission or the fax filing is not processed by court personnel when it is received, the party may move the court for an order filing the document nunc pro tunc. Cal Rules of Ct 2.304(d). The motion must be accompanied by the transmission record and a proof of transmission in the language set forth in Rule 2.304(d).

In direct fax filing, the filing fees may be paid by credit card. The Judicial Council fax cover sheet contains credit card information and a cardholder's signature line. Cal Rules of Ct 2.304(e)(1). If the credit card company rejects the charge, the court must proceed in the same manner as for a returned check used to pay the filing fee. On filing fees, see chap 15. Courts may also provide by local rule for attorney accounts to be used to pay for direct fax filings, and may require an advance deposit to open such an account. Cal Rules of Ct 2.304(f).

There is no rule of court indicating when a fax-filed document is considered filed for statute of limitations purposes. The rules governing *service* by fax, however, provide that service completed after 5 p.m. is considered to have occurred on the next court day. Cal Rules of Ct 2.306(g). See §18.11. See also *Rosenberg v Superior Court* (1994) 25 CA4th 897, 900, 30 CR2d 803 (complaint faxed to court after it had closed on day before statute of limitations expired deemed filed the following day).

Parties filing by direct fax filing must pay the court one dollar per page, in addition to any other fees. Cal Rules of Ct 2.304.

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§18.16 3. Demand for Originals After Fax Service or Filing

At any time after filing or service of a signed fax document, any other party may serve a demand for production of the original. The demand must be served on all parties but is not filed with the court. Cal Rules of Ct 2.305(b). When such a demand has been served, the parties must arrange a meeting to examine the signed original. Cal Rules of Ct 2.305(b)-(c).

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§18.17 E. Service by Telegraph

Under CCP §1017, a summons, writ, or order in a civil action, and all other papers requiring service, may be transmitted by telegraph for service. The procedures are set out in the statute.

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V. PROOF OF SERVICE

§18.18 A. Service by Mail

When a notice or other paper is served on a party or his or her attorney by mail under CCP §1012 (see §§18.5-18.6), proof of service may be made:

(1) **By nonparty adult:** The process server (frequently the attorney's secretary) prepares and files with the original papers an affidavit (or declaration under penalty of perjury; CCP §2015.5) stating the exact title of the document served, the server's name and residence or business address located in the county where the mailing occurs, that he or she is at least age 18 and not a party to the action, the date and place of mailing, the name and address of the person served as shown on the envelope, and that the envelope was sealed and deposited in the mail with postage fully prepaid. CCP §1013a(1). For a sample form, see §18.21.

NOTE: Alternatively, the affidavit or declaration may vary these items by replacing the statements regarding the mailing with statements that the server is readily familiar with the business's practice for collection and processing of correspondence for mailing, that the correspondence would be deposited with the postal service that same day in the ordinary course of business, the date and place of business the correspondence was placed for deposit in the mail, and that the envelope was sealed and placed for collection and mailing on that date following ordinary business practices. For a sample form, see §18.22. It is important to note that, on a motion of the party served, such service will be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit or declaration.

(2) **By attorney:** When a party's attorney has served the papers by mail, the attorney prepares and files with the original papers a certificate showing his or her name and business address and that he or she is an active member of the State Bar and not a party to the action. The certificate must also show the exact title of the document served, the date and place of deposit, the name and address of the person served as shown on the envelope, and that the envelope was sealed and deposited in the mail with postage fully prepaid. CCP §1013a(2). For a sample form, see §18.23.

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§18.19 B. Service by Express Mail, Overnight Delivery, or Facsimile Transmission

The methods of proof of service by mail (described in §18.18) can be adapted to accomplish proof of service by the alternative means now listed in CCP §1013.

On filing and serving papers by facsimile transmission, see Cal Rules of Ct 2.300-2.306. See §§18.11-18.16.

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§18.20 C. Personal or Substituted Service

When a notice or other paper is served on a party or his or her attorney by personal or substituted service under CCP §1011 (see §§18.8-18.10), proof of service must accompany the filing of the paper in court. See Cal Rules of Ct 1.21(c). The affidavit or declaration of service must be in a manner permitted by law and must show service on the attorney for each adverse party who is represented by separate counsel and on each party appearing in person. Cal Rules of Ct 1.21(a), (c).

Papers that are personally served on an attorney or his or her agent are often accompanied by an acknowledgment of receipt, which should be signed by the attorney or agent and then filed with the original papers. If they are not, the person making service should prepare an affidavit or declaration of service for filing with the original papers. See chap 12 for typical wording of proof of service by personal delivery.

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Source: Civil Litigation/California Civil Procedure Before Trial/18 Service of Papers/ VI. FORMS/§18.21 A. Form: Declaration of Service by Mail (Documents Deposited in Mail)

VI. FORMS

§18.21 A. Form: Declaration of Service by Mail (Documents Deposited in Mail)

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PROOF OF SERVICE BY MAIL

_ _[*Name*]_ _ declares:

I am over age 18, not a party to this action, and _ _[*reside/am employed*]_ _ in _ _ _ _ _ _ County at _ _[*address*]_ _. On _ _[*date*]_ _, I deposited in the United States mail at _ _[*place, e.g., city and state*]_ _ a copy of the attached _ _[*title or description of each paper*]_ _ in a sealed envelope, with postage fully prepaid, addressed to _ _[*name and address of each person served*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (attach to and file with original of papers served); ___ copies (attach one to each set of papers served); ___ office copies.

Comment: See §18.18 (proof of service by mail).

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§18.22 B. Form: Declaration of Service by Mail (Documents Placed for Collection and Mailing)

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PROOF OF SERVICE BY MAIL

_ _[*Name*]**_ _ declares:**

I am over age 18, not a party to this action, and _ _[*reside/am employed*]**_ _ in _ _ _ _ _ _ County at _ _**[*address*]**_ _. On _ _**[*date*]**_ _, following ordinary business practices, I placed for collection and mailing at the office(s) of _ _**[*name of business*]**_ _, located at _ _**[*address*]**_ _, a copy of the attached _ _**[*title or description of each paper*]**_ _ in a sealed envelope, with postage fully prepaid, addressed to _ _**[*name and address of each person served*]**_ _.**

I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (attach to and file with original of papers served); ___ copies (attach one to each set of papers served); ___ office copies.

Comment: On a motion of the party served, the service made by depositing documents in the office mail for later deposit in the United States mail will be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the declaration. See §18.18 (proof of service by mail).

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Source: Civil Litigation/California Civil Procedure Before Trial/18 Service of Papers/§18.23 C. Form: Attorney Certification of Service by Mail (Documents Deposited in Mail)

§18.23 C. Form: Attorney Certification of Service by Mail (Documents Deposited in Mail)

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PROOF OF SERVICE BY MAIL

_ _[*Name*]_ _ **certifies:**

I am an active member of the State Bar of California and am not a party to this action. My business address is _ _[*address*]_ _**. On** _ _[*date*]_ _**, I deposited in the United States mail at** _ _[*place, e.g., city and state*]_ _ **a copy of the attached** _ _[*title or description of each paper*]_ _ **in a sealed envelope, with postage fully prepaid, addressed to** _ _[*name and address of each person served*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (attach to and file with original of papers served); ___ copies (attach one to each set of papers served); ___ office copies.

Comment: See §18.18 (proof of service by mail). Attorneys often use the word "certify" rather than "declare." Code of Civil Procedure §2015.5 authorizes use of either "declare" or "certify."

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Source: Civil Litigation/California Civil Procedure Before Trial/18 Service of Papers/§18.24 D. Form: Facsimile Transmission Cover Sheet (Fax Filing) (Judicial Council Form MC-005)

§18.24 D. Form: Facsimile Transmission Cover Sheet (Fax Filing) (Judicial Council Form MC-005)

Print

MC–005

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO. : FAX NO. (*Optional*): E-MAIL ADDRESS (*Optional*) : ATTORNEY FOR (*Name*) :	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS : MAILING ADDRESS : CITY AND ZIP CODE : BRANCH NAME :	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
FACSIMILE TRANSMISSION COVER SHEET	CASE NUMBER:

TO THE COURT:

1. **Please file** the following transmitted documents in the order listed below:

Document name	No. of pages

2. ☐ **Processing instructions** consisting of: _____ pages are also transmitted.

3. ☐ **Fee required** ☐ Filing fee ☐ Fax fee (Cal. Rules of Court, rule 10.815)
   a. ☐ **Credit card payment** I authorize the above fees and any amount imposed by the card issuer or draft purchaser to be charged to the following account:
   ☐ VISA ☐ MASTERCARD Account No.: Expiration date:

   _____ ▶ _____
   (TYPE OR PRINT NAME OF CARDHOLDER) (SIGNATURE OF CARDHOLDER)

   b. ☐ **Attorney account** (Cal. Rules of Court, rule 2.304). Please charge my account no.:

Form Adopted for Mandatory Use
Judicial Council of California
MC-005 [Rev. January 1, 2007]

FACSIMILE TRANSMISSION COVER SHEET
(Fax Filing)

Cal. Rules of Court, rule 2.304
www.courtinfo.ca.gov

Copies: Original (transmit as cover sheet for papers to be filed; retain originals); ___ office copies.
Comment: See discussion in §18.11.

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19

Motions to Quash

I. INTRODUCTION
- A. Scope of Chapter §19.1
- B. Governing Law §19.2

II. WHEN TO CHALLENGE JURISDICTION OVER THE PERSON
- A. Motion to Quash Preferable §19.3
- B. If Default Judgment Already Entered
  - 1. Direct Attack §19.4
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IV. CHECKLIST: PROCEDURE FOR CHALLENGING JURISDICTION §19.30

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I. INTRODUCTION

§19.1 A. Scope of Chapter

For a court to have authority to render a valid judgment, it must have jurisdiction over the subject matter and over the parties. This chapter covers challenges to jurisdiction over the person, which consists of two elements:

- Personal jurisdiction based on minimum contacts; and
- Proper service.

A defendant wishing to challenge the court's jurisdiction over the person of a defendant may do one of the following:

- File a motion under CCP §418.10 to quash service of summons before filing any other pleading; or
- After a default judgment has been entered, attack the default judgment for lack of personal jurisdiction.

This chapter covers the first alternative in civil actions, including unlawful detainer. A defendant may also challenge jurisdiction over the person after a default judgment has been entered. See §§19.3-19.5. It discusses the motion to quash (see §§19.6-19.29) and contains a checklist on the procedures for challenging jurisdiction (see §19.30). On relief from default, see chap 38.

For discussion of subject matter jurisdiction, see chaps 6-7; for discussion of jurisdiction over the person, see chap 6.

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Source: Civil Litigation/California Civil Procedure Before Trial/19 Motions to Quash/§19.2 B. Governing Law

§19.2 B. Governing Law

A motion to quash service of summons is governed by CCP §418.10.

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II. WHEN TO CHALLENGE JURISDICTION OVER THE PERSON

§19.3 A. Motion to Quash Preferable

If a defendant has the opportunity to challenge jurisdictional defects early, it is much better to make a motion to quash than to wait until after a judgment has been entered. A defendant that loses the jurisdictional arguments raised in a direct or collateral attack on the judgment has long since waived the right to litigate the case. In contrast, a defendant that loses a motion to quash may still proceed to defend the case on its merits. See CCP §418.10.

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B. If Default Judgment Already Entered

§19.4 1. Direct Attack

A default judgment may be entered if a defendant fails to challenge jurisdiction and fails to appear in the action. See chap 38. When a default judgment has been entered, a defendant may make a direct attack on the judgment on the basis of lack of personal jurisdiction by:

- Motion to vacate judgment under CCP §473 (mistake, inadvertence, surprise, or excusable neglect).
- Motion or separate action requesting court to use its inherent equity powers to set aside judgment (see *Munoz v Lopez* (1969) 275 CA2d 178, 79 CR 563; 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§208-209, 215-242 (5th ed 2008)).
- Motion made under CCP §473.5(a) (no actual notice in time to defend action before default entered).
- Appeal (see *Columbia Screw Co. v Warner Lock Co.* (1903) 138 C 445, 71 P 498; 9 Witkin, Procedure, *Appeal* §93).

See also chap 38 (default).

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§19.5 2. Collateral Attack

A court's jurisdiction is also subject to collateral attack after judgment by, *e.g.,* filing a special appearance and motion to vacate judgment in an opposing party's action to enforce the default judgment. See, *e.g., Marriage of Merideth* (1982) 129 CA3d 356, 180 CR 909; see chap 38 (default).

NOTE: A presumption that the court acted within its jurisdiction becomes operative when a judicial act is under collateral attack. Evid C §666. Unless the jurisdictional defect appears on the face of the California judgment, the presumption of jurisdiction is conclusive with certain narrow exceptions. See 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§11-13 (5th ed 2008).

A defendant in an action to enforce a foreign default judgment, however, has the right to show the judgment to be in excess of jurisdiction if that issue was not litigated in the foreign state. *Indiana Ins. Co. v Pettigrew* (1981) 115 CA3d 862, 171 CR 770. The invalidity of the foreign judgment may be proved by extrinsic evidence. See 8 Witkin, Procedure, *Attack Judgment* §14.

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III. MOTION TO QUASH

§19.6 A. When Appropriate

Before judgment, the court's assertion of jurisdiction over a defendant may be challenged by a motion to quash service of summons under CCP §418.10. Under the statute, a party who files a motion to quash is not considered to have made a general appearance, and no default may be entered before expiration of the time to plead. CCP §418.10(d). On what constitutes a general appearance, see chap 6.

A defendant or cross-defendant may move under CCP §418.10 (to quash for lack of personal jurisdiction, to stay or dismiss on ground of inconvenient forum, or to dismiss for delay in prosecution) and simultaneously answer, demur, or move to strike the complaint or cross-complaint. CCP §418.10(e). Despite CCP §1014, no act by a party who files a motion under CCP §418.10, including filing an answer, demurrer, or motion to strike, constitutes an appearance, unless the court denies the motion made under §418.10. If the court does so deny the motion, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion. CCP §418.10(e)(1).

If the motion under §418.10 is denied and the defendant or cross-defendant petitions for a writ of mandate under §418.10(c), the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have concluded. CCP §418.10(e)(2).

Failure to file a motion under §418.10 at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution. CCP §418.10(e)(3).

It was the legislature's intent in enacting §418.10(e) to conform California practice in challenging personal jurisdiction to the practice under Fed R Civ P 12(b). Stats 2002, ch 69, §2. Under existing law, if, instead of filing a motion to quash, a challenging defendant filed an answer in which lack of jurisdiction over the person was asserted as an affirmative defense or in which disclaimers of jurisdiction were stated, the court would consider that the defendant had made a general appearance and had waived objections to jurisdiction. *Kriebel v City Council* (1980) 112 CA3d 693, 169 CR 342; *Neihaus v Superior Court* (1977) 69 CA3d 340, 137 CR 905.

Counsel should note, however, that a request for attorney fees made in connection with a motion to dismiss for inconvenient forum that is filed together with a motion to quash does not constitute a general appearance. *Berard Constr. Co. v Municipal Court* (1975) 49 CA3d 710, 122 CR 825.

When a party challenges a California court's assertion of jurisdiction over the person in a particular case, that court has jurisdiction to determine the issue of jurisdiction. See *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 109 P2d 942; *Jones v Brown* (1970) 13 CA3d 513, 520, 89 CR 651. The court's special jurisdiction to determine all jurisdictional issues means that even if the court, *e.g.,* upholds jurisdiction based on a determination that there are minimum contacts (see discussion in chap 6), it may subsequently find a lack of jurisdiction over the person on a motion to quash based on invalid service of process. *Ziller Electronics Lab GmbH v Superior Court* (1988) 206 CA3d 1222, 254 CR 410. For further discussion of *Ziller,* see §19.28.

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B. Making the Motion

§19.7 1. Grounds

The grounds for a motion to quash under CCP §418.10 may be that the court lacks jurisdiction over defendant for one or more of the following reasons:

- A defendant has insufficient "minimum contacts" with California (see §19.8);
- There is no basis for finding that the court has continuing jurisdiction over a defendant (see §19.8);
- The manner in which a defendant was served with a summons was defective (see §19.9);
- Service of an unlawful detainer action was improper (see §19.10).

On dissolved corporations, see §19.11.

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§19.8 a. No Minimum Contacts or Continuing Jurisdiction

Most of the reported decisions in the area of minimal contacts for personal jurisdiction arise in one of two possible contexts:

- Whether a defendant has sufficient "minimal contacts" in California for this state to exercise personal jurisdiction in the first place; and
- Whether a court continues to maintain jurisdiction over a party for purposes of modification of a proper prior order.

The former often involves a foreign manufacturer of an item that is the alleged cause of damage to plaintiff in California. The latter often involves a request by a spouse to modify a prior support decree or to partition a pension in a dissolution action against the former spouse now living in another state.

For a full discussion of personal jurisdiction, see chap 6.

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§19.9 b. Ineffective Service of Process

Failure to properly effect service of summons is really a failure of the plaintiff to obtain jurisdiction over the defendant (see *Societe Civile Succession Richard Guino v Redstar Corp.* (2004) 123 CA4th 1145, 20 CR3d 603; *Harrington v Superior Court* (1924) 194 C 185, 189, 228 P 15; *Chaplin v Superior Court* (1927) 81 CA 367, 371, 253 P 954), and is, therefore, properly the basis of a CCP §418.10 motion to quash. For discussion of the effect of failure to make proper service, see chap 17. A motion to quash or a motion to dismiss for failure to properly serve the summons within three years after filing the complaint (under CCP §583.210) is also appropriate. *Mannesmann DeMag, Ltd. v Superior Court* (1985) 172 CA3d 1118, 218 CR 632.

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§19.10 c. Failure to State Cause of Action for Unlawful Detainer

A motion to quash service is the proper procedure for challenging jurisdiction over the person in an unlawful detainer action. *Parsons v Superior Court* (2007) 149 CA4th Supp 1, 5, 58 CR3d 48; *Smith v Municipal Court* (1988) 202 CA3d 685, 688, 245 CR 300; *Delta Imports, Inc. v Municipal Court* (1983) 146 CA3d 1033, 194 CR 685. It is the only method by which a defendant can test whether a complaint states a cause of action for unlawful detainer and thereby supports a five-day summons. *Delta Imports, Inc. v Municipal Court, supra.* Although a demurrer is the normal procedure for challenging the sufficiency of a complaint, it constitutes a general appearance and waives the jurisdictional defect in the summons. *Smith v Municipal Court, supra; Delta Imports, Inc. v Municipal Court, supra.*

It is not entirely clear whether a motion to quash will be granted as to the entire unlawful detainer action if only some of the relief requested is not available under the unlawful detainer proceeding. In *Saberi v Bakhtiari* (1985) 169 CA3d 509, 516, 215 CR 359, the court held that the improper inclusion of a request for predetermination rent in an unlawful detainer complaint did not render the entire complaint invalid and subject to a motion to quash and that the improper allegations should be challenged by a motion to strike. By extension, the *Saberi* holding indicates that a motion to quash should be granted only if none of the relief requested in the complaint is available under the unlawful detainer proceeding. But see *Castle Park No. 5 v Katherine* (1979) 91 CA3d Supp 6, 8 n1, 154 CR 498 (motion to quash granted; holding implies that, when improper relief requested, entire action is subject to motion to quash).

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§19.11 d. Dissolved Corporation

Formerly, a motion to quash service of summons might have been useful when a plaintiff attempted to sue a dissolved corporation on a cause of action that arose after the corporate dissolution. The amendment of Corp C §2011(a) (operative Jan. 1, 1992), however, permits lawsuits against dissolved corporations to the extent of undistributed assets, such as liability insurance assets, and against shareholders of a dissolved corporation to the extent of assets received. The amendment overturns the result reached in *Pacific Scene, Inc. v Penasquitos, Inc.* (1988) 46 C3d 407, 250 CR 651, and incorporates suggestions made in *Penasquitos, Inc. v Superior Court* (1991) 53 C3d 1180, 283 CR 135.

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2. Time for Filing

§19.12 a. Actions Other Than Unlawful Detainer

A defendant must serve and file a notice of motion to quash service of summons on the ground of lack of jurisdiction over the person on or before the last day within which to plead or within any further time that the court for good cause may allow. CCP §418.10(a). The notice of motion may be coupled with a notice of motion to stay or dismiss the action on the ground of inconvenient forum under CCP §418.10(a)(2) (see chap 21) or with a motion to set aside a default or default judgment under CCP §§473-473.5 (CCP §418.10(d)). The notice must designate as the time for making the motion a date at least 10 but no more than 30 days after filing. CCP §418.10(b). For time to file motion to quash when a case is remanded from federal court for improper removal, see chap 22.

For sample forms of a notice of motion, supporting memorandum, and declaration that may be adapted for use in the context of a motion to quash, and a full discussion of drafting court papers, see chaps 11-12.

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§19.13 b. Unlawful Detainer Actions

In forcible entry and unlawful detainer cases, the time for making the motion must be at least three but no more than seven days after filing the notice. CCP §1167.4(a).

For sample forms of a notice of motion, supporting memorandum, and declaration that may be adapted for use in the context of a motion to quash, and a full discussion of drafting court papers, see chaps 11-12.

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§19.14 3. Effect of Filing

As noted above, filing a motion to quash service of summons is a special appearance and a default judgment cannot be entered before the expiration of the time to plead. CCP §418.10(d). A motion to quash may be combined with a motion to stay or dismiss for inconvenient forum (CCP §418.10(d)); with a motion attacking a judgment on CCP §473 grounds (CCP §418.10(a)(2)); with a motion under CCP §473.5 to set aside a default judgment (CCP §418.10(d)); or with an answer, demurrer, or motion to strike the complaint or cross-complaint (CCP §418.10(e)).

Despite CCP §1014, no act by a party who files a motion under CCP §418.10, including filing an answer, demurrer, or motion to strike, constitutes an appearance, unless the court denies the motion made under §418.10. If the court denies the motion under §418.10, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion. CCP §418.10(e)(1). A general appearance also does not result from filing a peremptory challenge under CCP §170.6 against the judge hearing the motion to quash. *School Dist. v Superior Court* (1997) 58 CA4th 1126, 68 CR2d 612; *Loftin v Superior Court* (1971) 19 CA3d 577, 97 CR 215.

Other effects of filing a motion to quash service of summons are discussed in §§19.15-19.16.

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§19.15 a. Court's Jurisdiction to Rule on Other Matters

In some instances, the issue may arise as to whether a court has jurisdiction to rule on any other matter before resolving a motion to quash for lack of jurisdiction over the person. In a family law case, the court in *Marriage of Stich* (1985) 169 CA3d 64, 214 CR 919, held that a trial court does have the power to award temporary support and attorney fees in a divorce matter, pending resolution of a motion to quash made on the basis of the validity of a foreign divorce decree. In *Marriage of Stich,* the court expressly found that the party opposing the motion had a fair or reasonable probability of being successful in establishing the invalidity of a Mexican divorce decree.

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§19.16 b. Extends Time to Plead

Service and filing of the notice of motion automatically extends the defendant's time to plead until 15 days after the service of a written notice of entry of an order denying the motion, unless the court for good cause extends the time for an additional period not exceeding 20 days. CCP §418.10(b).

Although there is no express statutory provision or case law on the issue of whether CCP §1013 extends the time to plead when the written notice of entry of the order is served by mail, amendments to §1013 that provide for its application "in the absence of a specific exception provided for by this section, other statute or rule of court" make it clear that the time to plead is extended by CCP §1013 when the written notice of entry of the order is served by mail.

In forcible entry and unlawful detainer cases, the time to plead is extended until five days after service of the written notice of entry of an order denying the motion unless the court for good cause extends the time for an additional period not exceeding 15 days. CCP §1167.4(b).

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§19.17 4. Date for Hearing; Notice

A hearing on a motion to quash must be held within 30 days after the motion is filed. CCP §418.10(b). Unlawful detainer cases must be heard within three to seven days after the motion is filed. CCP §1167.4.

The provisions of CCP §1005(b) expressly govern §418.10(b) motions to quash. Under §1005(b), when written notice of a motion is required, it must be given at least 16 court days before the hearing date, and, if notice is served by mail, the 16-day period is increased by 5 calendar days if notice is mailed within California to a California address. The time is increased even more if mailed to an address outside California or outside the United States. CCP §1005(b). The court, however, may prescribe a shorter time. CCP §1005(b).

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§19.18 C. Opposing the Motion

The opposing party must file all opposition papers, which should include a supporting memorandum and declarations, at least 9 court days before the date set for the hearing, unless otherwise ordered. CCP §1005(b); Cal Rules of Ct 3.1300(a). The opposition papers must be served by personal delivery, fax, express mail, or other method reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c).

Because the opposing party has the burden of proof on a motion to quash for lack of jurisdiction over the person (see §19.20), it is of crucial importance that detailed, carefully drafted declarations be filed in support of the opposition to the motion.

Additionally, when there are uncooperative witnesses or parties who have information crucial to the jurisdictional issues, it may be important to conduct discovery in order to obtain their testimony to include in the papers presented to the court on the motion. See discussion in §19.19. If the opposing party needs more time for discovery in order to obtain evidence that can be presented in opposition to the motion, an order continuing the hearing and an order shortening time for discovery should be sought.

For a general discussion of opposition to a motion, together with sample forms that may be adapted for use in the context of a motion to quash, see chap 12.

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§19.19 D. Discovery

A plaintiff is entitled to conduct discovery on the jurisdictional issues when a motion to quash service of summons for lack of jurisdiction is filed. *1880 Corp. v Superior Court* (1962) 57 C2d 840, 22 CR 209; *Mihlon v Superior Court* (1985) 169 CA3d 703, 215 CR 442. It appears that the defendant also may conduct discovery in connection with a motion to quash without its being considered a general appearance. *Islamic Republic of Iran v Pahlavi* (1984) 160 CA3d 620, 628, 206 CR 752.

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E. The Hearing

§19.20 1. Burden and Standard of Proof

When a defendant moves to quash service of summons for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. *Kroopf v Guffey* (1986) 183 CA3d 1351, 228 CR 807; *Thomas J. Palmer, Inc. v Turkiye Is Bankasi, A.S.* (1980) 105 CA3d 135, 146, 164 CR 181. This is why the evidence in opposition to the motion to quash should be as factually strong as the opponent can make it.

When a defendant challenges jurisdiction over the person on more than one ground, *e.g.,* lack of personal jurisdiction and ineffective service, the plaintiff must establish that a basis for jurisdiction exists on all grounds that have been challenged. See *Ziller Electronics Lab GmbH v Superior Court* (1988) 206 CA3d 1222, 1229, 254 CR 410.

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§19.21 2. Proving Jurisdiction in Tort Cases

Generally, a motion to quash is not the proper proceeding in which to test the legal or factual merits of a complaint. *J.M. Sahlein Music Co. v Nippon Gakki Co.* (1987) 197 CA3d 539, 545, 243 CR 4; *Regents of Univ. of N.M. v Superior Court* (1975) 52 CA3d 964, 970 n7, 125 CR 413. However, when personal jurisdiction depends on the defendant's having caused tortious effects in the forum state and the defendant presents evidence that its conduct did not cause the tortious effects, the plaintiff does have the burden of making a prima facie showing that there is substantive merit to the case. *J.M. Sahlein Music Co. v Nippon Gakki Co., supra*; *Regents of Univ. of N.M. v Superior Court, supra*.

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§19.22 3. Evidence

Although CCP §418.10 does not expressly provide that declarations are to be used in a motion to quash, the case law indicates that declarations are normally used as evidence in such a motion, along with the complaint. See *Evangelize China Fellowship, Inc. v Evangelize China Fellowship* (1983) 146 CA3d 440, 194 CR 240.

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§19.23 a. The Complaint

A verified complaint may be treated as a declaration for the purpose of sustaining the plaintiff's burden of proof in opposing a motion to quash. *Evangelize China Fellowship, Inc. v Evangelize China Fellowship* (1983) 146 CA3d 440, 194 CR 240; *Thomas J. Palmer, Inc. v Turkiye Is Bankasi, A.S.* (1980) 105 CA3d 135, 148, 164 CR 181. However, a complaint that states only ultimate facts or conclusions of law is not considered competent evidence. *Thomas J. Palmer, Inc. v Turkiye Is Bankasi A.S., supra.* Similarly, allegations in a verified complaint made on information and belief will not sustain the plaintiff's burden of proof. *Shearer v Superior Court* (1977) 70 CA3d 424, 138 CR 824.

Although an unverified complaint has no evidentiary value and is not competent evidence (*Mihlon v Superior Court* (1985) 169 CA3d 703, 215 CR 442; *Inselberg v Inselberg* (1976) 56 CA3d 484, 128 CR 578), it may be significant as a material fact defining the cause of action (*Mihlon v Superior Court, supra*).

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§19.24 b. Declarations

Declarations, in order to be competent evidence in a motion to quash proceeding, must be verified. *Inselberg v Inselberg* (1976) 56 CA3d 484, 128 CR 578. Declarations containing only ambiguous, vague, or conclusory statements (*Archibald v Cinerama Hotels* (1976) 15 C3d 853, 865, 126 CR 811) or hearsay, opinion, or supposition (*Thiebaut v Blue Cross of Indiana* (1986) 178 CA3d 1157, 224 CR 277; *Inselberg v Inselberg, supra*) are not competent evidence. But see *Kroopf v Guffey* (1986) 183 CA3d 1351, 1358, 228 CR 807 (dictum that motion to quash may be made and determined on hearsay affidavits).

When both sides submit verified declarations, a court may find that the evidence on one side is not credible in view of the preponderance of the evidence submitted by the opposition. *Kroopf v Guffey, supra.* When competent evidence is presented by both sides, the court determines whether the plaintiff has carried the burden of establishing the facts of jurisdiction. See §19.20 for discussion of burden of proof.

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§19.25 F. Sanctions for Bringing Motion to Quash

Sanctions may be awarded against any party or attorney under CCP §128.7(b) for bringing motions to quash that are frivolous or are filed "primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." See §1.6 for effective dates. See *Luke v Baldwin United Corp.* (1985) 167 CA3d 664, 213 CR 654. However, sanctions will not usually be awarded except in the clearest cases. See *Luke v Baldwin United Corp., supra,* in which the court set aside an order for sanctions against a law firm for bringing a motion to quash, holding that the attorneys' conduct was not egregious, there was no improper motive, the motion was not utterly without merit, and the attorney-client privilege prevented the attorneys from exonerating themselves. Nonetheless, the prudent attorney always needs to examine the propriety of the motion as new facts are discovered.

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G. Response to Order After Hearing

§19.26 1. If Motion Denied

Although an order granting a motion to quash is appealable (CCP §904.1(a)(3)), an order denying it is not. See *Kneeland v Ethicon Suture Labs.* (1952) 113 CA2d 335, 248 P2d 447. If the court denies the motion to quash, the challenging party may:

- Petition for a writ of mandate (CCP §418.10(c));
- Answer or otherwise plead and litigate the case on the merits; or
- Move for reconsideration.

When a court's decision in favor of asserting personal jurisdiction has become final, either by appellate review or by failure to seek review, the decision is res judicata and no longer open to attack in an action subsequently brought on the judgment. *American Sur. Co. v Baldwin* (1932) 287 US 156, 77 L Ed 231, 53 S Ct 98; *Baldwin v Iowa State Traveling Men's Ass'n* (1931) 283 US 522, 75 L Ed 1244, 51 S Ct 517. If, however, the second action is not interchangeable or coextensive with the first, even if both actions involve the same primary right, the court may deny a motion to quash based on lack of jurisdiction over the person in the second action even if the court grants the defendant's motion to quash in the first action. *Silverman v Superior Court* (1988) 203 CA3d 145, 249 CR 724.

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§19.27 a. Petition for Writ of Mandate

If the motion to quash is denied, the losing party may serve on the adverse party and file with the trial court, within 10 days after service of notice of entry of an order that the motion has been denied or within any further time not exceeding 20 days that the court for good cause allows, a notice that a petition for writ of mandate has been filed in an appropriate reviewing court. CCP §418.10(c). The writ filed with the reviewing court is intended to convince the reviewing court to order the trial court to enter an order quashing the service of summons.

The time to file a petition for a writ under §418.10(c) may be extended by the provisions of CCP §1013 regarding mailing (*Shearer v Superior Court* (1977) 70 CA3d 424, 138 CR 824), on the basis of CCP §473 (*McIntire v Superior Court* (1975) 52 CA3d 717, 719 n4, 125 CR 379; *Quattrone v Superior Court* (1975) 44 CA3d 296, 118 CR 548), or based on the circumstances of the case or equitable principles (*Demarest v Superior Court* (1980) 103 CA3d 791, 796, 165 CR 641; *Cornell Univ. Med. College v Superior Court* (1974) 38 CA3d 311, 113 CR 291). For further discussion, see California Civil Writ Practice §§16.54-16.57 (4th ed Cal CEB 2008).

Service and filing of the notice of a petition for writ of mandate extends the time to plead until 10 days after a service of notice of final judgment in the mandate proceeding, but the trial court for good cause may extend the time for an additional period not exceeding 20 days. CCP §418.10(c).

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§19.28 b. Other Responses

A losing party whose motion to quash has been denied and who does not file a petition for writ of mandate may file an answer or otherwise plead within 15 days after service of written notice of entry of the order denying the motion or within such additional time, not exceeding 20 days, that the court for good cause allows. CCP §418.10(b).

The losing party may also, in certain limited circumstances, success fully move the trial court for reconsideration. See *Ziller Electronics Lab GmbH v Superior Court* (1988) 206 CA3d 1222, 254 CR 410. In *Ziller,* the court first granted a motion to quash on the basis of defective service while finding that there were minimum contacts. On reservice, the defendant again moved to quash on the basis of lack of jurisdiction, asserting again the lack of minimum contacts. The trial court denied the motion on the basis of the prior order. The appellate court, however, while holding that the prior finding of minimum contacts was binding on the parties as an interim trial court ruling, went on to find that the trial court had abused its discretion by refusing to reconsider the minimum contacts issue. The *Ziller* court reiterated the rule that an interim ruling of a trial court only becomes final by entry of judgment.

Filing an answer or otherwise pleading after a motion to quash is denied waives the right to seek review of the order of denial. *McCorkle v City of Los Angeles* (1969) 70 C2d 252, 74 CR 389. But see *Marriage of Hattis* (1987) 196 CA3d 1162, 1165 n2, 242 CR 410 (appellate court treated appeal filed at conclusion of action as petition for writ of mandate because jurisdictional issue fully briefed and opposing party did not question propriety of appeal).

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§19.29 2. If Motion Granted

An order granting a motion to quash is an appealable order. CCP §904.1(a)(3). A prior dismissal on the ground of lack of jurisdiction over the person is res judicata in a subsequent action by the same parties if based on the same theory of recovery. *MIB, Inc. v Superior Court* (1980) 106 CA3d 228, 164 CR 828.

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§19.29A H. Attorney Fees

The court has the inherent power to rule on a motion for attorney fees following a successful motion to quash. *Shisler v Sanfer Sports Cars, Inc.* (2008) 167 CA4th 1, 6, 83 CR3d 771. See also *Profit Concepts Mgmt., Inc. v Griffith* (2008) 162 CA4th 950, 955, 76 CR3d 396 (Oklahoma resident was prevailing party in dismissal due to lack of personal jurisdiction).

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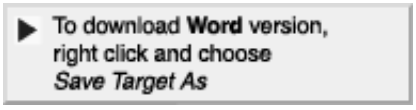
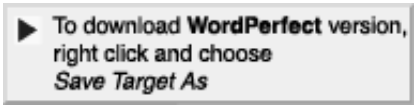
Source: Civil Litigation/California Civil Procedure Before Trial/19 Motions to Quash/§19.30 IV. CHECKLIST: PROCEDURE FOR CHALLENGING JURISDICTION

§19.30 IV. CHECKLIST: PROCEDURE FOR CHALLENGING JURISDICTION





Moving Party

- Identify ground for challenging jurisdiction (see §§19.7-19.11).
- Decide approach for challenge:
- Motion to quash (see §§19.6-19.29); or
- Attack on default judgment (see §§19.4-19.5).

Moving to Quash

Moving Party

- Before filing any other pleading, serve and file notice of motion and motion to quash, supporting memorandum, and declarations (see chap 12, §§19.12-19.13, 19.22-19.24); if necessary, conduct discovery (see §19.19).

Opposing Party

- Serve and file opposition to motion, memorandum, and declarations (see §§19.18, 19.22-19.24); if necessary, conduct discovery (see §19.19).

Moving Party

If motion granted:

- Submit order to court.

If motion denied:

- Serve petition for writ of mandate on adverse party and trial court and file with reviewing court (see §§19.26-19.27);
- Answer or otherwise plead, waiving further challenge (see §§19.26, 19.28); or
- Move for reconsideration in trial court (see §§19.26, 19.28).

Opposing Party

If motion granted:

- Decide whether to file appeal (see §19.29).

Attacking Default Judgment

Party Challenging Jurisdiction

- After default entered for failure to answer, challenge judgment by one of following methods for which specific requirements are met:
- Direct attack (see §19.4):
- CCP §473 motion;
- Separate action or motion;
- CCP §473.5 motion; or
- Appeal.
- Collateral attack (see §19.5):

- File special appearance to challenge personal jurisdiction in action to enforce judgment along with motion to vacate prior judgment.

Party Defending Judgment and Jurisdiction

- File and serve responsive papers to challenging party's attack

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Motions to Change Venue

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I. INTRODUCTION

§20.1 A. Scope of Chapter

This chapter primarily discusses motions for change of venue under CCP §§396b and 397. It discusses grounds for challenging venue and who may challenge venue (§§20.2-20.7), procedures for the moving party (see §§20.8-20.18), procedures for the responding party (§§20.19-20.21), hearing and determination (see §§20.22-20.25), transfer of action (see §§20.26-20.31), and review of orders (see §§20.32-20.35). It also provides a checklist of procedures for motion for change of venue (see §20.36) and forms (§§20.37-20.42).

For a discussion of venue, see chap 8. See chaps 11 (form and format of pleadings and court papers), and 12 (noticed motions) for general discussion of law and motion procedures applying to motions for change of venue. Coordination of cases is covered in chap 44. For discussion of motions to transfer for lack of subject matter jurisdiction, see chap 6.

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§20.2 B. Governing Law

Under CCP §397, the court may, on motion, change the place of trial of a civil action when:

- The court designated in the complaint is not the proper court;
- The convenience of witnesses and the ends of justice would be promoted by the change;
- There is reason to believe that an impartial trial cannot be had in that court; or
- There is no judge of the county who is qualified to act in the case.

The statute also allows the court to change venue to the residence of the respondent in marital dissolution proceedings "when the ends of justice would be promoted by the change." CCP §397(e).

Other statutes provide additional grounds to change venue in specific situations. For example, the court may change venue to the county of residence of either party in any proceeding for dissolution, annulment, or legal separation under the Family Code when both parties have moved from the county in which judgment was rendered, if the ends of justice and convenience of the parties would be promoted by the change. CCP §397.5. Other grounds are provided by CCP §394, which authorizes change of venue to a neutral county in actions involving a city, county, or local agency (see §§8.72-8.76), and by Govt C §§955, 955.2, and 955.3 and CCP §401, which govern motions to change venue in actions involving the state or a state agency or officer (see §8.71).

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II. CHALLENGING VENUE—DESCRIPTION AND USE

A. Grounds

§20.3 1. Wrong Court

If the complaint is filed in the wrong court, the court must transfer the action to any proper court requested in timely motion by the defendant. CCP §396b(a). Transfer is mandatory even if a subsequent motion based on convenience of witnesses and the ends of justice would require a retransfer of the matter. To determine whether the action has been filed in the wrong court, see CCP §§392-404.8 and chap 8.

Venue that is properly based on the residence of a bona fide defendant remains proper even though the action is later dismissed as to that defendant. *Remington Sewing Mach. Co. v Cole* (1882) 62 C 311; *Ferguson v Koerber* (1924) 69 CA 47, 230 P 476. Thus, the plaintiff may find it possible to control venue by commencing the action in the county where a codefendant resides, and by dismissing that defendant from the action later.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.4 2. Convenience of Witnesses

§20.4 2. Convenience of Witnesses

The court, in its discretion, may transfer an action to promote the convenience of witnesses and the ends of justice. Generally, only convenience to nonparty witnesses is considered. *Wrin v Ohlandt* (1931) 213 C 158, 1 P2d 991. Ordinarily, the court may not base its decision on the convenience of:

- Parties or employees of parties (*Wrin v Ohlandt, supra*; *Dillman v Superior Court* (1962) 205 CA2d 769, 23 CR 498) unless the employee is a witness for an opposing party (*J.C. Millett Co. v Latchford-Marble Glass Co.* (1959) 167 CA2d 218, 334 P2d 72; *Harden v Skinner & Hammond* (1955) 130 CA2d 750, 279 P2d 978);
- An expert witness with no personal knowledge of the facts (*Wrin v Ohlandt, supra*; *Rothschild v Superior Court* (1963) 216 CA2d 778, 31 CR 248; *Barnett v United Oil Co.* (1935) 5 CA2d 175, 42 P2d 656); or
- Counsel for the parties (*Lieppman v Lieber* (1986) 180 CA3d 914, 225 CR 845).

However, in limited situations, the court may consider the convenience of a party, *e.g.,* when transfer to another county would endanger the health of a party whose testimony is material. *Lieberman v Superior Court* (1987) 194 CA3d 396, 239 CR 450; *Simonian v Simonian* (1950) 97 CA2d 68, 217 P2d 157. The court also may consider the convenience of a former employee who was no longer employed by a party when the action was commenced. *Wood v Silvers* (1939) 35 CA2d 604, 96 P2d 366.

The transfer must promote not only the convenience of witnesses, but also the ends of justice. *Peiser v Mettler* (1958) 50 C2d 594, 328 P2d 953. Frequently, this showing can be made inferentially because the facts that establish convenience of the witnesses also relate to savings in expenses and witnesses' time. *Pearson v Superior Court* (1962) 199 CA2d 69, 18 CR 578.

NOTE: Code of Civil Procedure §397(c) gives the court the power to change the place of trial even if the plaintiff has designated a proper court or the defendant has caused venue to be transferred to a proper court.

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§20.5 3. Impartial Trial

The court has the power to change the place of trial if "there is reason to believe that an impartial trial cannot be had" in the court designated in the complaint. CCP §397(b). A party is entitled to a change of venue if local prejudice of such a widespread nature can be shown that the court could conclude that it would be impossible to have a fair trial. *Cook v Pendergast* (1882) 61 C 72. Frequently, it will be impossible to make an adequate showing until an unsuccessful attempt to select a jury has been made. See *J.I. Case Threshing Co. v Copren Bros.* (1917) 35 CA 70, 169 P 443.

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§20.6 4. No Judge Qualified

The place of trial may be changed if there is no judge of the court qualified to act. CCP §397(d). As a practical matter this ground rarely is used. When no judge in the county is qualified to sit, the Chair of the Judicial Council may assign an outside judge to hear the matter. CCP §170.8.

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§20.7 B. Who May Challenge

Any party to an action may move to change venue. However, the moving defendant must be either a named party to the litigation or served as a fictitiously named defendant; a person who voluntarily appears as a fictitiously named defendant may not move to change venue. *Liera v Los Angeles Fin. Co.* (1950) 99 CA2d 254, 221 P2d 737. For further discussion, see 3 Witkin, California Procedure, *Actions* §909 (5th ed 2008).

A defendant may obtain a change of venue on grounds of nonresidence without joining the other defendants in the motion when none of the defendants reside in the county where the action has been filed and venue is not proper on some other basis (*Brown v Happy Valley Fruit Growers, Inc.* (1929) 206 C 515, 274 P 977), even if the other defendants oppose the motion (*Wood, Curtis & Co. v Herman Mining Co.* (1903) 139 C 713, 73 P 588). See chap 8. The same rule applies to a motion made on the ground of local prejudice. *People v Ocean Shore R.R.* (1938) 24 CA2d 420, 75 P2d 560. See §20.5.

The plaintiff may not move to change venue on "wrong court" grounds, even if he or she could have properly designated a county other than the county where the defendant resides at the outset. See *Cook v Pendergast* (1882) 61 C 72. However, the plaintiff can achieve the same result by dismissing the complaint and filing a new complaint in a proper county if the defendant has not yet filed a motion to change venue under CCP §396b. CCP §581(h); *Mansfield v Pickwick Stages, Inc.* (1923) 191 C 129, 215 P 389.

Either the plaintiff or the defendant may obtain a change of venue on grounds of convenience of witnesses (*Grewell v Walden* (1863) 23 C 165; *Carruthers v Crown Prods. Co.* (1948) 89 CA2d 326, 200 P2d 819), as well as to secure an impartial trial (*San Joaquin & Kings River Canal & Irrig. Co. v Stevinson* (1919) 179 C 533, 178 P 292).

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III. PROCEDURES FOR MOVING PARTY

A. Time to File Motion

§20.8 1. Wrong Court

A motion for change of venue on the ground that the case has been brought in the wrong court must be made at the time the defendant answers, demurs, or moves to strike "or, at his or her option, without answering, demurring, or moving to strike and within the time otherwise allowed to respond." CCP §396b. If the defendant does not file a timely motion in proper form, the right to change venue may be waived. The action will be tried where it was commenced (CCP §396b(a)), unless the defendant can show that he or she acted in good faith without any intent to waive the right to have the action tried in a proper court (*Lyons v Brunswick-Balke Collender Co.* (1942) 20 C2d 579, 127 P2d 924 (defendant filed motion to change venue along with an amended demurrer promptly after discovering that plaintiff had dismissed codefendant who had filed pending motion); see *Van Gaalen v Superior Court* (1978) 80 CA3d 371, 145 CR 509). The defendant must also exercise diligence in bringing the matter to hearing. *Davison v Gentry* (1934) 136 CA 423, 29 P2d 266. See §8.8 for a discussion of unenforceability of contractual agreements concerning venue.

PRACTICE TIP: Counsel should not answer or set a hearing on a demurrer before obtaining a ruling on the motion to change venue. If an answer is filed, the plaintiff may oppose the motion to transfer on grounds of convenience of the witnesses *or* "the ends of justice." CCP §396b(d). It is unsettled whether, in order to retain the action the plaintiff must prove that both the convenience of witnesses and the ends of justice will be promoted or whether only one or the other suffices. Compare *Braunstein v Superior Court* (1964) 225 CA2d 691, 37 CR 666 (showing either is sufficient under CCP §396b(d) unlike CCP §397(c)) with *Maxwell v Murray* (1961) 190 CA2d 440, 11 CR 916 (both must be shown under CCP §396b). Thus, it is possible that the plaintiff might be able to defeat the defendant's right to transfer on wrong court grounds under CCP §396b(d) when a motion to retransfer under CCP §397(c) might not be successful. Setting the demurrer for hearing at the same time as the venue motion may result in waste of the court's time, particularly if that court requires the motions to be set in different departments.

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§20.9 2. Convenience of Witnesses

A motion for change of venue on convenience of witness grounds must be made within a reasonable time after the defendant has filed an answer. *DeLong v DeLong* (1954) 127 CA2d 373, 273 P2d 921; *Cook v Pendergast* (1882) 61 C 72; *Pascoe v Baker* (1910) 158 C 232, 110 P 815. Until an answer has been filed, the court cannot determine what matters are at issue and whether evidence offered by the proposed witnesses will be material. *Buran Equip. Co. v Superior Court* (1987) 190 CA3d 1662, 236 CR 171; *Johnson v Superior Court* (1965) 232 CA2d 212, 42 CR 645.

Whether the time is reasonable depends on the length of the delay and the prejudice caused by the delay. The trial court's exercise of discretion in determining the issue rarely will be disturbed. Compare, *e.g., Barclay v Supreme Lodge* (1917) 34 CA 426, 167 P 701 (motion granted although made over one year after demurrer overruled), with *Willingham v Pecora* (1941) 44 CA2d 289, 112 P2d 328 (denial of motion held proper when made four months after case set for trial and granting of motion would have resulted in five months' delay).

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§20.10 3. Impartial Trial

The court may not entertain a motion for change of venue under CCP §397(b) (impartial trial cannot be had) before the issues are defined by the filing of an answer. *Cook v Pendergast* (1882) 61 C 72. When appropriate, the court may delay ruling on the motion until the trial date (*People v Spring Valley Co.* (1952) 109 CA2d 656, 241 P2d 1069) or until an effort has been made to select an impartial jury (*J.I. Case Threshing Co. v Copren Bros.* (1917) 35 CA 70, 169 P 443). Although it is not necessary that efforts to impanel a jury first be exhausted if other bases for determination exist, it is frequently impossible to make an adequate showing until an unsuccessful attempt to select a jury has been made. *People v Ocean Shore R.R.* (1938) 24 CA2d 420, 75 P2d 560.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.11 B. Required Moving Papers

§20.11 B. Required Moving Papers

In general, unless the parties stipulate to a transfer, venue may be changed only on the filing of a motion. CCP §397; *General Motors Acceptance Corp. v Codiga* (1923) 62 CA 117, 216 P 383. The motion must be made by filing a notice of motion, supporting memorandum, declarations containing the appropriate factual showing, and proof of service of a copy of the papers on the adverse party. CCP §§396b(a), 1010-1020; Cal Rules of Ct 3.1112-3.1113; *Thompson v Superior Court* (1972) 26 CA3d 300, 103 CR 94. For a discussion of general motion procedure, see chap 12.

NOTE: When change of venue is sought for any reason other than that the court in which the action was filed lacks venue (see CCP §397(b)-(e)), the moving party is required to pay the costs and fees of transferring the case (including fees for filing papers in the transferee court) at the time the notice of motion is filed. CCP §399(a).

In an unlawful detainer action or an action involving an installment or automotive sales contract or a consumer obligation, the defendant does not need to file a noticed motion for change of venue if the case has been brought in the wrong court. See CCP §396a(b). In these actions, the plaintiff must show in a verified complaint, or an affidavit filed with the complaint, that the action is filed in the proper court. If it appears that the action was filed in the wrong court, transfer is mandatory unless the defendant in writing or in open court consents to retention of the case in the court in which it was filed. CCP §396a(b).

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§20.12 1. Notice of Motion

The notice of motion for change of venue must follow the format prescribed for notices of motion generally. CCP §1010. See chap 12. It should contain a statement of when the motion will be made, the statutory grounds on which it will be made, the court to which transfer is sought, and the papers on which it is based. The statement of the grounds should follow the language of the statute. See, *e.g., Willingham v Pecora* (1941) 44 CA2d 289, 112 P2d 328 (notice that omitted "and the ends of justice" defective). Although the court may refuse to consider grounds not specified in the notice (*McDonald v California Timber Co.* (1907) 151 C 159, 90 P 548), the defect may be cured if the notice incorporates supporting declarations that indicate sufficiently the ground relied on (*Tarman v Sherwin* (1961) 189 CA2d 49, 10 CR 787; *Modlin v Walter's Fur Shop* (1948) 83 CA2d 384, 188 P2d 805). Therefore, the notice should always incorporate supporting papers by reference. The court also may permit the notice to be amended to cure any defects. *Joe Lowe Corp. v Rasmusson* (1942) 53 CA2d 490, 127 P2d 1002.

If the notice does not designate the court to which transfer is sought, or a stipulation of the parties, the court will designate the transferee court. CCP §398. Counsel should make sure that the court selected is a proper court for transfer under the grounds stated in the notice. *Sausen v Anderton* (1954) 129 CA2d 324, 276 P2d 814 (court denied motion in rescission action when defendants sought change to place of business instead of residence). For a form of notice, see §20.37.

PRACTICE TIP: If there are defects in the notice of motion or if no notice was given, the opposing party's appearance should be limited to objecting to the hearing on the motion. Lack of notice or defects in the notice of motion are waived if the opposing party appears and argues the merits of the motion. *Spangenberg v Spangenberg* (1932) 123 CA 387, 11 P2d 408.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.13 2. Supporting Declarations

§20.13 2. Supporting Declarations

Declarations in support of a motion for change of venue are not required by statute; however, the moving party has the burden of presenting evidence to establish grounds for the transfer and ordinarily does so by submitting supporting declarations and affidavits. See Cal Rules of Ct 3.1306(a). The moving party may also rely on a verified complaint uncontroverted by opposing declarations. *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 184 CR 296. Although the court has the discretion to permit oral testimony for good cause (Cal Rules of Ct 3.1306(a)), in practice many courts (including Los Angeles and Alameda County Superior Courts) usually do not permit oral testimony on law and motion matters. See, *e.g., People v Tucker* (1897) 117 C 229, 49 P 134; *Haldane v Haldane* (1962) 210 CA2d 587, 26 CR 670. For a discussion of the procedure to obtain permission to present oral testimony, see §12.103.

NOTE: If a party is seeking reasonable expenses and attorney fees because the motion or the selection of venue was not made in good faith, the attorney should prepare a declaration describing the efforts made to obtain a stipulation and a detailed description of the expenses and attorney fees sought. For a sample declaration, see §20.40.

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§20.14 a. Declaration of Residence

A motion for change of venue on wrong court grounds to the defendant's residence should be accompanied by a declaration showing that, at the time the action was commenced, the defendant was a resident of the county to which transfer is sought. It is not necessary to allege and prove the converse, *i.e.,* that the defendant was not a resident of the county where the action was filed. *Stone v Everts* (1928) 203 C 197, 263 P 236.

WARNING: Counsel should make sure that the declaration establishes the defendant's county of residence *at the time the action was commenced*. Failure to do so may result in denial of the motion. See, *e.g., Heidel v California Transit Co.* (1928) 204 C 21, 266 P 290 (motion denied because declaration failed to state that place was principal place of business at time of commencement of action).

If there is more than one defendant, the moving defendant must show that no defendant resided in the county where the action was commenced. *Sequoia Pine Mills, Inc. v Superior Court* (1968) 258 CA2d 65, 65 CR 353. Although the moving party may make the declaration on information and belief (*Brown v Happy Valley Fruit Growers, Inc.* (1929) 206 C 515, 274 P 977), the better practice is for each defendant to file a declaration of residence. At least one court has held that a declaration of the defendant's residence made on information and belief by a third person is a conclusion of law unless accompanied by specific facts that enable the court to make an independent determination. *O'Brien v O'Brien* (1911) 16 CA 103, 116 P 692. See also *Gutierrez v Superior Court* (1966) 243 CA2d 710, 52 CR 592 (declaration on information and belief as to facts is hearsay and should be disregarded). But see *Fielder v Superior Court* (1963) 213 CA2d 60, 28 CR 597.

A moving party seeking to change venue to his or her residence must also show that the county where the action is filed is not a proper place for trial under any applicable theory. *Carruth v Superior Court* (1978) 80 CA3d 215, 145 CR 344; *Karson Indus., Inc. v Superior Court* (1969) 273 CA2d 7, 77 CR 714. In a transitory action, for example, the defendant must also show that the county designated by the plaintiff was not the place where the injury occurred. For declaration of residence, see form in §20.39.

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§20.15 b. Declaration Relating to Type of Action

A motion for change of venue on wrong court grounds (see §20.3) may also be brought when the court designated is not the proper place for trial for the type of action filed. For example, venue is improper under CCP §397(a) when an action affecting title to real property is not brought in the county where the property is located. See discussion of CCP §392 in §§8.32-8.40. If the court is "not the proper court" due to the type of action brought, the defendant's moving papers should include a brief declaration to that effect. For example, when the action is based on breach of contract and venue is proper in the county where the contract was made, the declaration should include evidentiary facts establishing where the contract was entered into.

Although a declaration that states only ultimate facts, *e.g.,* that a contract was entered into in a particular county, is sufficient absent a contrary showing (*Erwin v Cee-Tee Constr. Co.* (1952) 114 CA2d 364, 250 P2d 287), it may be insufficient if challenged (see *Hagan v Gilbert* (1948) 83 CA2d 570, 189 P2d 548, disapproved on other grounds in *Monogram Co. v Kingsley* (1951) 38 C2d 28, 237 P2d 265). See §20.39 for a form declaration based on type of action.

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§20.16 c. Declaration Based on Convenience of Witnesses

When a motion for change of venue is made under CCP §397(c) on the grounds that the convenience of witnesses and the ends of justice would be promoted by the change, the supporting declarations must show (*Peiser v Mettler* (1958) 50 C2d 594, 328 P2d 953):

- Each witness's name;
- The substance of the expected testimony each will give; and
- Facts showing why their attendance at trial will be inconvenient and why the ends of justice would be served by a transfer.

The declaration is insufficient if any of these facts is omitted. See, *e.g., Corfee v Southern Cal. Edison Co.* (1962) 202 CA2d 473, 20 CR 870 (failure to show convenience of witnesses would be promoted by change); *Juneau v Juneau* (1941) 45 CA2d 14, 113 P2d 463 (failure to state names and nature of testimony).

It is not necessary for the declaration to state that a particular person actually will be a witness, as long as the proposed witnesses are identified by name. *J.C. Millett Co. v Latchford-Marble Glass Co.* (1959) 167 CA2d 218, 334 P2d 72; *Wood v Silvers* (1939) 35 CA2d 604, 96 P2d 366. Similarly, it is not necessary that the declaration show that the witnesses' testimony will be favorable to the moving party's case if the materiality of the evidence and the need for the testimony is shown. *J.C. Millett Co. v Latchford-Marble Glass Co., supra*; *Edwards v Pierson* (1957) 156 CA2d 72, 318 P2d 789. The evidence also must be admissible. *Harden v Skinner & Hammond* (1955) 130 CA2d 750, 279 P2d 978.

It is not necessarily the residence of a witness that determines convenience of travel to the place of trial; the place of occupation also is relevant. *Willingham v Pecora* (1941) 44 CA2d 289, 112 P2d 328. Therefore, if the place of occupation differs from the place of residence, the declaration should include the place and nature of the witnesses' occupations, the means of transportation available, accessibility of the place of trial, and the consequences to witnesses of time-consuming travel to trial. See *Wood v Silvers, supra.*

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§20.17 3. Memorandum in Support of Motion

The notice of motion and motion for change of venue must be accompanied by a memorandum in support of the motion. Cal Rules of Ct 3.1112(a). The court may construe the failure to file a memorandum as an admission that the motion lacks merit and may deny the motion. Cal Rules of Ct 3.1113. See also *Weber v Purdy* (1948) 84 CA2d 482, 191 P2d 66 (right to change of venue waived by failure to file memorandum with motion). For sample memorandum in support of motion, see §12.141.

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§20.18 C. Effect of Motion

The power of the trial court to act on most other motions or proceedings is suspended by the filing of a motion for change of venue. *Brady v Times-Mirror Co.* (1895) 106 C 56, 39 P 209; *Moore v Powell* (1977) 70 CA3d 583, 138 CR 914. The court may not consider, for example, a demurrer to the complaint (*Pickwick Stages Sys. v Superior Court* (1934) 138 CA 448, 32 P2d 433) nor issue a temporary restraining order (*County of Riverside v Superior Court* (1968) 69 C2d 828, 73 CR 386; but see below) before the venue motion is decided. However, the following ancillary steps may be taken while the motion is pending:

- The court may sustain a special demurrer to permit the plaintiff to cure defective venue allegations and concurrently may deny a motion to change venue without prejudice to its renewal after the amended complaint is filed. See, *e.g., Kostal v Pullen* (1950) 36 C2d 528, 225 P2d 217.
- The plaintiff may voluntarily dismiss the action against some or all of the defendants after the motion has been made (*Rogers v Transamerica Corp.* (1935) 6 CA2d 340, 44 P2d 635), unless the motion is made under CCP §396b (CCP §581).
- The court may issue an order permitting the plaintiff to amend the complaint to allege the true name of a fictitiously named defendant. *Gutierrez v Superior Court* (1966) 243 CA2d 710, 52 CR 592.
- The court may, on a motion to change venue to a neutral county under CCP §394, concurrently order transfer and severance of the action under CCP §1048. *City of Oakland v Darbee* (1951) 102 CA2d 493, 227 P2d 909.
- In a marital dissolution proceeding, the court may rule on "motions for allowance of temporary support of the other party and of any children of the marriage, temporary restraining orders, attorneys' fees and costs, and make all necessary and proper orders in connection therewith." CCP §397(e). Under CCP §396b, which covers proceedings for legal separation as well as dissolution proceedings, the court has similar authority when the motion is made on grounds of improper court, except that it may not issue temporary restraining orders.
- In a suit to enforce the duty of support under Fam C §4000, the court may consider child support matters while a change of venue motion is pending. *Thompson v Thames* (1997) 57 CA4th 1296, 67 CR2d 695.

NOTE: Suspension of the court's power does not affect the parties' ability to conduct self-executing discovery unless it is necessary to seek the court's assistance, *e.g.,* to obtain a medical exam or to compel discovery.

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IV. PROCEDURES FOR RESPONDING PARTY

§20.19 A. Counterdeclarations, Countermotions, and Motions to Retransfer

The plaintiff may oppose a motion by filing:

- Counterdeclarations or affidavits that disprove the defendant's showing or, if an answer has been filed, that show that the action should be retained in the court designated in the complaint;
- A countermotion to retain the action in the original court; or
- A motion to retransfer the action to the original court on the grounds of convenience to witnesses and to promote the ends of justice following a change of venue on wrong court grounds before an answer was filed (see §§20.9, 20.16 for discussion of procedures for moving party on convenience of witness grounds).

A motion for change of venue on grounds of (a) convenience of witnesses and the ends of justice, (b) impartial trial, or (c) no judge qualified may be opposed only by filing counterdeclarations or affidavits. The opposing party may not file a countermotion. *Cook v Pendergast* (1882) 61 C 72. However, when an answering defendant moves for change of venue on the ground that the court in which the action is pending is not the proper court for trial, the plaintiff may respond by filing counterdeclarations or affidavits in opposition or a countermotion to retain the action in the county of filing on grounds of convenience of witnesses and promotion of the ends of justice. *Gilman v Nordin* (1952) 112 CA2d 788, 247 P2d 394. If no answer has been filed, the plaintiff must wait to make a motion in the transferee court to retransfer, on grounds of convenience of witnesses. *Gordon v Perkins* (1928) 203 C 183, 263 P 231; *Kroesen v Gordon* (1943) 61 CA2d 385, 142 P2d 935.

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§20.20 B. Evidentiary Showing

A party who opposes a motion for change of venue usually makes an evidentiary showing by filing counterdeclarations or affidavits in response to the motion. *Cook v Pendergast* (1882) 61 C 72. Although a verified complaint (*Carnation Co. v El Rey Cheese Co.* (1948) 88 CA2d 857, 200 P2d 19) and possibly even an unverified complaint (see, *e.g., Quick v Corsaro* (1960) 180 CA2d 831, 4 CR 674) may be treated as a counterdeclaration to the extent it contradicts the declarations of the moving party, the better practice is to prepare declarations framed in evidentiary facts rather than to rely on a complaint that, if properly drawn, is pleaded in ultimate facts (*Mills v Dickson* (1933) 129 CA 728, 19 P2d 278).

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§20.21 C. Consistency With Theory of Complaint

The declarations in opposition must be consistent with the theory of the complaint. Because venue is determined by the complaint as originally filed, the plaintiff may not affect venue by changing the theory of the action by declaration or affidavit submitted in opposition to a motion to change (*Sloan v Court Hotel* (1945) 72 CA2d 308, 164 P2d 516) nor by amending the complaint (*Kallen v Serretto* (1932) 126 CA 548, 14 P2d 917). See §8.6. But see §16.14 on amending complaint to state true name of fictitiously named defendant. For example, declarations filed in opposition to a motion for change of venue on grounds of wrong court may not be used to change the action's theory from a transitory action to a local action. *Sloan v Court Hotel* (1945) 72 CA2d 308, 164 P2d 516.

PRACTICE TIP: Countermotions are rarely filed. In most cases the party opposing the motion simply files counterdeclarations based on convenience of witnesses and promotion of the ends of justice. CCP §396b. There may even be an advantage to opposing the motion under §396b instead of filing a countermotion under CCP §397(c) because the language of §396b requires the plaintiff only to show that either the convenience of witnesses *or* the ends of justice be promoted. See §20.4.

A motion for change of venue based on convenience of witnesses may be successfully opposed by an offer to stipulate to the facts to which each witness designated in the motion would testify. *Blossom v Waller* (1916) 30 CA 439, 158 P 509.

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V. HEARING AND DETERMINATION

§20.22 A. Burden of Proof

The court designated in the original complaint is presumed to be a proper court for trial. *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 184 CR 296; *Black Diamond Asphalt, Inc. v Superior Court* (2003) 109 CA4th 166, 170, 134 CR2d 510. Therefore, the moving party has the burden of establishing the facts necessary to justify a change of venue. *Massae v Superior Court* (1981) 118 CA3d 527, 173 CR 527; *J.C. Millett Co. v Latchford-Marble Glass Co.* (1956) 144 CA2d 838, 301 P2d 914. The moving party must show that (1) venue as laid is improper on any applicable theory (*Black Diamond Asphalt, Inc. v Superior Court, supra*) and (2) the transferee county designated in the motion is a proper county for trial. *Hearne v DeYoung* (1896) 111 C 373, 43 P 1108; *Sequoia Pine Mills, Inc. v Superior Court* (1968) 258 CA2d 65, 65 CR 353 (moving party must show that no defendant is a county resident); *Beutke v American Sec. Co.* (1955) 132 CA2d 354, 282 P2d 201.

When the complaint does not allege facts justifying nonresidence venue, the defendant can establish a prima facie case of improper venue simply by showing that at the time the complaint was filed, no named defendant was a resident of the county in which the action was pending. *Sequoia Pine Mills, Inc. v Superior Court, supra*. The burden of showing that the action falls under one of the statutory exceptions to the general rule that actions are triable at the defendant's residence then shifts to the plaintiff. *Goosse v Clifton* (1946) 75 CA2d 44, 170 P2d 104. In other words, when the complaint is silent, the individual defendant need not assume the burden initially of negating all possible bases for venue. See *Hammond v Ocean Shore Dev. Co.* (1913) 22 CA 167, 133 P 978.

When the motion to change venue is based on grounds other than "wrong court," the burden of proof is on the moving party, whether the plaintiff or the defendant. *City of Stockton v Ellingwood* (1926) 78 CA 117, 248 P 272 (convenience of witnesses); *J.I. Case Threshing Co. v Copren Bros.* (1917) 35 CA 70, 169 P 443 (impartial trial).

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§20.23 B. Effect of Order Granting Motion

When an order changing venue is granted, the court loses further jurisdiction to act in the matter (*Marshall v Dunlap* (1955) 138 CA2d 59, 291 P2d 538), except to consider and decide a motion to vacate the order of transfer under CCP §473 (*Badella v Miller* (1955) 44 C2d 81, 279 P2d 729). Prohibition is available to prevent trial in the transferor court. *Chase v Superior Court* (1908) 154 C 789, 99 P 355. The transferee court acquires jurisdiction of the action and all matters pertaining to it. *Retailers' Credit Ass'n v Superior Court* (1937) 19 CA2d 457, 65 P2d 937. The transfer order does not immediately vest the transferee court with jurisdiction; the transferee court does not acquire jurisdiction until the transfer fee is paid and the papers are filed in the transferee court. *London v Morrison* (1950) 99 CA2d 876, 222 P2d 941; *Tanzman v Midwest Express Airlines, Inc.* (SD Cal 1996) 916 F Supp 1013 (papers may not be transmitted until after time for filing petition for writ of mandate under CCP §399 has passed).

The plaintiff cannot evade the effect of an order obtained by the defendant by voluntarily dismissing the action and then refiling it. Unless there has been a change of circumstances, the prior order is binding on the court in a second action on the same facts. *Tarman v Sherwin* (1961) 189 CA2d 49, 10 CR 787.

In a marital dissolution proceeding, diligence and proper timing of requests for attorney fees, costs, and spousal and child support become especially crucial. Although the transferor court has the power to consider such applications before an order changing venue is made (CCP §§396b, 397(e); see *Stutsman v Stutsman* (1947) 79 CA2d 81, 178 P2d 769), only the transferee court can do so after a change of venue has been ordered (*Searcy v Superior Court* (1920) 47 CA 124, 190 P 202).

For discussion of the award of attorney fees and costs to the prevailing party, see §§20.28-20.31.

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§20.24 C. Renewal of Motion

The denial of a motion for change of venue on one ground does not preclude a new motion on a different ground, whether made by the same defendant (*Seybert v County of Imperial* (1956) 139 CA2d 221, 293 P2d 135) or by another defendant (*Marshall v Dunlap* (1955) 138 CA2d 59, 291 P2d 538). For example, the defendant may file a motion based on convenience of witnesses once an answer has been filed, even if an earlier motion based on wrong court grounds was denied.

Although nothing in the Code of Civil Procedure precludes renewal of a motion for change of venue, the courts discourage renewal of the motion on the same grounds unless there has been a material change in circumstances. *Connell v Bowes* (1942) 49 CA2d 542, 122 P2d 71. A renewed motion usually will be denied (*Smith v Pelton Water Wheel Co.* (1907) 151 C 399, 90 P 932), unless the original denial (1) was expressly "without prejudice" (*Lundy v Lettunich* (1920) 50 CA 451, 195 P 451; see also *Kostal v Pullen* (1950) 36 C2d 528, 225 P2d 217), or (2) is set aside under CCP §473 (*Yellow Mfg. Acceptance Corp. v Stoddard* (1949) 93 CA2d 301, 208 P2d 1040). An order granting a renewed motion for change of venue when there has not been a change of circumstances is an abuse of the court's discretion and may be set aside by writ of mandate. *Thompson v Superior Court* (1972) 26 CA3d 300, 103 CR 94.

If the plaintiff materially amends the complaint or if circumstances otherwise change after the original denial, a renewed motion will be considered on the merits. *South v Wishard* (1954) 123 CA2d 642, 267 P2d 827. However, the motion will be denied if it is not made within a reasonable time after the moving party knows or should know of the new circumstances. *Thompson v Superior Court, supra*.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.25 D. Time to Answer After Order

§20.25 D. Time to Answer After Order

- **Venue changed under CCP §396a.** Following an order changing venue under CCP §396a (Unruh Act, Automobile Sales Finance Act, or unlawful detainer), a defendant who has been served but who has not appeared has 30 days to plead, beginning with service of written notice of the filing of the action in the new court.
- **Venue changed under CCP §396b.** When a change of venue motion under CCP §396b is granted, the defendant has 30 days to plead, beginning when the defendant is served with written notice of the filing of the action in the new court. CCP §586(a)(6)(B). When a motion for change of venue under CCP §396b is denied, the defendant has 30 days in which to respond unless the court orders otherwise. Cal Rules of Ct 3.1326.

PRACTICE TIP: Counsel should check to see if local rules developed in response to the Trial Court Delay Reduction Act (Govt C §§68600-68620) provide less time to answer. For the time to answer after review of the order, see §20.35. On delay reduction, see chap 40.

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VI. TRANSFER OF ACTION

§20.26 A. Selection of Court

- **When motion granted on wrong court grounds**. The court must transfer the action to any proper court agreed to by stipulation of the parties, in writing or orally in open court, and entered in the minutes or docket. If the parties do not stipulate, the action must be transferred to any proper court designated by the defendant in the notice of motion or in open court, and entered in the minutes or docket at the time when the order for transfer is made. When no stipulation or designation is made, or when transfer is ordered on the court's own motion, the action will be transferred to any proper court selected by the court in which the action is pending. CCP §398.
- **When motion granted on any ground specified in CCP §397(b)-(d).** The action must be transferred to any court stipulated to by the parties in writing or orally in open court, which has jurisdiction of the subject matter. If the parties fail to agree, the court must transfer the action to the nearest or most accessible court where the objection giving rise to the transfer does not exist. CCP §398.

NOTE: Local rules developed under the Trial Court Delay Reduction Act (Govt C §§68600-68620) dramatically alter the pace of litigation. Counsel should consider the effects of these programs in stipulating to a new venue. On delay reduction, see chap 40.

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§20.27 B. Transmission of Papers

When an order for transfer is made, the clerk must transmit the pleadings and papers (or a transcript of the pleadings if they are oral) to the clerk of the transferee court after final denial of a petition for a writ of mandate or expiration of time to file the petition. CCP §399(a). On payment of costs and fees as a prerequisite for transfer and on penalties for failure to pay, see §§20.28-20.29.

At the time of transmittal, the clerk of the transferor court must mail notice to all parties who have appeared, stating the date on which transmittal occurred. On receipt of the papers and pleadings, the clerk of the transferee court must give prompt notice by mail to all such parties, stating the date of filing and the number assigned to the case. CCP §399(b).

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C. Payment of Costs and Fees

§20.28 1. Wrong Court Motion

When the court has granted a defendant's motion for change of venue made on wrong court grounds, the costs and fees of transfer, including any expenses and attorney fees awarded to the defendant under CCP §396b (see §20.30), must be paid by the plaintiff before the action will be transferred. A defendant who has paid the costs and fees at the time of making the motion is entitled to reimbursement when the order is made. CCP §399(a).

If the plaintiff has not paid the costs and fees within five days after service of notice of the order, any other interested party, whether or not named in the complaint, may pay the costs and fees and recover them as costs if the party prevails at trial or as an offset if the plaintiff prevails. CCP §399(a). If payment is not made within 30 days after service of notice of the order, the transferor court may on motion dismiss the action without prejudice on condition that the same action may not be brought in another court before payment is made. If review of the order changing venue has been sought, the time for payment is extended to within 30 days after final notice of the order of transfer. If proceedings are not stayed pending review, the time for payment is 60 days after service of notice of the order. In any case, the action may not be presented until the costs and fees are paid. CCP §399(a).

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.29 2. Motion on Other Grounds

§20.29 2. Motion on Other Grounds

When an order changing venue has been sought on any ground specified in CCP §397(b)-(e), the costs and fees of transfer and of filing the papers in the transferee court must be paid by the moving party when the notice of motion is filed. CCP §399(a). Despite the mandatory language of CCP §399, and although no local rules so authorize, courts in some counties (*e.g.,* Alameda, San Francisco) follow the practice of neither requiring nor accepting transfer fees and costs until after the motion has been granted or a stipulation for change of venue under CCP §398 has been filed. In Los Angeles County Superior Court, the clerk's office requires prior payment of fees and costs on a motion based on convenience of witnesses and promotion of the ends of justice under CCP §397(c), but not on a motion based on other grounds. To complicate the matter further, some judges will not grant a motion for change of venue made under CCP §397(b)-(e) unless fees and costs have been paid, as required by CCP §399(a).

Given this situation, the attorney for the moving party should tender the costs and fees to the clerk of the county in which the motion is filed. If the tender is rejected by the clerk, the attorney should be prepared to tender the costs and fees in court on the day the motion is heard, with a declaration stating:

- How they were computed; and
- That they were tendered to the clerk's office and refused at the time the motion was filed.

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D. Attorney Fees and Expenses

§20.30 1. Wrong Court Motion

When the court has ruled on a motion to change venue on the ground that the court in which the action was filed is not the proper court, it may award to the prevailing party reasonable expenses and attorney fees incurred in making or resisting the motion. CCP §396b. These fees and costs are recoverable whether or not the prevailing party is entitled to recover other litigation costs. In determining whether to make such an order, the court must consider whether:

- An offer to stipulate to change venue was reasonably made and rejected; and
- The motion or selection of venue was made in good faith, given the facts and law that the party making the motion or selecting venue knew or should have known.

CCP §396b; *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 184 CR 296.

Because the attorney is responsible for knowing the venue rules, any award of attorney fees and expenses is the personal liability of the attorney and is not chargeable to the party. CCP §396b. Sanctions may not be imposed unless notice is "contained in a party's papers, or on the court's own noticed motion, and after opportunity to be heard." CCP §396b. Counsel for the party seeking an award of attorney fees and expenses should file a declaration describing the efforts made to obtain a stipulation to change venue or to have the motion withdrawn. See §20.13 and form in §20.40.

When the defendant has been awarded attorney fees and expenses under CCP §396b, the fees and expenses are included in the costs that the plaintiff must pay before the action may continue. CCP §399(a). For discussion, see §20.28.

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§20.31 2. Motion on Other Grounds

Although CCP §396b appears to apply only to motions filed on wrong court grounds, the point is unresolved. A party can still seek an award of sanctions for actions undertaken primarily for improper purposes such as harassment, to cause unnecessary delay, or to increase litigation costs. CCP §128.7; *Lieppman v Lieber* (1986) 180 CA3d 914, 225 CR 845 (sanctions awarded under CCP §128.5 (applies only to cases filed on or before December 31, 1994) for frivolous motion for change of venue under CCP §397(c) (convenience of witnesses)). See also *Fegles v Kraft* (1985) 168 CA3d 812, 214 CR 380 (award of sanction under CCP §128.5 must be supported by specific findings, stated in the order, justifying the award). See §1.6 for effective dates of sanctions statutes (CCP §§128.5-128.7).

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VII. REVIEW OF ORDERS

A. Method of Review

§20.32 1. Superior Court in Other Than Limited Civil Case

A superior court order, in other than a limited civil case, granting or denying a motion for change of venue is reviewable by petition for writ of mandate. CCP §400. See also *Hennigan v Boren* (1966) 243 CA2d 810, 52 CR 748 (propriety of order may not be raised on appeal because mandamus is available). The party seeking review may petition the court of appeal for a writ of mandate within 20 days after service of a written notice of order. The superior court may extend the time, for good cause, for an additional period not to exceed 10 days if the extension is sought before expiration of the initial 20-day period. CCP §400. A copy of the petition must be filed in the trial court immediately after it is filed in the court of appeal.

The court of appeal in its discretion may stay all proceedings pending final judgment on the petition. The clerk of the court of appeal must file a copy of any order or judgment immediately after it becomes final with the trial court clerk. CCP §400.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.33 2. Limited Civil Cases

§20.33 2. Limited Civil Cases

Venue orders issued in limited civil cases (see chap 6) are reviewable by appeal from the order. CCP §904.2(c). The reviewing court may stay all proceedings pending determination of the appeal. CCP §916.

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§20.34 B. Standard of Review

In reviewing a venue order, the reviewing court applies the same standard in determining if the order was proper whether the order is reviewed by writ (see §20.32) or by appeal (see §20.33). When change of venue is a matter of right (*e.g.,* a motion under CCP §397(a) on grounds of wrong court), the lower court's resolution of conflicting testimony in favor of the prevailing party will be upheld unless it is clear that the court acted arbitrarily. *Swartz v California Olive Growers' Packing Corp.* (1942) 56 CA2d 168, 133 P2d 20. When change of venue is a matter of judicial discretion (*e.g.,* a motion under CCP §397(c) on grounds of convenience of witnesses and promotion of ends of justice), a reviewing court will not disturb the trial court's order unless the court has abused its discretion. *Union Trust Life Ins. Co. v Superior Court* (1968) 259 CA2d 23, 66 CR 270. However, when the moving party has made a showing that is sufficient to justify a change of venue and there is no showing whatever in opposition, it is an abuse of discretion to deny the change. *First-Trust Joint Stock Land Bank v Meredith* (1936) 16 CA2d 504, 60 P2d 1023. For further discussion concerning discretionary change of venue on convenience grounds, see 3 Witkin, California Procedure, *Actions* §§948-954 (5th ed 2008).

NOTE: Granting a motion to change venue for the convenience of witnesses under CCP §397(c) may be an abuse of discretion if the plaintiff is severely injured. *Lieberman v Superior Court* (1987) 194 CA3d 396, 239 CR 450. In *Lieberman*, the plaintiff was so seriously injured that changing venue of a personal injury action to the county where the accident occurred and the nonparty witnesses resided would have prevented the plaintiff from testifying and would have deprived the jury of the opportunity to observe the plaintiff's physical condition first-hand.

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§20.35 C. Time to Answer After Review

When the reviewing court's decision on a venue order under CCP §396b on wrong court grounds has become final or the stay of the order has been terminated, the court having jurisdiction over the trial must thereafter, on application or on its own motion, allow the defendant a reasonable time to answer the complaint. CCP §586(a)(6)(C). Notice of the order must be served promptly by the party who obtained it, or by the clerk if made on the court's own motion. CCP §586(a)(6)(C).

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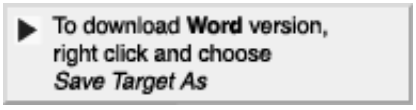
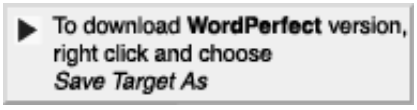
Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.36 VIII. CHECKLIST: PROCEDURE FOR MOTION FOR CHANGE OF VENUE

§20.36 VIII. CHECKLIST: PROCEDURE FOR MOTION FOR CHANGE OF VENUE





Prehearing Procedures

Moving Party

- Attempt to obtain a stipulation to the change of venue
- Decide which defendant should file motion, if there are multiple defendants who reside in different counties
- Prepare moving papers:
- Notice of motion and motion to change venue (see §20.12)
- Memorandum in support of motion (see §20.17)
- Supporting declarations relating to residence, type of action, convenience of witnesses or offer to stipulate to change if attorney fees are sought (see §§20.13-20.16)
- File and serve moving papers on other parties:
- Within the time to plead for wrong court motion (CCP §396b)
- Within a reasonable time after filing of the answer for motions on other grounds (see §§20.8-20.10)
- Pay costs and fees of transfer when notice of motion is filed under CCP §397(b)-(e)
- Call court to obtain tentative ruling
- Notify court and opposing counsel if appearance at hearing is desired

Opposing Party

- Prepare opposing papers:
- Counterdeclarations or affidavits disputing moving party's showing or seeking retention based on convenience of witnesses or ends of justice when answer has been filed (see §20.19)
- Countermotion if wrong court motion is opposed on grounds of convenience of witnesses and ends of justice when answer has been filed (see §§20.19-20.20)
- Memorandum in opposition to motion
- Amend complaint to state true name of fictitious defendant whose residence would make venue proper

Posthearing Procedures

Prevailing Party

- When sanctions are awarded, prepare order containing specific findings justifying the award

If motion is granted

- Make sure the clerk of the court transmits the entire file of the action to the transferee court
- Apply to dismiss action if costs and fees not paid within 30 days of service of notice of the order (CCP §399(a))

Nonprevailing Party

- Seek review and stay of the order:
- In other than limited civil case (see chap 6), by writ of mandate to the court of appeal within 20 days (plus 10 days' extension for good cause from superior court) of service of written notice of order (CCP §400)

- In limited civil case, by appeal to the appellate department of the superior court (CCP §904.2(c))
- File motion to retransfer on grounds of convenience of witnesses and ends of justice
- Renew motion on different grounds or changed circumstances

Defendant

- File answer

If motion granted

- Within 30 days of service of written notice of the filing of the action in the new court for change of venue under CCP §396a (Unruh Act, Automobile Sales Finance Act, or unlawful detainer) (CCP §396a(c))
- Within 30 days of service of written notice of the filing of the action in the new court for change of venue under CCP §396b (wrong court) (CCP §586(a)(6)(B); Cal Rules of Ct 3.1326)

If motion denied

- Within 30 days unless the court orders otherwise (CCP §586(a)(6)(A); Cal Rules of Ct 3.1326)

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/ IX. FORMS/§20.37 A. Form: Notice of Motion for Change of Venue

IX. FORMS

§20.37 A. Form: Notice of Motion for Change of Venue

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR CHANGE OF VENUE;** _ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court for an order** _ _[*specify nature of order sought*]_ _ **under Code of Civil Procedure § (§)** _ _[*396b and*]_ _ **397 on the following grounds:**

[*Option 1*]

the action was not filed in the proper court and the _ _[*name of court*]_ _ **in** _ _ _ _ _ _ _ _ **County is the proper court for trial.**

[*Option 2*]

(1) this is an action for _ _[*e.g., the recovery of real property, recovery of an estate or interest in real property, injuries to real property*]_ _ **that is** _ _[*wholly/partially*]_ _ **located in** _ _ _ _ _ _ _ _ **County, California, and (2) no part of this property is located in the county where the action was commenced.**

[*Option 3*]

there is reason to believe that _ _[*e.g., defendant*]_ _ **cannot receive an impartial trial in** _ _ _ _ _ _ _ _ **County.**

[*Option 4*]

the convenience of witnesses and the ends of justice would be promoted by changing the place of trial from _ _ _ _ _ _ _ _ **County to** _ _ _ _ _ _ _ _ **County.**

[*Continue*]

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §20.12 (notice of motion for change of venue), chap 12 (formal requirements for notices of motion). The notice of motion must specify each ground on which the motion is made (CCP §1010); the court may consider only grounds that are specified. *McDonald v California Timber Co.* (1907) 151 C 159, 90 P 548. See §§20.3-20.6 on grounds for motion.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, "pleading paper" (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.38 B. Form: Notice of Motion to Retain Venue

§20.38 B. Form: Notice of Motion to Retain Venue

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO RETAIN VENUE;**
	)	_ _[*SUPPORTING*
_ _[*Name(s)*]_ _,	)	*MEMORANDUM;*]_ _
Defendant(s)	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court for an order** _ _[*specify nature of order sought*]_ _ **under CCP §397(c) on the grounds that the convenience of witnesses and the ends of justice will be promoted.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §20.12 (notice of motion for change of venue), chap 12 (formal requirements for notices of motion).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, "pleading paper" (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.39 C. Form: Declaration Supporting Motion for Change of Venue on Wrong Court Grounds

§20.39 C. Form: Declaration Supporting Motion for Change of Venue on Wrong Court Grounds

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**CHANGE OF VENUE**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am a _ _[*e.g., defendant*]_ _ **in this action.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could testify competently to them.

[*Option 1: If motion is based on defendant's residence*]

3. None of the defendants named in this action resided in the county where this Court is located when this action was commenced. Defendant, _ _[*name*]_ _**, resided then and resides now at** _ _[*address*]_ _ **in** _ _ _ _ _ _ **County.**

[*Choose appropriate alternative*]

[*Either*]

4. The alleged injury that is the subject of this action did not occur in the county where this Court is located. The injury occurred, if at all, in _ _ _ _ _ _ **County.** _ _[*State facts showing that injury occurred in another county*]_ _**.**

[*Or*]

4. The alleged contract that is the subject of this action was not entered into or to be performed in the county where this Court is located. The contract was entered into and was to be performed, if at all, in _ _ _ _ _ _ **County.** _ _[*State facts showing that contract was to be performed in another county*]_ _**.**

[*Option 2: If motion is based on location of property*]

3. The real property that is the subject of this action is located in _ _ _ _ _ _ County.

4. No part of the real property is located in _ _[*name of county where action was commenced*]_ _.

[*Continue*]

5. _ _[*Continue declarant's statements*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (attach to and file with original of notice of motion); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§20.13-20.15 (declaration on wrong court grounds) and §§12.43-12.53 (formal requirements for declarations). When the declaration of residence is made by a third person, the declarant should include specific facts on which the declaration is based.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.40 D. Form: Declaration by Defendant's Attorney When Motion Made on Wrong Court Grounds

§20.40 D. Form: Declaration by Defendant's Attorney When Motion Made on Wrong Court Grounds

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**CHANGE OF VENUE**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the attorney of record for defendant, _ _[*name*]_ _**, in this action.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could testify competently to them.

3. Before making this motion, I offered to stipulate to change venue to _ _ _ _ _ _ _ _ **County by** _ _[*specify action taken*]_ _**. Plaintiff** _ _[*name*]_ _**'s counsel,** _ _[*name of attorney*]_ _**,** _ _[*rejected my offer on* _ _[*date*]_ _*/failed to respond to my offer*]_ _**.**

4. Plaintiff's selection of venue in this action was not made in good faith. Under the facts and law plaintiff knew or should have known: _ _[*State facts establishing proper venue in another county*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (attach to and file with original of notice of motion); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§20.13, 28.30 (declaration regarding attorneys' fees), §§12.43-12.53 (formal requirements for declarations).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.41 E. Form: Declaration Supporting Motion for Change of Venue for Convenience of Witnesses and Ends of Justice

§20.41 E. Form: Declaration Supporting Motion for Change of Venue for Convenience of Witnesses and Ends of Justice

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**CHANGE OF VENUE**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*e.g., the attorney for defendant,* _ _[*name*]_ _*, in this action*]_ _**.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could testify competently to them.

3. _ _[*List names and addresses of witnesses (including opposing witnesses) who are expected to testify, and substance and importance of their expected testimony*]_ _**.**

4. _ _[*State facts showing why it would be inconvenient for witnesses to appear at present place of trial*]_ _**.**

5. _ _[*State facts showing that change of venue will promote ends of justice*]_ _**.**

6. When filing the notice of motion for change of venue, I paid the costs and fees required by the court clerk to transfer this action to, and file the papers in, the _ _[*name of court*]_ _ **of _ _ _ _ _ _ _ _ County.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (attach to and file with original of notice of motion); ___ copies for service (one for each other party); ___ office copies.

Comment: See §20.9 (motion for change of venue based on convenience of witnesses), §§12.43-12.53 (formal requirements for declarations).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/20 Motions to Change Venue/§20.42 F. Form: Stipulation and Order Changing Venue

§20.42 F. Form: Stipulation and Order Changing Venue

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**STIPULATION AND ORDER**
vs	)	**CHANGING VENUE**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The parties agree that (1) the place of trial of this action be changed to the _ _[*name of court*]_ _ **of** _ _ _ _ _ _ **County and (2) payment of costs and fees of the transfer be made by** _ _[*name of party*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Plaintiff

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Defendant

ORDER

The parties having agreed,

IT IS ORDERED that:

1. _ _[*Name and number of action*]_ _ **be transferred to the** _ _[*name of court*]_ _ **of** _ _ _ _ _ _ **County on payment by** _ _[*name of party*]_ _ **of all fees required by law.**

2. The court clerk transmit a certified copy of this order and all the pleadings and papers filed in this action to the clerk of the _ _[*name of court*]_ _ **of** _ _ _ _ _ _ **County.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___

office copies.

Comment: See §§20.13, 20.30 (declaration re attorney fees), §§12.104-12.119 (use of proposed orders; formal requirements).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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21

Motions to Stay or Dismiss for Inconvenient Forum

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- B. Governing Law §21.2

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I. INTRODUCTION

§21.1 A. Scope of Chapter

This chapter discusses the motion to dismiss or stay an action on the basis of inconvenient forum. It sets forth the characteristics of the doctrine of forum non conveniens (see §§21.3-21.6), when it is appropriate (see §§21.7-21.15), the procedure (see §§21.16-21.23), diagnostic questions (see §21.24), a procedure checklist (see §21.25), and forms (see §§21.26-21.29).

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§21.2 B. Governing Law

A motion to stay or dismiss on the basis of inconvenient forum is governed by CCP §§410.30 and 418.10.

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§21.3 II. CHARACTERISTICS OF DOCTRINE

A motion to dismiss or stay an action on the basis of inconvenient forum does not challenge jurisdiction but asks the court, in its discretion, to decline to exercise, or to stay its exercise of, jurisdiction. The motion may be made as a special appearance or after a general appearance has been made. The court considers a number of factors in deciding whether it is in the interest of substantial justice that the case be heard in a forum outside California and may include any just conditions in its order. If the action is based on certain kinds of contracts, an action to dismiss or stay for inconvenient forum may be barred. Additionally, if the action is based on a contract containing a forum selection clause, that provision is generally enforceable in California and may be controlling in the court's consideration of a motion to stay or dismiss based on inconvenient forum grounds.

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§21.4 A. Distinguished From Change of Venue and Jurisdiction

Unlike a motion for change of venue, which is based on an improper choice of forum in California, a motion under CCP §§410.30 or 418.10 is addressed to the court's discretionary power to refuse to exercise, or to stay its exercise of, jurisdiction. *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556 (granting or denial of motion is within trial court's discretion; substantial deference given to its determination); *Hansen v Owens-Corning Fiberglas Corp.* (1996) 51 CA4th 753, 59 CR2d 229. A motion to dismiss or stay seeks to have the case litigated in a court outside California. The alternative forum may be another state or country. A motion changing venue under CCP §397 seeks a transfer of the case to another California court.

Unlike a challenge to jurisdiction, which is not based on the court's discretionary power, the doctrine of forum non conveniens, which is the basis of a motion to dismiss or stay under CCP §410.30, is an equitable one embracing the court's discretionary power. *Stangvik v Shiley, Inc., supra*.

Because a motion to dismiss or stay is not based on a challenge to jurisdiction, if the state court denies the motion and the case is heard in a California court, even if it is an inconvenient forum, the action of the California court is valid and will be entitled to full faith and credit in other states. See Comment to CCP §410.30.

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§21.5 B. Statutory Authority; Limitations

In some situations, California courts may have jurisdiction over an action but may conclude that the forum in which it has been brought is an inconvenient forum and that it would be "in the interest of substantial justice" if it were heard in a forum outside California. CCP §410.30(a).

California law codifies the common-law doctrine of forum non conveniens permitting the court to decline to exercise its jurisdiction in appropriate cases. See Comment to CCP §410.30. Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when the court believes that the action may be more appropriately and justly tried elsewhere. *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556; *Hansen v Owens-Corning Fiberglas Corp.* (1996) 51 CA4th 753, 59 CR2d 229.

Under CCP §410.30, on motion of a party, or on the court's own motion, the court may dismiss or stay an action, in whole or in part, on grounds of inconvenient forum. The motion is made under CCP §410.30 if a general appearance has already been made or under both CCP §§410.30 and 418.10 if no general appearance has been made. The distinction between the two enabling statutes is that CCP §418.10 provides certain privileges to the defendant moving party who makes the motion prior to making a general appearance. See discussion in §21.17.

A court cannot order an action dismissed or stayed if it arises out of a contract, agreement, or undertaking governed by CCP §410.40. Contracts governed by CCP §410.40 are those

- In which the parties have designated that California law governs;
- That relate to a transaction involving $1,000,000 or more; and
- That contain a provision by the nonresident parties to submit to the jurisdiction of California courts.

For a further limitation, see CC §1646.5.

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§21.6 C. Combining Motion With Challenge to Jurisdiction or With Answer, Demurrer, or Motion to Strike

A defendant moving to quash service for lack of personal jurisdiction may move to dismiss or stay the action on the ground of inconvenient forum in the alternative. CCP §418.10(a).

PRACTICE TIP: A defendant challenging jurisdiction should also make the alternative motion to dismiss or stay. It provides the defendant with two possible ways to win instead of one, and it also provides the court a discretionary basis to grant the defendant relief even if the jurisdictional challenge fails.

A defendant or cross-defendant may make a motion under CCP §418.10 (to quash for lack of personal jurisdiction, to stay or dismiss on ground of inconvenient forum, or to dismiss for delay in prosecution) and simultaneously answer, demur, or move to strike the complaint or cross-complaint. CCP §418.10(e). Notwithstanding CCP §1014, no act by a party who makes a motion under CCP §418.10, including filing an answer, demurrer, or motion to strike, constitutes an appearance, unless the court denies the motion made under §418.10. If the court denies the motion made under §418.10, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion. CCP §418.10(e)(1).

If the motion under §418.10 is denied and the defendant or cross-defendant petitions for a writ of mandate under §418.10(c), the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded. CCP §418.10(e)(2).

Failure to make a motion under §418.10 at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution. CCP §418.10(e)(3).

It was the intent of the legislature in enacting §418.10(e) to conform California practice with respect to challenging personal jurisdiction to the practice under Fed R Civ P 12(b). Stats 2002, ch 69, §2.

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III. WHEN APPROPRIATE

§21.7 A. Availability of Suitable Alternative Forum

A threshold question is whether the alternative forum proposed by the party seeking to stay or dismiss is a "suitable" place for trial, which is, essentially, a forum that has jurisdiction over the defendant and where the plaintiff's causes of action are not barred by the statute of limitations. *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556 (Norway and Sweden, where plaintiffs lived, were suitable given agreement of defendant, a California resident, to be sued there); *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 702, 91 CR3d 178 (China suitable forum when air crash occurred there, most plaintiffs were Chinese residents, no defendants were California residents, and all defendants had agreed to be bound by Chinese judgment); *American Cemwood Corp. v American Home Assur. Co.* (2001) 87 CA4th 431, 435, 104 CR2d 670.

There are three considerations in determining suitability. There is little dispute about the first two: (1) The defendant must be subject to the alternative forum's jurisdiction, and (2) the claim must not be barred by a statute of limitations in the alternative forum. Both considerations may be dealt with by the court's imposition of conditions. See *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 750 n2, 1 CR2d 556; *Hansen v Owens-Corning Fiberglas Corp.* (1996) 51 CA4th 753, 59 CR2d 229. A defendant seeking to stay or dismiss an action on the basis of forum non conveniens must show that all defendants are subject to jurisdiction in the proposed alternate forum. A rule permitting a stay or dismissal of an action over which no single alternative court could exercise jurisdiction would force the plaintiff to pursue separate actions in multiple states or countries to obtain complete relief. Such a rule, by encouraging piecemeal litigation and blossoming numbers of actions in multiple jurisdictions, would threaten precisely those considerations of convenience, economy, and justice the doctrine was designed to bolster. *American Cemwood Corp. v American Home Assur. Co.* (2001) 87 CA4th 431, 438, 104 CR2d 670.

A third suitability consideration is whether the proposed alternative forum provides the plaintiff a remedy that is not so clearly inadequate or unsatisfactory that it amounts to no remedy at all. 54 C3d at 753, 1 CR2d at 561. Mere inability of the plaintiff to pursue causes of action in the other forum, which could be pursued in California, does not render the other forum unsuitable. *Shiley, Inc. v Superior Court* (1992) 4 CA4th 126, 133, 6 CR2d 38. See *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 696, 702, 91 CR3d 178 (expert declarations and other evidence supported conclusion that Chinese courts were capable of litigating and providing remedy for plaintiffs' complex product liability claims). See also discussion of conditions in §21.14.

Even if the trial court judge were to find that California law is likely to provide the plaintiff with procedural and substantive legal advantages, that fact "cannot be considered as a factor in plaintiff's favor in the forum non conveniens balance." *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 754, 1 CR2d 556. The fact that the law is less favorable in the alternative forum should not be accorded any weight in deciding a motion for forum non conveniens, provided, however, that some remedy is afforded. *Stangvik v Shiley, Inc., supra*; *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 696, 91 CR3d 178; *Roulier v Cannondale* (2002) 101 CA4th 1180, 1187, 124 CR2d 877.

In rare circumstances, an alternative forum may not be suitable, even though the defendant is subject to the alternative forum's jurisdiction and there is no procedural bar to a hearing on the merits. *Shiley, Inc. v Superior Court* (1992) 4 CA4th 126, 6 CR2d 38. This may occur when the proposed alternative forum is in a foreign country that does not have an independent judiciary or observe basic due process. *Shiley Inc. v Superior Court, supra*. See *Chong v Superior Court* (1997) 58 CA4th 1032, 68 CR2d 427 (proceedings stayed; no evidence that Hong Kong courts will not continue to provide due process after return to Chinese control).

In light of a defendant-retailer's stipulation to the jurisdiction of Swiss courts and in a waiver of any statute of limitations defenses, a trial court did not err in determining that Switzerland was a suitable alternative forum. *Roulier v Cannondale* (2002) 101 CA4th 1180, 1186, 124 CR2d 877 (Swiss resident injured in Switzerland on bicycle purchased in California and manufactured by company incorporated in Delaware).

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§21.8 B. Factors Considered

A motion to dismiss or stay for inconvenient forum is based on notions of "substantial justice." CCP §410.30. The doctrine recognizes that there are cases in which, although jurisdiction exists, California has little relation either to the parties or to the cause of action, and a California suit would greatly increase the burden to the defendant. Judicial Council Comment to CCP §410.30. In the absence of a statutory definition of "substantial justice," courts consider a number of relevant factors that have been developed in case law and other authorities.

A court asked to rule on a motion to stay or dismiss, which has determined that the proposed alternative forum is "suitable" (see §21.7), must next determine whether the balance of private and public factors favors (1) retaining the action for trial in California or (2) granting the motion. *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556. The private interests of the litigants are factors that make the trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, including the ease of access to sources of proof, the cost of obtaining witnesses' attendance, and the availability of compulsory process to compel the production of evidence and witnesses' attendance. The public interest factors favoring the granting of a motion to stay or dismiss include avoidance of overburdening local courts that have congested calendars, protecting prospective jurors from the needless inconvenience of having to consider and decide cases in which the local community has little concern, and the weight of the competing interests of California and the proposed alternative forum. Note that the Comment to CCP §410.30 contains two different sets of factors: one from the Uniform Interstate and International Procedure Act and one from the Restatement (Second) of Conflict of Laws, p 311 (Proposed Official Draft, pt I, chap 4, 1967).

The discussion in §§21.9-21.11 focuses on some of the factors most often mentioned and considered.

The defendant—the party moving for a stay or dismissal—has the burden of proof in attempting to override the plaintiff's choice of forum. 54 C3d at 751.

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§21.9 1. Plaintiff's Residence, Choice of Forum

California residents are given preference in access to the state's often overcrowded courts, both because of convenience and because it is residents who pay to maintain those courts. *Price v Atchison, T. & S.F. Ry.* (1954) 42 C2d 577, 582, 248 P2d 457 (cited in *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556). If a plaintiff who is a California resident has filed suit in California, that choice of forum "should rarely be disturbed unless the balance [of factors; see §21.8] is strongly in favor of the defendant." 54 C3d at 754 (resident plaintiff's choice presumed to be convenient; state has strong interest in providing adequate forum to its residents). See *Thomson v Continental Ins. Co.* (1967) 66 C2d 738, 742, 59 CR 101; *Brown v Clorox Co.* (1976) 56 CA3d 306, 311, 128 CR 385.

The rule of preference for California residents, however, has been the subject of a statutory revision of CCP §410.30(a), which provides that "the domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." This provision has been interpreted as calling for "less weight" being given to the issue of California residence. *Credit Lyonnais Bank Nederland, N.V. v Manatt, Phelps, Rothenberg & Tunney* (1988) 202 CA3d 1424, 249 CR 559. As noted by one court, it is yet to be determined whether the change in the statutory language will be interpreted by other courts as changing the long-standing rule of preference to California residents. *Klein v Superior Court* (1988) 198 CA3d 894, 901, 244 CR 226. Especially in cases in which all of the parties are California residents, for example, it is hard to imagine that a court will not still be reluctant to dismiss an action. See *Bechtel Corp. v Industrial Indem. Co.* (1978) 86 CA3d 45, 150 CR 29 (no dismissal or stay under prior law if all parties California residents). See discussion of dismissal versus stay in §21.13.

If the plaintiff is not a California resident and is the resident of a suitable (see §21.7) foreign jurisdiction, the plaintiff's choice of California as a forum is not a substantial factor in favor of retaining California jurisdiction. *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 755, 1 CR2d 556; *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 702, 91 CR3d 178.

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§21.10 2. Defendant's Residence

The state in which a defendant corporation was incorporated, and has its principal place of business, is presumed to be a convenient forum, but a resident defendant may overcome this presumption by evidence that a proposed alternative forum is a more convenient place for trial. *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 754, 1 CR2d 556 (California corporation presented evidence to support trial court's finding that Norway and Sweden were more convenient places to try product liability suits by residents of those countries against the corporation). The totality of the corporate defendant's contacts or connection with the state may be considered, but it is not true that a California court cannot stay or dismiss a burdensome action if the defendant's principal place of business is in the state. 54 C3d at 760.

Court congestion is a factor that the California court may consider, but dismissals or stays for inconvenient forum should not be used as court docket control device. 54 C3d at 758 (court noted that more than 100 foreign plaintiffs had filed product liability suits in California against defendant manufacturer of artificial heart valves and that hundreds of witnesses and millions of pages of documents would be involved in suit).

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§21.11 3. Other Factors

A court that has been asked to rule on a motion to stay or dismiss, having determined that an alternative forum is suitable (see §21.7) and having given appropriate weight to the plaintiff's choice of California as a forum in the light of the plaintiff's place of residence (see §21.9) and to the defendant's residence (see §21.10), may next need to balance certain private and public interest factors. See §21.8. For discussion of how such factors as those noted below are weighed in a specific instance, see *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 757, 1 CR2d 556; *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 701, 91 CR3d 178. See also Comment to CCP §410.30.

Among those private interests involving the parties are:

- Location of evidence, including scene if view might be necessary or helpful. See *Credit Lyonnais Bank Nederland, N.V. v Manatt, Phelps, Rothenberg & Tunney* (1988) 202 CA3d 1424, 249 CR 559; *Great Northern Ry. v Superior Court* (1970) 12 CA3d 105, 113, 90 CR 461.
- Defendant's principal place of business and extent of business in each state. *Brown v Clorox Co.* (1976) 56 CA3d 306, 128 CR 385; *Great Northern Ry. v Superior Court, supra*. See §21.10.
- Parties' relationship to California. *Great Northern Ry. v Superior Court, supra*.
- Location and convenience of parties and witnesses. *Roulier v Cannondale* (2002) 101 CA4th 1180, 1189, 124 CR2d 877; *Hansen v Owens-Corning Fiberglas Corp.* (1996) 51 CA4th 753, 59 CR2d 229; *Schlussel v Schlussel* (1983) 141 CA3d 194, 190 CR 95.
- Relative costs of maintaining action in this state compared to alternative forum. *Great Northern Ry. v Superior Court, supra*.
- Place of occurrence of transaction or event. *Great Northern Ry. v Superior Court, supra.*
- Plaintiff's motive, if plaintiff unreasonably or unfairly invoked California jurisdiction to vex, harass, or oppress defendant. *Gulf Oil Corp. v Gilbert* (1947) 330 US 501, 91 L Ed 1055, 67 S Ct 839. See generally *Bechtel Corp. v Industrial Indem. Co.* (1978) 86 CA3d 45, 49, 150 CR 29; Comment to CCP §410.30.

Among the public interest factors are:

- Burden on California courts. *Roulier v Cannondale, supra*; *Hansen v Owens-Corning Fiberglas Corp., supra*; *Brown v Clorox Co., supra*.
- Judicial efficiency. *Dendy v MGM Grand Hotels, Inc.* (1982) 137 CA3d 457, 187 CR 95. See *Great Northern Ry. v Superior Court, supra*.
- Interest of California in providing forum for parties or in regulating situation or conduct involved. See, *e.g., Roulier v Cannondale* (2002) 101 CA4th 1180, 1190, 124 CR2d 877 (California's interest in deterring negligent design and in preventing sale and production of defective products in state); *Campbell v Parker-Hannifin Corp.* (1999) 69 CA4th 1534, 82 CR2d 202 (California had insufficient interest to justify use of state's judicial time and resources to try action by heirs of victims of airplane crash in Australia).
- Reasonableness of imposition of jury duty on community having no relation to case. *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 703, 91 CR3d 178; *Great Northern Ry. v Superior Court, supra.*
- Relative ease of enforceability of judgment. *Great Northern Ry. v Superior Court, supra*.
- Health and safety of California residents involved. *Ferreira v Ferreira* (1973) 9 C3d 824, 109 CR 80.

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§21.12 C. Effect of Federal Law

Under 28 USC §1404, a federal district court has broad discretion to transfer a case from one federal district court to another "for the convenience of parties and witnesses in the interest of justice." 28 USC §1404(a). See *Piper Aircraft Co. v Reyno* (1981) 454 US 235, 70 L Ed 2d 419, 102 S Ct 252. This enactment largely replaces the common law doctrine of forum non conveniens, allowing a federal court to dismiss an action when the convenience of the parties would make it more suitable to try the case in another court. See *Gulf Oil Corp. v Gilbert* (1947) 330 US 501, 91 L Ed 1055, 67 S Ct 839. When there are two related federal court actions pending in different states and a party seeks transfer to allow both cases to be heard in the same federal court, courts consider the "first-to-file rule." *Big Dog Motorcycles v Big Dog Holdings, Inc.* (D Kan 2005), 351 F Supp 2d 1188 (transfer of case from Kansas to California federal court denied when there was no compelling reason for transfer and Kansas action was filed first).

It has been noted that in the federal court system a broader discretion is exercised because the federal courts have the power to transfer an action to a federal court in another state, while a California court does not have that power. Comment to CCP §410.30. California courts have sometimes placed a higher priority on certain issues than do federal courts. Deference to the plaintiff's choice of forum is given greater weight in California than in federal courts, if the plaintiff is a California resident. But see *Monegro v Rosa* (9th Cir 2000) 211 F3d 509, 512 (calling California and federal forum non conveniens doctrines "virtually identical"). See §21.9.

The doctrine of forum non conveniens is still relevant for foreign plaintiffs. *Duha v Agrium, Inc*. (6th Cir 2006) 448 F3d 867. In one case, a German attorney's suit against former clients for fees for services rendered in Germany was properly dismissed on the ground of forum non conveniens in favor of an alternative forum in Germany. The court stated that the German court is well equipped to apply the substantive German attorney fee statute in a manner required by its local procedure, and that it made little sense to require the district court to apply German substantive law in a procedure required by the Federal Rules of Civil Procedure. *Leetsch v Freeman* (9th Cir 2001) 260 F3d 1100, 1105.

A defendant seeking dismissal on forum non conveniens grounds bears the burden of showing that an adequate alternative forum exists. *Tuazon v R.J. Reynolds Tobacco Co.* (9th Cir 2006) 433 F3d 1163, 1178. A plaintiff's showing that the remedy provided in the foreign forum is less favorable than that available in the U.S. forum is not determinative. *Loya v Starwood Hotels & Resorts Worldwide, Inc.* (9th Cir 2009) 583 F3d 656, 666 (even though Mexico severely capped recovery in wrongful death actions, not abuse of discretion for district court to dismiss, on forum non conveniens grounds, suit under the Death on the High Seas Act (46 USC §§30301-30308) brought by personal representative of American who died scuba diving off Mexican coast). A foreign plaintiff is entitled to less deference in its choice of forum than is a U.S. plaintiff. *Vivendi SA v T-Moblie USA, Inc.* (9th Cir 2009) 209 US App Lexis 23982, *12 (dismissal on forum non conveniens grounds upheld when one plaintiff was French corporation that engaged in forum shopping, plaintiffs' fraud claims related to European transactions, and all but three witnesses resided in Europe). The court may dismiss a suit on forum non conveniens grounds before establishing its jurisdiction. Appellate review of a district court's forum non conveniens determination is highly deferential. *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp.* (2007) 549 US 422, 167 L Ed 2d 15, 127 S Ct 1184.

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§21.13 D. Dismissal or Stay

Because a California court cannot force jurisdiction on another state, it cannot order a transfer to another state but is limited to either staying or dismissing the action. *Thomson v Continental Ins. Co.* (1967) 66 C2d 738, 744, 59 CR 101. See Comment to CCP §410.30. The purpose of allowing a motion based on inconvenient forum is to provide "substantial justice." If the court dismisses the action, it loses jurisdiction, while if it merely stays the proceeding, it does not. *Archibald v Cinerama Hotels* (1976) 15 C3d 853, 126 CR 811; see Comment to CCP §410.30. The stay remains in effect until the time period provided by the stay order has elapsed. See Comment to CCP §410.30. At any time before the stay expires, the court on noticed motion can modify the stay order and take any further action that the interests of justice require. See Comment to CCP §410.30.

Even if the plaintiff is a California resident, the court is not precluded from staying or dismissing the action. CCP §410.30. This provision modified former case law, which precluded dismissal if the plaintiff was a California resident, absent extraordinary circumstances. *Archibald v Cinerama Hotels, supra;* see Comment to CCP §410.30. See discussion in §21.8.

In most circumstances, however, the courts may continue to follow former case law and stay rather than dismiss an action absent exceptional circumstances to ensure that the plaintiff obtains substantial justice. *Archibald v Cinerama Hotels, supra; Ferreira v Ferreira* (1973) 9 C3d 824, 109 CR 80; *Van Keulen v Cathay Pac. Airways, Ltd.* (2008) 162 CA4th 122, 75 CR3d 471 (after state case was stayed, resident-plaintiffs waited 4 years to file suit in foreign court).

PRACTICE TIP: The moving party should always request a dismissal or a stay in the alternative. The court may be reluctant to grant a request for dismissal, even in light of the language of CCP §410.30.

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§21.14 E. Order on Just Conditions

The order dismissing or staying the action on grounds of inconvenient forum may be made "on any conditions that may be just." CCP §410.30. Conditions imposed by courts on granting motions regarding inconvenient forum may include a requirement that defendants not plead the statute of limitations in the alternative forum and that defendants consent to jurisdiction and service in a particular jurisdiction. See *Stangvik v Shiley, Inc.* (1991) 54 C3d 744, 750 n2, 1 CR2d 556, which lists the seven conditions imposed by the trial court in that case as defendant's agreement to:

- Submit to the jurisdiction of two foreign courts;
- Comply with those courts' discovery orders;
- Make past and present employees reasonably available to testify as ordered by those courts at defendant's expense;
- Toll the statute of limitations while the actions were pending in California;
- Make documents available under those courts' laws at defendant's cost;
- Permit depositions in the United States under California law; and
- Pay any final judgments rendered in the foreign actions.

See also Comment to CCP §410.30. Similar language in CCP §473 has also been interpreted to include payment of attorney fees and posting of bonds. *Mark Briggs & Assoc. v Kinestar, Inc.* (1983) 143 CA3d 483, 192 CR 21; *Reeves v Hutson* (1956) 144 CA2d 445, 301 P2d 264.

PRACTICE TIP: The plaintiff should, in addition to opposing the motion on the merits, advise the court of all appropriate conditions that the court should impose in the event the defendant prevails and a stay or dismissal is ordered. Such conditions might include that (1) the defendant waive the statute of limitations of the new forum, (2) the defendant consent to jurisdiction and service of process in the new forum, (3) the alternative action proceed to trial in a particular period of time, and (4) completed discovery be transferred to the other forum.

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§21.15 F. Effect of Contractual Provision

A California court may exercise jurisdiction over a person who has consented to the exercise of jurisdiction (*National Equip. Rental, Ltd. v Szukhent* (1964) 375 US 311, 315, 11 L Ed 2d 354, 84 S Ct 411), provided he or she is competent to give consent (*Harrington v Superior Court* (1924) 194 C 185, 228 P 15), and absent a showing that enforcement of the forum selection provision would be unfair or unreasonable (*Smith, Valentino & Smith, Inc. v Superior Court* (1976) 17 C3d 491, 131 CR 374; *Furda v Superior Court* (1984) 161 CA3d 418, 207 CR 646). On jurisdiction, see chap 6.

Similarly, a California court may grant a motion to stay or dismiss on grounds of inconvenient forum on the basis of a contractual forum selection clause, in which case a factor such as plaintiff's choice of forum (see §21.9) has little weight. See *Cal-State Bus. Prod. & Serv. v Ricoh* (1993) 12 CA4th 1666, 16 CR2d 417 (California dealer bound by clause in agreement with New York distributor). A contractual forum selection clause must provide for a mandatory forum selection rather than be merely permissive to prevent a court staying an action on the grounds of forum non conveniens. See *Berg v MTC Electronics Technols. Co*. (1998) 61 CA4th 349, 71 CR2d 523; §6.79 (forum selection clauses). A forum selection clause in a stock options exchange agreement between a California resident and a U.S. subsidiary of a German corporation was as a matter of law mandatory rather than permissive, and the trial court had to enforce the clause because plaintiff made no showing that substantial justice could not be achieved in a German court or that a rational basis is lacking for the selection of Hamburg as the forum. *Intershop Communications AG v Superior Court* (2002) 104 CA4th 191, 196, 127 CR2d 847.

The contractual forum selection provision will ordinarily be given effect in an inconvenient forum decision unless the public interests that are considered in making the decision outweigh the private interest of the parties in enforcing the provision. *Appalachian Ins. Co. v Superior Court* (1984) 162 CA3d 427, 208 CR 627. If, however, the contract falls within the requirements of CC §1646.5 or CCP §410.40, then the case is not subject to a motion for inconvenient forum. CC §1646.5; CCP §§410.30-410.40.

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IV. PROCEDURE

A. Time to Make Motion

§21.16 1. Before or After General Appearance

After a general appearance has been made, a defendant may make a motion to dismiss or stay under CCP §410.30 at any time in the proceeding. *Appalachian Ins. Co. v Superior Court* (1984) 162 CA3d 427, 208 CR 627; 2 Witkin, California Procedure, *Jurisdiction* §380 (5th ed 2008). The provisions of CCP §418.10 only apply if a defendant has not made a general appearance. *Britton v Dallas Airmotive, Inc.* (2007) 153 CA4th 127, 134, 62 CR3d 487. See discussion of the protective provisions of CCP §418.10 in §21.17. A plaintiff may make the motion at any time. CCP §410.30(a).

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§21.17 2. Effect of Making Motion Before Pleading

The defendant's motion to stay or dismiss made on or before the last day to plead or within an additional time allowed by the court is a special appearance. CCP §418.10(d). It does not waive the defendant's right to challenge jurisdiction. CCP §418.10(a). It also allows the defendant making the motion under CCP §418.10 extensions of time to plead (CCP §418.10(b)-(c)), protection against entry of a default judgment before expiration of the time to plead (CCP §418.10), and the right to review an order of denial by writ of mandate (CCP §418.10(c)).

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§21.18 B. Time to Serve and File Papers

Time to serve and file moving and responsive papers for a motion made under CCP §410.30 after the defendant has made a general appearance are governed by standard motion procedures as set forth in CCP §1005. Cal Rules of Ct 3.1300. For full discussion, see chap 12.

If the motion is filed as a special appearance under CCP §418.10(a), it must designate a date for hearing not more than 30 days after filing of the notice and it must be served in accord with the provisions of CCP §1005(b).

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§21.19 C. Content of Moving Papers

There are no special court forms or attachment sheets used in making a motion to dismiss or stay. The moving party must file a notice of motion (CCP §1010) (see §21.26) and a memorandum in support of the motion (Cal Rules of Ct 3.1112(a), 3.1113). (On Cal Rules of Ct 3.1112(a) requirement of filing of a "motion," see §12.9.) In addition, because a motion to stay or dismiss is based on evidentiary considerations, declarations should also be filed. See §21.27. Finally, the moving party should include a request that the court take judicial notice of the law of the alternative forum in order to demonstrate that the alternative forum is suitable. See §§21.9, 21.28. In appropriate cases, the defendant may submit expert testimony by declaration as to the suitability of the alternative forum. *Klein v Superior Court* (1988) 198 CA3d 894, 903, 244 CR 226 (declaration of expert regarding Swiss law). The moving party may choose to wait to see if the opposing party raises issues regarding the suitability of the alternative forum and file a request to take judicial notice as part of the reply rather than as part of the moving papers.

PRACTICE TIP: The declarations should set forth extensive competent evidence relevant to the factors the court should consider in making its decision. The declarations should clarify the facts as to all relevant factors. See discussion of factors in §§21.7-21.11. A request to take judicial notice should be filed setting forth the alternative forum's law on relevant jurisdiction, statute of limitations, and substantive law. See discussion in §21.9.

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§21.20 D. Content of Responsive Papers

There is no requirement that responsive papers be filed by the responding party. The responding party who wishes to contest the motion should nevertheless file a memorandum in opposition and accompanying declarations. If appropriate, a request to take judicial notice and objections to evidence may also be filed.

PRACTICE TIP: The memorandum, in addition to arguing the law, should set forth appropriate conditions for the order in the event the defendant prevails. See §21.14. The declarations should set forth extensive competent evidence directed to the factors the court should consider in making its decision. See §§21.7-21.11. A request to take judicial notice should be filed, if appropriate, to advise the court of the alternative forum's laws on jurisdiction, statute of limitations, and applicable substantive law. See discussion in §§21.9. See form in §21.28.

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§21.21 E. Hearing on the Motion; Order

Unlike many motions, a motion for inconvenient forum may involve oral argument at the hearing.

As discussed in §21.13, the court is more likely to order a stay and impose conditions than it is to order dismissal and thus lose jurisdiction entirely. If a stay is ordered, all parties' counsel should be prepared to discuss possible conditions of the order as well as time limits for fulfilling the conditions, if appropriate. A losing plaintiff's counsel, in particular, should make every effort to have the court set definite time limits on any conditions the court imposes.

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§21.22 F. Effect of Order on Time to File Responsive Pleading or Writ of Mandate

If the motion is brought as a special appearance, and it is denied, the defendant has 15 days to file a responsive pleading from service of a written notice of entry of the order, unless the court for good cause extends the time for an additional period not exceeding 20 days. CCP §418.10(b). Nothing in the statute prevents the parties from stipulating to additional time to file a response, and, in fact, counsel often do agree to such stipulations. However, counsel should consult local rules under the Trial Court Delay Reduction Act (Govt C §§68600-68620), for limitations on such stipulations.

If the motion is brought as a special appearance, and it is denied, the defendant may choose to file a writ of mandate to review the order rather than file a responsive pleading. The petition for writ of mandate must be filed within 10 days after service of a written notice of entry of the order denying the motion, or within a further time not exceeding 20 days that the trial court may allow for good cause. Unless, on or before the last day of the defendant's time to file a responsive pleading, the defendant serves on the adverse party and files with the trial court a notice of a petition for a writ of mandate, the defendant must file a responsive pleading in the trial court within the time provided in CCP §418.10(b). CCP §418.10(c). The service and filing of the notice extends the defendant's time to plead until 10 days after service on him or her of a written notice of the final judgment in the mandate proceeding, unless the trial court for good cause extends the time for an additional period not exceeding 20 days. CCP §418.10(c).

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§21.23 G. Review by Writ or Appeal

A defendant whose motion to dismiss or stay is denied may file a petition for writ of mandate to review the order. CCP §418.10. If the defendant made the motion as a special appearance under CCP 418.10, the time limits set out in that statute apply. See discussion in §21.22. The defendant may also seek review of an order denying a motion to stay or dismiss for inconvenient forum by an appeal after a judgment is entered. *A & M Records, Inc. v Heilman* (1977) 75 CA3d 554, 142 CR 390. A plaintiff may appeal an order staying or dismissing the action on the ground of inconvenient forum. CCP §§904.1(a)(3), 904.2(d). See generally *Youngblood v Board of Supervisors* (1978) 22 C3d 644, 651, 150 CR 242.

WARNING: The time to appeal an order granting a motion to dismiss for inconvenient forum may run from the date of the written order of dismissal under CCP §581d following the court's granting of the motion to dismiss on the ground of inconvenient forum. CCP §904.1(a)(3).

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§21.24 V. DIAGNOSTIC QUESTIONS

Answers to the following questions may assist counsel in evaluating whether to make a motion to dismiss or stay in a particular case or in evaluating how to respond to a motion to dismiss or stay:

1. Do any of the following factors bar dismissal or stay?

- No other suitable forum
- Binding contractual agreement that the case be heard in California
- Deference to the plaintiff's choice of forum is not outweighed by other factors
- Case is based on a contract governed by CCP §410.40

2. Are any of the following factors relevant and do they weigh in favor of the moving or responding party?

- Location of the evidence, including scene, if view might be necessary or helpful
- Moving party's place of residence or principal place of business and extent of business done in each state
- Parties' relationship to California
- Relative costs of maintaining the action in California compared to the alternative forum
- Place of occurrence of transaction or event that is the subject of the suit
- Plaintiff's motive
- Burden on California courts
- Judicial efficiency
- Interest of California in providing forum for parties or in regulating situation or conduct involved
- Reasonableness of imposition of jury duty on community having no relation to case
- Relative ease of enforceability of judgment

If opposing party loses the motion:

3. Should the moving party include in its moving papers its consent to any of the following conditions of the court's granting its motion and should the responding party request that the court impose any of the following conditions on a grant of the motion?

- The moving party consents to jurisdiction and service of process in the alternative forum
- The parties stipulate to transfer to the alternative forum all discovery already conducted
- Other appropriate conditions

On motions to dismiss or stay for inconvenient forum, see CCP §§410.30-410.40, 418.10. See also 2 Witkin, California Procedure, *Jurisdiction* §§375-379 (5th ed 2008).

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§21.25 VI. CHECKLIST: PROCEDURE FOR MOTION TO DISMISS OR STAY FOR INCONVENIENT FORUM

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Moving Party

- Decide whether to bring motion to dismiss or stay for inconvenient forum separately or together with challenge to jurisdiction (see §§21.7-21.14, 21.24)
- Decide whether to bring motion to dismiss or stay for inconvenient forum instead of other responsive procedure (if motion is made before a general appearance)
- Prepare moving papers (see §§20.16-20.19):
- Notice of motion and motion
- Memorandum in support of motion
- Declaration(s)
- Request to take judicial notice, if appropriate
- Obtain hearing date
- File and serve moving papers with proof of service
- File proof of service

Opposing Party

- Prepare opposing papers (see §20.20):
- Memorandum of in opposition to motion, including proposed conditions in order if moving party prevails
- Declaration(s)
- Request to take judicial notice, if appropriate
- Written evidentiary objections to moving party's papers and request to strike, if appropriate
- Serve and file opposing papers

Moving Party

- Prepare reply to opposing papers:
- Reply memorandum
- Reply declaration(s)
- Written evidentiary objections to opposing party's papers and request to strike, if appropriate
- Serve and file reply papers

If motion denied:

Moving Party

- File answer within 15 days of service of notice of entry of order (court may extend time by 20 days for good cause) (CCP §418.10(b))
- File notice of petition for writ of mandate within 10 days of notice of entry of order (court may extend time by 20 days for good cause); filing notice of petition for writ of mandate shall extend time for filing a responsive pleading until 10 days after service of written notice of final judgment in mandate proceeding (CCP §418.10(c))

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VII. FORMS

§21.26 A. Form: Notice of Motion to Dismiss or Stay Action

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION TO DISMISS OR TO STAY ACTION; SUPPORTING MEMORANDUM; DECLARATION(S);** _ _[*REQUEST TO TAKE JUDICIAL NOTICE*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, will and hereby does move the Court for an order dismissing the action or, if the motion to dismiss is denied, for an order staying the proceeding under Code of Civil Procedure §(§)410.30** _ _[*and 418.10*]_ _ **on the grounds that that the State of California is an inconvenient forum and that in the interests of justice the action should be heard in a forum outside California.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the Declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §21.19 (content of moving papers), chap 12 (formal requirements for notices of motion). Every motion must be accompanied by a memorandum in support of the motion. Cal Rules of Ct 3.1112(a), 3.1113. See §§12.30-12.31. A motion to dismiss or stay may be combined, in the alternative, with a motion to quash service of summons on the basis of lack of jurisdiction. See §21.6.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§21.27 B. Form: Declaration Supporting Motion to Dismiss or Stay Action

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S MOTION TO DISMISS OR STAY ACTION**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*e.g., a defendant in this action/an officer of defendant corporation and authorized to make this declaration*]_ _**.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.

3. _ _[*E.g., I am a resident of* _ _[*name of alternative forum state*]_ _ **and reside at** _ _[*address*]_ _**. I am subject to the jurisdiction of the State of** _ _[*name of alternative forum state*]_ _]_ _**.**

4. _ _[*E.g., The accident that is the subject of this lawsuit occurred in* _ _[*name of alternative forum*]_ _]_ _**.**

5. _ _[*Continue declarant's statements, stating facts pertinent to the factors discussed in §§21.8-21.11*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§21.19 (contents of moving papers) and §§12.43-12.53 (formal requirements for declarations). For a discussion of the factors that may be relevant and should be addressed in declarations, see §§21.7-21.11.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§21.28 C. Form: Request to Take Judicial Notice to Support or Oppose Motion to Dismiss or Stay Action

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**REQUEST TO TAKE JUDICIAL**
vs	)	**NOTICE IN** _ _[*SUPPORT*
	)	*OF/OPPOSITION TO*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**MOTION TO DISMISS OR**
	)	**STAY ACTION**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

REQUEST IS HEREBY MADE by _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, that under Evidence Code §452 the Court take judicial notice of the following:** _ _[*Insert appropriate references to the law of the alternative forum relating to, e.g., jurisdiction, statute of limitations, substantive law of the case*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§21.19-21.20.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§21.29 D. Form: Order Dismissing or Staying Action

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER** _ _[*DISMISSING/ STAYING*]_ _ **ACTION**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, for an order dismissing or staying the action for inconvenient forum was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made and good cause appearing that California is an inconvenient forum for the trial of this action and in the interests of substantial justice the action should be tried in the proper court in _ _[*name of state or country*]_ _,

IT IS ORDERED that:

1. _ _[*E.g., This action be dismissed, or this action be stayed on the condition(s) that* _ _[*e.g., defendant consent to the jurisdiction of* _ _[*name of alternative forum state or country*]_ _ **and that defendant waive objections to the action based on any statute of limitations of** _ _[*name of alternative forum state or country*]_ _]_ _.

2. _ _[*State any additional orders, e.g., Relief from the stay be sought on 15 days' noticed motion*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §21.21 (hearing on motion), §§12.104-12.119 (use of proposed orders; formal requirements).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, "pleading paper" (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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22

Removal to Federal Court

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I. INTRODUCTION

§22.1 A. Scope of Chapter

This chapter discusses removal of actions from state to federal court. It discusses the nature of removal jurisdiction (see §§22.3-22.5), and removal of federal question cases (see §§22.6-22.15), diversity cases (see §§22.16-22.29), separate and independent claims (see §§22.30-22.33), and other claims (see §§22.34-22.38). It discusses cross-claims against plaintiffs or third parties (see §§22.39-22.40), pendent claim jurisdiction (§22.41), and actions made nonremovable by statute (see §§22.42-22.46).

It also discusses whether to seek removal (see §§22.47-22.66) and removal timing and procedures (see §§22.67-22.96), and contains a checklist of procedure for evaluating removal of the action (see §§22.97), and forms (see §§22.98-22.99).

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§22.2 B. Governing Law

Removal is generally governed by 28 USC §1441(a), although other statutes provide for removal (see discussion below).

Removal jurisdiction derives entirely from statute. *Libhart v Santa Monica Dairy Co.* (9th Cir 1979) 592 F2d 1062, 1064. There is no "federal common law" respecting removal; unless a statute permits removal, the court has no discretion to allow it. The general rule concerning removal is in 28 USC §1441(a), which provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Additional grants of removal jurisdiction for federal question and diversity of citizenship cases is specified in 28 USC §1441(b). See §§22.6-22.29. However, §1441(b) also limits general removal jurisdiction in diversity cases to those cases in which no defendant is a citizen of the state in which the action is brought. See §22.16. Subsection (b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treatises or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

A further grant of removal jurisdiction is in 28 USC §1441(c), which applies when removal is not possible under 28 USC §1441(a)-(b). See §§22.30-22.33. Subsection (c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates.

Other sections provide for removal, *e.g.:*

- Civil action brought in a state court against a foreign state (28 USC §1441(d); see §22.34);
- Action is commenced against an officer or agency of the United States, or a property holder whose title is derived from any such officer (28 USC §1442(a); see §22.35);
- Action in which the Federal Deposit Insurance Corporation is a party (as either a plaintiff or a defendant) (12 USC §1819);
- Certain actions against members of the armed forces of the United States (28 USC §1442(a); see §22.36);
- Various civil rights cases (28 USC §1443; see §22.37); and
- Foreclosure actions against the United States (28 USC §1444; see §22.38).

Certain actions are made nonremovable by 28 USC §1445 and by other statutory authority. See §§22.42-22.46. The procedure for removal is specified in 28 USC §§1446-1452. See §§22.67-22.96.

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II. OVERVIEW

§22.3 A. Nature of Removal Jurisdiction

Removal jurisdiction allows defendants sued in state court to "remove" the lawsuit to federal court in certain limited, statutorily prescribed circumstances. Generally, those circumstances involve complaints that raise federal claims, or lawsuits filed against defendants who live in different states from the plaintiff who are sued in a court outside their home state for more than $75,000. Removal jurisdiction is "but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law.'" *Avco Corp. v Aero Lodge No. 735* (1968) 390 US 557, 560, 20 L Ed 2d 126, 88 S Ct 1235.

The general rule is that the plaintiff has the right to select the forum of plaintiff's own choosing and to prosecute the lawsuit, in his or her own way, to a conclusion. *Lewis v Time, Inc.* (ED Cal 1979) 83 FRD 455, 458. Removal is an exception to this general rule, forcing the plaintiff to prosecute the lawsuit in a forum other than of his or her own choosing. The rationale for removal jurisdiction is based on twin goals:

- To avoid local prejudice; and
- To guarantee vindication of federal rights.

"Success in achieving these goals is dependent upon the party's ability to obtain 'national justice' from an unbiased federal court." 83 FRD at 461.

Exercising the statutory right of removal is not without consequences to the removing party. For example, by choosing to invoke federal jurisdiction, the removing party waives immunity to which it might otherwise be entitled under the Eleventh Amendment. *Lapides v Board of Regents of Univ. Sys. of Ga.* (2002) 535 US 613, 152 L Ed 2d 806, 122 S Ct 1640; *Embury v King* (9th Cir 2004) 361 F3d 562.

For further discussion of grounds for federal jurisdiction, see chap 7.

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§22.4 B. Former Derivative Rule

Until June 19, 1986, federal court jurisdiction after removal was derived from the initial jurisdiction of the state court in which the action was filed. The rule was that, for the federal court to acquire derivative jurisdiction by removal, the state court had originally to have had jurisdiction. See *Mercy Hosp. Ass'n v Miccio* (ED NY 1985) 604 F Supp 1177. Put another way, the jurisdiction of the district court after removal was derivative of the jurisdiction that existed in the state court when the action was originally filed. *Schroeder v Trans World Airlines, Inc.* (9th Cir 1983) 702 F2d 189, 192, overruled on other grounds in *Moore-Thomas v Alaska Airlines, Inc.* (9th Cir 2009) 553 F3d 1241, 1246.

This rule resulted in the anomaly recognized by the court in *People v Kerr-McGee Chem. Corp.* (7th Cir 1982) 677 F2d 571. Because removal jurisdiction was derivative, *i.e.,* only a case properly before a state court could be removed to federal court, if the state court lacked either subject matter jurisdiction or jurisdiction over a party, a federal court could not acquire jurisdiction by removal. This result followed even if the federal court would have had jurisdiction had the action been initially brought in federal court. 677 F2d at 575.

The following examples illustrate the rule:

EXAMPLE 1: *A,* a resident of California, sued *B,* a resident of New York, in a California state court on the theory of fraud and sought a recovery of $2 million. Because the case was properly filed in the state court, which had jurisdiction, and because, as discussed §§22.16-22.29, diversity jurisdiction existed, removal was proper.

EXAMPLE 2: *A* sued *B* in a California state court, seeking a declaratory judgment that *B*'s invention of a medical laser would have been obvious at the time the invention was made to a person having ordinary skill in the art of medical lasers, and, thus, *B*'s patent should be held invalid. *B* removed the action to the federal court in California. Ironically, because the federal courts have exclusive rather than just concurrent jurisdiction over patent matters, the California court never properly had jurisdiction of the matter, and, therefore, the district court could not obtain derivative or removal jurisdiction. Even though the action could properly have been filed in federal court initially, it was not, and thus was not properly removable to federal court. (Federal courts faced with this issue would usually dismiss the case. See *Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389, 1392 n3.)

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§22.5 C. Current Nonderivative Rule

The derivative rule discussed in §22.4 made little sense. If a case over which federal courts had exclusive jurisdiction was initially filed in state court and removed, and thereafter dismissed, the case could be refiled in the federal court (assuming no statute of limitations problem), and under a related case local court rule, "low-numbered" (*i.e.,* transferred) by the district judge to whom it was assigned the second time to the district judge who dismissed it.

The doctrine of derivative jurisdiction was abolished by enactment of 28 USC §1441(e) (*Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389, 1392 n3), which provides:

> The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Thus, as a result of the enactment of 28 USC 1441(e) in the second example in §22.5, the district court can now retain jurisdiction over the patent matter.

NOTE: Abolishment of the doctrine of derivative jurisdiction does not affect the general rule that only those state actions that could have been filed originally in federal court are removable. 28 USC §1441(a); *Caterpillar Inc. v Williams* (1987) 482 US 386, 392, 96 L Ed 2d 318, 107 S Ct 2425; *Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389, 1393.

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III. REMOVAL OF FEDERAL QUESTION CASES

§22.6 A. Authority

Federal question jurisdiction generally exists in its present form as a result of the enactment of 28 USC §1331, which provides that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Removal of a state civil action when federal district courts would have original jurisdiction is authorized under 28 USC §1441(a), which specifies the general rule for removal. See §22.3. Thus, a case filed in state court may generally be removed to federal court under 28 USC §1441(a) when federal question jurisdiction exists. Furthermore, removal of federal question cases over which district courts would have original jurisdiction is also authorized under 28 USC §1441(b), which essentially repeats the above quoted language of 28 USC §1331. See §22.3.

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§22.7 B. When Is Federal Question Involved?

Because a case may generally be removed to federal court based on federal question jurisdiction (see §22.6), the question thus becomes: when does a case arise under the Constitution, treaties, or laws of the United States? Justice Holmes provided what is considered to be the first definitive answer in *American Well Works Co. v Layne & Bowler Co.* (1916) 241 US 257, 260, 60 L Ed 987, 36 S Ct 585: "a suit arises under the law that creates the cause of action." In another threshold decision bearing on the issue, Justice Cardozo cautioned, in *Gully v First Nat'l Bank* (1936) 299 US 109, 115, 81 L Ed 70, 57 S Ct 96, that "[n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." Instead, as summarized by the Ninth Circuit in *Hunter v United Van Lines* (9th Cir 1984) 746 F2d 635, 646:

> Justice Cardozo instructed us to determine whether the federal element in the claim was "basic" as opposed to "collateral," and "necessary" as opposed to "merely possible." (Citation omitted.) Similarly, courts have looked to whether the federal element in the claim was "pivotal," (citation omitted) or "substantial," (citation omitted) as opposed to merely "incidental," (citation omitted) or whether it was "direct and essential" as opposed to "attenuated," (citation omitted) or "paramount" as opposed to "collateral" (citations omitted).

Thus, it is generally accurate to say that a case arises under the laws of the United States if the plaintiff's right to relief requires resolution of a substantial question of federal law (*Brinkin v Southern Pac. Transp. Co.* (ND Cal 1983) 572 F Supp 236, 238), or perhaps more precisely, when the "heart" of the complaint involves federal law (*Newberry v Pacific Racing Ass'n* (9th Cir 1988) 854 F2d 1142, 1146), or when an "essential element" of plaintiff's claim is federal (*First Nat'l Bank v Aberdeen Nat'l Bank* (8th Cir 1980) 627 F2d 843, 849). For example, an action filed in state court against a national bank based on common law and state usury law may be removed to federal court because it actually arises under federal law. *Beneficial Nat'l Bank v Anderson* (2003) 539 US 1, 156 L Ed 2d 1, 123 S Ct 2058. A suit filed in state court under the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) may also be removed to federal court. *Breuer v Jim's Concrete, Inc*. (2003) 538 US 691, 155 L Ed 2d 923, 123 S Ct 1882.

On federal court jurisdiction, see chap 7.

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C. Determining Federal Question Removal Jurisdiction

§22.8 1. Well-Pleaded Complaint Rule

It is often said that the plaintiff is the master of plaintiff's own claim, and, as a result, may elect to plead or forgo some or all of his or her federal claims, and may choose the forum in which to bring the action. See *Bright v Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766, 769; *Schroeder v Trans World Airlines, Inc.* (9th Cir 1983) 702 F2d 189, 190, overruled on other grounds in *Moore-Thomas v Alaska Airlines, Inc.* (9th Cir 2009) 553 F3d 1241, 1246. This concept is seminal to any removal analysis.

Because the plaintiff is considered master of his or her claims, it follows that, if a choice exists, plaintiff may choose either a federal or a state remedy for a particular wrong. If the plaintiff chooses to rely on state law, in the absence of fraud, defendant cannot be heard to complain. *Teamsters Local No. 116 v Fargo-Moorhead Auto. Dealers Assoc.* (D ND 1978) 459 F Supp 558, 560. See also *People v Kerr-McGee Chem. Corp.* (7th Cir 1982) 677 F2d 571, 575. Furthermore, the plaintiff may generally draw the complaint as plaintiff sees fit, because it is not up to the court to evaluate plaintiff's strategy as long as fraudulent concealment is not involved. *Ashley v Southwestern Bell Tel. Co.* (WD Tex 1976) 410 F Supp 1389, 1393. If plaintiff relies on state law, a defendant cannot remove the case to federal court unless diversity of citizenship exists (see §§22.16-22.29). 410 F Supp at 1392.

This concept, that it is the prerogative of the plaintiff to include and exclude what plaintiff wishes in his or her complaint, and therefore control and potentially defeat removal, has become known as the "well-pleaded complaint rule." Under the well-pleaded complaint rule, the federal question, which is a predicate for removal jurisdiction, "must appear from the complaint and not from any federal defense the defendant might raise to defeat the claim." *Bright v Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766, 769. See §22.9. Whether federal jurisdiction exists is determined solely by examination of plaintiff's case, without resort to defendant's pleadings. *Self v General Motors Corp.* (9th Cir 1978) 588 F2d 655, 657. Thus, the complaint on its face must disclose federal question jurisdiction (*Schmidt v National Org. for Women* (ND Fla 1983) 562 F Supp 210, 213), and only the plaintiff's own statement of plaintiff's cause of action will be looked to under this rule (*People v Glendale Fed. Sav. & Loan Ass'n* (CD Cal 1979) 475 F Supp 728, 731). Federal question jurisdiction may not be based on defendant's counterclaims. *Holmes Group, Inc. v Vornado Air Circulation Sys.*, Inc. (2002) 535 US 826, 153 LEd2d 13, 122 S Ct 1889.

On artful pleading doctrine as a limitation to the well-pleaded complaint rule, see §§22.10-22.15.

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§22.9 2. Federal Defenses Generally Irrelevant

As a corollary of the rule that removal jurisdiction must be disclosed from the face of the complaint (see §22.8), defenses are generally ignored in determining whether removal jurisdiction exists, even when the defense is based in part, or entirely, on a substantial federal question. But see §22.13 on defense of complete federal preemption.

A federal question is not created by defendant's assertion of an issue of federal law in defendant's pleadings or in the notice of removal (see *People v Kerr-McGee Chem. Corp.* (7th Cir 1982) 677 F2d 571, 575), nor is a federal question created by a defense based entirely on federal law (*Hunter v United Van Lines* (9th Cir 1984) 746 F2d 635, 639).

Aside from matters of legislative history and statutory interpretation, the rationale for this rule is that, just as a plaintiff cannot create federal jurisdiction by anticipating a defense in what would otherwise be a state court complaint, so, too, a defendant may not create removal jurisdiction by going outside the scope of the complaint, which is supposed to frame the issues. *People v Glendale Fed. Sav. & Loan Ass'n* (CD Cal 1979) 475 F Supp 728, 731. When plaintiff has alleged a state-law claim, the defendant cannot transform the action into one arising under federal law merely by injecting a federal question into the action and thereby select the forum where the case will be litigated. *Caterpillar Inc. v Williams* (1987) 482 US 386, 399, 96 L Ed 2d 318, 107 S Ct 2425. "If a defendant could do so, the plaintiff would be master of nothing." *Caterpillar Inc. v Williams, supra*.

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3. Artful Pleading Doctrine

§22.10 a. Exception to Well-Pleaded Complaint Rule

Generally, plaintiff is the master of plaintiff's complaint as to the law plaintiff will rely on and the forum in which to bring the action unless there is fraudulent concealment of a federal claim. See *Bright v Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766, 769; *Ashley v Southwestern Bell Tel. Co.* (WD Tex 1976) 410 F Supp 1389, 1392. See also §22.8. Plaintiff cannot conceal by artful pleading the true nature of a complaint. *Bright v Bechtel Petroleum, Inc., supra* (780 F2d at 769). Plaintiff cannot avoid litigating in federal court what is essentially a federal claim "by artfully drafting the complaint in terms of state law." *People v Kerr-McGee Chem. Corp.* (7th Cir 1982) 677 F2d 571, 575. If plaintiff has essentially a federal claim but artfully drafts the complaint in terms of state law, defendant is entitled to have the case removed to federal court. *People v Kerr-McGee Chem. Corp., supra* (rule stated; however case remanded because complaint grounded on state law and not artfully pled to defeat removal). See *Bright v Bechtel Petroleum, Inc., supra* (removal to federal court held proper). This is known as the artful pleading doctrine.

Under the artful pleading doctrine, a federal district court in an appropriate case can recharacterize a plaintiff's state-law claims as federal claims, exercise jurisdiction over those claims, and proceed with the case. *Hunter v United Van Lines* (9th Cir 1984) 746 F2d 635, 640. The court must examine the complaint "to determine if a federal claim is necessarily presented," notwithstanding that plaintiff's complaint is couched exclusively in state law terms. *Schmidt v National Org. for Women* (ND Fla 1983) 562 F Supp 210, 213. The court's role in considering the propriety of removal is to pierce the veil of plaintiff's complaint and to look to the real nature of the claim asserted in the complaint regardless of how it is characterized. *Ashley v Southwestern Bell Tel. Co.* (WD Tex 1976) 410 F Supp 1389, 1392. "Neither artful or inartful pleading, nor inadvertence, mistake, or fraud can keep the federal courts from their appointed task of reaching the real nature of the claim asserted in plaintiff's complaint and uncovering any lurking federal question." *Ashley v Southwestern Bell Tel. Co., supra.*

The Ninth Circuit, calling the artful pleading doctrine a "minefield," has cautioned that the doctrine may be invoked only in limited circumstances because it "raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Lippitt v Raymond James Fin. Serv.* (9th Cir 2003) 340 F3d 1033, 1041. Only two categories of cases should apply to the artful pleading doctrine:

- Complete preemption cases; and
- Substantial federal question cases, *i.e.,* claims that are "necessarily federal in character."

340 F3d at 1042. See also *McMaster v Coca-Cola Bottling Co. of Cal.* (ND Cal 2005) 392 F Supp 2d 1107 (plaintiffs' claim challenging defendant's policy of "charging" plaintiffs for certain driving trips in company vans under Lab C §2802 could not be recharacterized as artfully pled federal claim when (1) it was not equivalent to tax refund suits and (2) the potential need to interpret "commuting" under the IRC and IRS regulations did not convert the claim to a federal question).

For an example of a court recharacterizing a claim when complete federal preemption is not involved, see *Salveson v Western States Bankcard Ass'n* (9th Cir 1984) 731 F2d 1423, 1427 (plaintiffs first filed federal claim suits in federal court, lost, then recharacterized same claims and filed in state court; application of artful pleading doctrine and removal to federal court held proper).

For discussion of the artful pleading doctrine as a defense, see §7.19.

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§22.11 b. Courts May Look Beyond Complaint for Artful Pleading

When the artful pleading doctrine is involved, the court may look to more than just the face of the complaint. See *Salveson v Western States Bankcard Ass'n* (9th Cir 1984) 731 F2d 1423, 1427. It has been noted that in determining the propriety of removal, in practice, courts usually consider the facts as disclosed by the whole record, rather than limiting their inquiry to the face of the complaint. *Villarreal v Brown Express, Inc.* (5th Cir 1976) 529 F2d 1219, 1221.

Thus, district courts have looked beyond the complaint to the petition for removal (now a notice of removal) to determine the true nature of the plaintiff's complaint, *i.e.,* to determine whether a federal claim was necessarily involved. See, *e.g., Schroeder v Trans World Airlines, Inc.* (9th Cir 1983) 702 F2d 189, 191, overruled on other grounds in *Moore-Thomas v Alaska Airlines, Inc.* (9th Cir 2009) 553 F3d 1241, 1246 (determination of applicability of Railway Labor Act (45 USC §§151-188) from complaint and additional facts in petition for removal); *Oquendo v Dorado Beach Hotel Corp.* (D PR 1974) 382 F Supp 516, 518 (determination of status of party as "affecting commerce" for applicability of Labor Management Relations Act of 1947).

In addition to looking at the petition for removal, a district court on occasion has even looked to other complaints filed by other plaintiffs. See, *e.g., Bright v Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766, 769, in which the complaint alleged a cause of action for breach of an employment contract. Plaintiff alleged a "breach of contract and a gross violation of Christian principles" in that the amount of the paychecks issued by the defendant were less than contracted for or agreed to. The court looked to background information in the petition for removal, supporting affidavits, and a complaint filed in state court by another employee using the identical above quoted language which had been removed to federal court and dismissed as frivolous shortly before plaintiff filed his complaint, in determining that plaintiff's cause of action was artfully pleaded and that it in fact challenged federal income tax withholding laws and regulations.

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c. Defense of Federal Preemption

§22.12 (1) Defense of Federal Preemption Generally Insufficient as Ground for Removal

Generally, federal preemption (*i.e.,* that federal law preempts state law in a particular field) is raised as a defense to a plaintiff's complaint. Because such a defense does not appear on the face of a well-pleaded complaint (see §22.8) it does not confer removal jurisdiction. *Metropolitan Life Ins. Co. v Taylor* (1987) 481 US 58, 63, 95 L Ed 2d 55, 107 S Ct 1542. A federal defense, including preemption, is not a basis for removal, even if plaintiff's complaint anticipates such a defense or the parties agree that the only real issue in the case is the federal defense. *Caterpillar Inc. v Williams* (1987) 482 US 386, 392, 96 L Ed 2d 318, 107 S Ct 2425. See §22.8. On complete preemption doctrine exception, see §22.13.

Thus, the merits of a federal preemption defense should usually in the first instance be decided by the state court "with ultimate recourse to the Supreme Court." *New York v Local 115 Joint Bd.* (ED NY 1976) 412 F Supp 720, 724. Under the Supremacy Clause, the state court is bound to follow federal law on the issue raised by the federal preemption defense. 412 F Supp at 724. If the defendant prevails on this issue in state court, the case will be dismissed on the merits based on federal preemption. See *Hunter v United Van Lines* (9th Cir 1984) 746 F2d 635, 641.

On district court's duty to remand action to state court under 28 USC §1447(c) when it lacks removal jurisdiction, see *Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389.

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Source: Civil Litigation/California Civil Procedure Before Trial/22 Removal to Federal Court/§22.13 (2) Exception: The Complete Preemption Doctrine

§22.13 (2) Exception: The Complete Preemption Doctrine

A corollary to the well-pleaded complaint rule, known as the complete preemption doctrine, has evolved. *Caterpillar Inc. v Williams* (1987) 482 US 386, 393, 96 L Ed 2d 318, 107 S Ct 2425. This doctrine is an exception to the rule precluding removal based on a defense of federal preemption (see §22.12). When Congress by federal legislation completely preempts state law in a particular area, a claim purportedly based on such preempted state law is deemed from its inception to necessarily present a federal claim, and thus to arise under federal law. *Caterpillar Inc. v Williams, supra*; *Metropolitan Life Ins. Co. v Taylor* (1987) 481 US 58, 63, 95 L Ed 2d 55, 107 S Ct 1542. See *Teamsters Local No. 116 v Fargo-Moorhead Auto. Dealers Assoc.* (D ND 1978) 459 F Supp 558 (if federal legislation preempts area of law in question, plaintiff necessarily states federal cause of action although plaintiff purports to rely on state law). Such a completely preempted claim is removable from state court. *Metropolitan Life Ins. Co. v Taylor, supra*. For purposes of the well-pleaded complaint rule, the state claim is converted into a federal claim notwithstanding that in the absence of federal legislation state law would provide a cause of action. *Caterpillar Inc. v Williams, supra*; *Metropolitan Life Ins. Co. v Taylor, supra*. Counterclaims based on completely preempted state law do not qualify a case for federal question jurisdiction. *Vaden v Discovery Bank* (2009) ___US___, 173 LEd2d 206, 219, 129 S Ct 1262.

For a case in which the court found a federal question despite plaintiff's state claim characterization when no controlling state law existed concerning issue and complaint was patterned after federal cases in area, see *Nance v Jackson* (MD Ala 1972) 56 FRD 463 (reapportionment).

NOTE: Prior to the United States Supreme Court decision in *Caterpillar Inc. v Williams* (1987) 482 US 386, 393, 96 L Ed 2d 318, 107 S Ct 2425, for the artful pleading doctrine to be applied based on complete preemption and the case removed to federal court, the Ninth Circuit required both that federal law: (a) displaced state law and (b) conferred a remedy for the claim asserted. See *Sullivan v First Affiliated Secs., Inc.* (9th Cir 1987) 813 F2d 1368, 1372; *Hunter v United Van Lines* (9th Cir 1984) 746 F2d 635, 641. If federal law displaced state law but did not provide for a federal cause of action to replace the state cause of action, plaintiff could not be deemed to be avoiding a federal cause of action because none existed. Under those circumstances, federal preemption operated only as a defense and removal was improper. 746 F2d at 643.

In *Caterpillar Inc. v Williams, supra,* the United States Supreme Court appeared to disapprove the Ninth Circuit Court of Appeals requirement for complete preemption that the federal law confer a remedy for the claim asserted, *i.e.,* that the federal cause of action relied on by plaintiff provide plaintiff with a remedy. The Ninth Circuit opinion in that case, *Williams v Caterpillar Tractor Co.* (9th Cir 1986) 786 F2d 928, 932, held that removal based on the complete preemption doctrine was appropriate only when "federal law provides both a superseding remedy replacing the state law cause of action *and* preempts that state law cause of action," and that these two inquiries are distinct, and both must be satisfied for removal to be proper. The Supreme court, in affirming the Court of Appeals' judgment on other grounds, noted that the above analysis by the Court of Appeals was squarely contradicted by *Avco Corp. v Aero Lodge No. 735* (1968) 390 US 557, 20 L Ed 2d 126, 88 S Ct 1235, in which removal was held proper although the relief sought by the plaintiff at that time could be obtained only in state court. *Caterpillar Inc. v Williams* (1987) 482 US 386, 391 n4, 96 L Ed 2d 318, 107 S Ct 2425. But see *Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389, 1395, in which the court, quoting from *Young v Anthony's Fish Grottos, Inc.* (9th Cir 1987) 830 F2d 993, 997 noted, that "[i]n applying the 'complete preemption' doctrine, we have emphasized that it is not enough that federal law preempts state law, federal law must also 'supplant [the state law claim] with a federal claim.'"

In *Ethridge*, removal based on complete preemption under §§7-8 of the National Labor Relations Act (29 USC §§157-158) was held improper. The court reasoned that §§7-8 confer original jurisdiction in the National Labor Relation Board rather than in the district court to determine plaintiff's retaliatory discharge claim for union organizing efforts. Because the district court lacked original jurisdiction, it also lacked removal jurisdiction, and thus the district court was required to remand the case to state court under 28 USC §1447(c). *Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389, 1396.

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§22.14 (a) How Complete Preemption Is Determined

The court must look to the intent of Congress in enacting the legislation in question to determine if the federal law completely preempts state law in the area. *Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389, 1396. See *Metropolitan Life Ins. Co. v Taylor* (1987) 481 US 58, 66, 95 L Ed 2d 55, 107 S Ct 1542 ("touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the preemption defense but the intent of Congress"). If the court determines that it was the intent of congress that the federal legislation completely preempt state law in the area, removal is appropriate. See generally *Metropolitan Life Ins. Co. v Taylor, supra*. On the other hand, if the court finds that there was no congressional intent in enacting the legislation for complete preemption, the court must remand the case back to the state court under 28 USC §1447(c). *Ethridge v Harbor House Restaurant, supra*.

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§22.15 (b) Examples of When Complete Preemption Doctrine Applied

The defense of complete preemption giving rise to removal based on the artful pleading doctrine (see §22.13) often occurs in the area of labor relations. Several cases have upheld removal against remand motions on the basis of the complete preemption doctrine when defendant's petition (now notice) for removal claimed that a state law complaint actually hid a labor-management dispute subject to the Labor Management Relations Act (LMRA) §301 (29 USC §185) and the court found that §301 applied. See, *e.g., Avco Corp. v Aero Lodge No. 735* (1968) 390 US 557, 20 L Ed 2d 126, 88 S Ct 1235 (heart of complaint involved clause in collective bargaining agreement). See generally *Caterpillar Inc. v Williams* (1987) 482 US 386, 393, 96 L Ed 2d 318, 107 S Ct 2425 (complete preemptive effect of §301 discussed, but §301 held inapplicable under facts, thus case not removable to federal court); *Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389 (case discussed in §22.13).

Removal has also been upheld in other areas based on the complete preemption doctrine. For example, in *Sweeney v Morgan Driveaway, Inc.* (D Colo 1975) 394 F Supp 1216, plaintiff sued in state court for breach of contract for shipment of a mobile home from one state to another, negligence, and outrageous conduct concerning the contract. The case was removed to federal court and plaintiff's motion for remand was denied. The court characterized plaintiff's complaint as stating a federal cause of action under the Carmack Amendment to the Interstate Commerce Act (49 USC §20(11)). The court held that the Carmack Amendment preempted state and common law damage claims resulting from interstate shipment of goods and that federal law exclusively governs a carrier's liability in this area. On federal courts' original jurisdiction over actions arising under any act of congress regulating commerce, see 28 USC §1337). In *Bright v Bechtel Petroleum, Inc.* (9th Cir 1986) 780 F2d 766 (discussed in §22.11), the court applied the artful pleading doctrine to a tax case under the guise of a breach of contract claim. See *Aetna Health, Inc. v Davila* (2004) 542 US 200, 159 L Ed 2d 312, 124 S Ct 2488 (enforcement remedy under §502(a)(1)(b) of Employee Retirement Income Security Act (ERISA) (29 USC §1132(a)(1)(B)) is exclusive and completely preempts state law claims); *Metropolitan Life Ins. Co. v Taylor* (1987) 481 US 58, 95 L Ed 2d 55, 107 S Ct 1542 (purported state law claims completely preempted by ERISA §502(a)(1)(b); federal court had removal jurisdiction).

In determining whether removal will be upheld, counsel must distinguish between the complete preemption doctrine, in which removal would be proper (see §22.13), and other defenses, including federal preemption, in which removal would be improper (see §§22.8-22.9, 22.12). The following two examples illustrate this distinction:

EXAMPLE 1: *A* sues *B* for intentional infliction of emotional distress and invasion of privacy, claiming that *B* published a statement in which he claimed that *A* had served six months in jail in 1967 for conspiracy to commit mail fraud. *B* removes, claiming that the only issue to be decided involves the First Amendment to the United States Constitution and the cases interpreting it, because *A* was, at the time of publication, running for the local city council, and was thus a public figure. As such, *B* claims that removal jurisdiction should exist under 28 USC §1441(a)-(b). Removal in this case would be improper. Invasion of privacy and intentional infliction of emotional distress are proper common law claims which have not been preempted, much less supplanted, with an elusive federal remedy, and the state courts have jurisdiction to determine defenses related to the United States Constitution and cases decided thereunder.

EXAMPLE 2: *A* sues *B*, claiming that *A* slipped, fell, and injured herself due to an unsafe condition on *B*'s property. *B* removes, showing in her removal notice that the property on which the unsafe condition allegedly existed was an oceangoing vessel owned by *B* and operating in international navigable waters. *B*'s removal is probably proper, because by the enactment of 28 USC §1333(1), Congress intended to provide for exclusive federal jurisdiction relating to admiralty and maritime cases. Moreover, the court may appropriately look to matters such as *B*'s removal notice to ascertain the facts giving rise to removal (see §22.11).

On court exercising removal jurisdiction based on application of artful pleading doctrine (see §22.10) when state law complaint drafted to avoid stating allegations or claims resolved against plaintiff by earlier federal judgment, see *Ethridge v Harbor House Restaurant* (9th Cir 1988) 861 F2d 1389, 1403 (preclusion effect of federal judgment always

question of law).

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IV. REMOVAL OF DIVERSITY CASES

§22.16 A. Diversity Removal Jurisdiction Generally; Jurisdictional Amount

In addition to federal question jurisdiction (see §§22.6-22.15), district courts have original jurisdiction based on diversity of citizenship. Original district court jurisdiction based on diversity of citizenship exists under 28 USC §1332(a) in all civil actions when the amount in controversy exceeds $75,000, exclusive of costs and interest, and is between citizens of:

- Different states;
- A state "and citizens or subjects of a foreign state"; or
- Different states "and in which citizens or subjects of a foreign state are additional parties."

Original district court jurisdiction based on diversity of citizenship also exists when the amount in controversy exceeds $75,000, exclusive of costs and interest, and is between a foreign state, defined in 28 USC §1603(a), "as plaintiff and citizens of a [s]tate or of different [s]tates." 28 USC §1332(a). Because under 28 USC §1332(a) the district courts have original jurisdiction in diversity of citizenship cases when the amount in controversy exceeds $75,000, the district courts have removal jurisdiction of such matters under 28 USC §1441(a)-(b).

However, in addition to the requirement for diversity jurisdiction that there be complete diversity between the plaintiffs and defendants (*City of Indianapolis v Chase Nat'l Bank* (1941) 314 US 63, 69, 86 L Ed 47, 62 S Ct 15; *Stonybrook Tenants Ass'n v Alpert* (D Conn 1961) 194 F Supp 552, 556), removal is proper under 28 USC §1441 only if none of the defendants properly joined and served is a citizen of the state where the action is brought. 28 USC §1441(b). Thus, if there is complete diversity between plaintiffs and defendants but one of the defendants named and served is a citizen of the state in which plaintiff brings the action, removal is improper. 28 USC §1441(b). See *Hunter v Philip Morris USA* (9th Cir 2009) 582 F3d 1039, 1043; *Pecherski v General Motors Corp.* (8th Cir 1981) 636 F2d 1156, 1160. Furthermore, if one of the defendants named in good faith, even if not served, will defeat complete diversity between plaintiffs and defendants, removal is improper. *Clarence E. Morris, Inc. v Vitek* (9th Cir 1969) 412 F2d 1174. See *Pecherski v General Motors Corp., supra*.

Moreover, for removal to be proper, diversity must exist at the time of commencement of the suit and at the time the notice of removal is filed. *Gibson v Bruce* (1883) 108 US 561, 27 L Ed 825, 2 S Ct 873 (decided before current notice procedure; party cannot deprive state court of jurisdiction it properly had over party by changing citizenship after suit commenced); *Stonybrook Tenants Ass'n v Alpert, supra*. There is an exception to this requirement, however. Diversity need not exist at the time of commencement of the suit for removal to be proper if diversity is created by an event occurring thereafter, *e.g.,* voluntary dismissal of a party whose presence destroyed diversity. See *Strasser v KLM Royal Dutch Airlines* (CD Cal 1986) 631 F Supp 1254, 1256. See also §22.72; *Clarence E. Morris, Inc. v Vitek, supra*.

NOTE: On removal of actions brought against foreign states without regard to a jurisdictional amount under 28 USC §1441(d), see §22.34.

On original diversity jurisdiction generally, see chap 7.

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B. Plaintiff as Master of Plaintiff's Complaint

§22.17 1. In General

Generally, plaintiff is the master of plaintiff's complaint and can choose the forum in which to bring the action. See §22.8. Thus, *e.g.,* plaintiff may file a suit in state court seeking to recover a specific amount that is less than the required jurisdictional amount for diversity jurisdiction even though plaintiff is entitled to recover a greater amount and thereby prevent removal. See *St. Paul Mercury Indem. Co. v Red Cab Co.* (1938) 303 US 283, 294, 82 L Ed 845, 58 S Ct 586. When plaintiff seeks certain remedial relief including compensatory damages, however, whether the jurisdictional amount is sufficient for removal is determined by plaintiff's claim as shown by the record at the time the notice of removal is filed. See *Harrison v Grandison Co.* (ED La 1940) 34 F Supp 356. The question of jurisdiction is determined by the amount or value sought to be recovered by plaintiff, or the amount or value that the defendant will lose if plaintiff is successful with the suit. *Harrison v Grandison Co., supra*. See *Cappa v New Jellico Coal Co.* (ED Tenn 1950) 87 F Supp 369 (plaintiff sought to recover a sum not to exceed $3000 under state workers' compensation law without alleging a definite percent of disability; attempted limitation on recovery held a nullity as violative of state compensation law; jurisdictional amount present). On aggregation of amount of claims when more than one claim is alleged or when there is more than one plaintiff, see chap 7.

Plaintiff's motive in joining defendants is immaterial provided there is in good faith a cause of action against the joined defendants. *Mecom v Fitzsimmons Drilling Co.* (1931) 284 US 183, 189, 76 L Ed 233, 52 S Ct 84. Thus, plaintiff may join defendants to avoid federal jurisdiction. *Mecom v Fitzsimmons Drilling Co., supra*. Although plaintiff is the master of plaintiff's complaint, plaintiff cannot destroy the requisite diversity of citizenship for removal jurisdiction, however, by the fraudulent joinder of parties. See §§22.19-22.21. Nor can plaintiff defeat removal jurisdiction by joinder of formal or unnecessary parties. *Salem Trust Co. v Manufacturers' Fin. Co.* (1924) 264 US 182, 189, 68 L Ed 628, 44 S Ct 266. In determining whether there is the requisite diversity for removal jurisdiction, the court will disregard the citizenship of nominal or formal parties and consider only the citizenship of indispensable and necessary parties. *Stonybrook Tenants Ass'n v Alpert* (D Conn 1961) 194 F Supp 552, 556. The court will also disregard the citizenship of fraudulently joined parties. See §22.19. On court looking beyond complaint to determine issue of diversity, see §22.21.

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§22.18 2. Effect of Amendments to Complaint

There is no ground for removal if, before a notice of removal is filed (see §22.76), plaintiff who commenced a state court action seeking damages in excess of the jurisdictional amount required for removal amends its complaint to seek a reduced sum below the jurisdictional amount required for removal. It is immaterial that plaintiff's object in reducing the amount sought to be recovered is to prevent removal. *Anderson v Western Union Tel. Co.* (ED Ark 1914) 218 F 78. On jurisdictional amount generally, see §22.16. Conversely, if, at the time of commencement of the state action, the damages sought in the complaint are less than the jurisdictional amount required for removal, and plaintiff thereafter amends the complaint to seek damages in the jurisdictional amount, the case becomes removable. *Journal Pub. Co. v General Cas. Co.* (9th Cir 1954) 210 F2d 202, 204.

NOTE: Historically, if after removal the amount recoverable was reduced below the jurisdictional requirement by stipulation, amendment, or otherwise, the district court was not divested of jurisdiction and proceeded with the case. *St. Paul Mercury Indem. Co. v Red Cab Co.* (1938) 303 US 283, 292, 82 L Ed 845, 58 S Ct 586. Plaintiff could not thereafter have the case remanded to state court. *St. Paul Mercury Indem. Co. v Red Cab Co., supra*. *St. Paul Mercury,* however, was decided before Congress amended 28 USC §1447(c) in 1988, which now provides that a court *is* divested of jurisdiction after removal if, by amendment, plaintiff reduces its damage request to below the jurisdictional minimum. See *Villano v Kohl's Dep't Stores, Inc*. (SD NY 2005) 362 F Supp 2d 418 (court granted plaintiff's motion for remand in personal injury action because, after removal, plaintiff's amended complaint no longer met the amount in controversy requirement).

Similarly, absent fraudulent joinder (see §§22.19-22.20), it appears that a plaintiff may, before a notice of removal is filed, amend the complaint to join as a defendant a citizen of the state where the action is pending and thereby defeat removal jurisdiction. See *Jones v Cargill Nutrena Feed Div.* (SD Ala 1987) 665 F Supp 907 (amended complaint adding nondiverse party defendant filed in state court day before appropriate state court received notice of the removal, which was filed in wrong state court; see §22.88). The plaintiff, before notice of removal is filed, may also amend a complaint to dismiss a nondiverse defendant creating diversity of citizenship even if intended as trial strategy and thereby make the case removable. See *Gravitt v Southwestern Bell Tel. Co.* (WD Tex 1975) 396 F Supp 948.

After a case is removed to federal court, whether a plaintiff can amend the complaint in such a way as to cause the case to be remanded to state court appears to depend on the circumstances of the case. Under 28 USC §1447(e), if plaintiff seeks to join additional defendants whose joinder would destroy jurisdiction, the court has discretion to deny joinder or to grant joinder and remand the case back to state court. Compare *PG&E v Fibreboard Prods.* (ND Cal 1953) 116 F Supp 377 (plaintiff could not amend complaint to add two defendants as joint tortfeasors to destroy diversity) with *Ingersoll v Pearl Assur. Co.* (ND Cal 1957) 153 F Supp 558 (plaintiff who failed to state cause of action against named nondiverse defendant in original state court complaint allowed to amend complaint after removal when allegations in amended complaint showed named defendant was an indispensable party; plaintiff's motion to remand case granted) and *Heintz v Ohio Cas. Ins. Co.* (SD Cal 1953) 112 F Supp 199 (following removal, plaintiff filed first amended complaint adding two defendants who were not formal or nominal parties, or necessary or indispensable parties; pleadings silent as to citizenship of defendants but suggested that they like plaintiff were California citizens; court held that it would remand case unless within 30 days it could be shown by appropriate pleadings, or dismissal of nondiverse defendants by plaintiff, that diversity existed). However, the addition, after removal, of a necessary party who is a citizen of the forum state but does not otherwise destroy diversity does not require remand. *Spencer v United States Dist. Court* (9th Cir 2004) 393 F3d 867.

On rule requiring that a case remain in state court unless plaintiff by voluntary act brings about a change rendering case removable, see *Self v General Motors Corp.* (9th Cir 1978) 588 F2d 655, 657 (final judgment on merits dismissing one defendant not basis for removal; only plaintiff's voluntary act can bring about removal). See also §22.72.

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3. Effect of Fraudulent Joinder

§22.19 a. Does Not Defeat Diversity

Although plaintiff as master of the complaint can select the forum in which to bring the action (see §22.17), a plaintiff cannot fraudulently join a resident defendant having no real connection with the controversy to prevent removal. *Wilson v Republic Iron & Steel Co.* (1921) 257 US 92, 97, 66 L Ed 144, 42 S Ct 35. Fraudulent joinder is a term of art that does not reflect on plaintiff or plaintiff's counsel. *Morris v Princess Cruises, Inc*. (9th Cir 2001) 236 F3d 1061, 1067; *Lewis v Time, Inc.* (ED Cal 1979) 83 FRD 455, 460. Rather, fraudulent joinder is the rubric applied when the court determines that plaintiff has not stated a cause of action against a nondiverse defendant, "or in fact no cause of action exists." *Morris v Princess Cruises, Inc*., *supra*; *Lewis v Time, Inc., supra*. If there can be no recovery under state law for the cause of action alleged or under the facts alleged, and the failure is obvious according to the settled rules of the state (*Morris v Princess Cruises, Inc., supra*), or there is no intention to secure a joint judgment, the joinder is deemed fraudulent (*Parks v New York Times Co.* (5th Cir 1962) 308 F2d 474, 478; *Lewis v Time, Inc., supra*). See also *Hunter v Philip Morris USA* (9th Cir 2009) 582 F3d 1039, 1043. Thus, courts are not required to delve into the plaintiff's state of mind, or that of plaintiff's counsel, in order to determine a fraudulent intent.

If, in a case removed to federal court, the plaintiff's complaint has stated a cause of action against the nondiverse defendant and any failure to do so is not obvious according to the settled law of the state, then remand is appropriate. See *Hunter v Philip Morris USA* (9th Cir 2009) 582 F3d 1039. In *Hunter*, the plaintiff's product liability suit against a cigarette manufacturer and a local merchant had been removed to federal court on grounds of federal diversity jurisdiction; defendants argued and the trial court found that because plaintiff's claims against the state defendant were impliedly preempted by the congressional policy favoring the legality of cigarettes, the state defendant had been fraudulently joined. The Ninth Circuit disagreed, stating that the defense of implied preemption could not be used as a basis for finding fraudulent joinder, and, even if it could, the attempt here was unsuccessful because preemption requires inquiry into the merits of plaintiff's claims against all the defendants and an analysis of federal law. Plaintiff had stated a claim against the merchant under Alaska state law, and the Ninth Circuit refused to find preemption in the absence of clear evidence of conflict between state and federal law.

When fraudulent joinder is present, the court may disregard fraudulently joined parties in determining diversity and retain jurisdiction. *Morris v Princess Cruises, Inc*., *supra*; *Lewis v Time, Inc., supra*. On court piercing the pleadings and considering entire record to determine basis for joinder, see §22.21.

On alleging facts rather than deductions and proving fraudulent joinder by clear and convincing evidence, see §§22.19-22.20.

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§22.20 b. Standard Court Applies to Determine if Liability Exists Under State Law

Some courts apply the standard that before fraudulent joinder will be found the court must determine that there is no "arguably reasonable basis" under the alleged facts for predicting that state law might impose liability on the joined resident defendant. See *Tedder v FMC Corp.* (5th Cir 1979) 590 F2d 115. If there is an arguably reasonable basis for joinder, the joinder is proper; if no arguably reasonable basis exists, the joinder is fraudulent and lack of diversity will not prevent removal. See *Tedder v FMC Corp., supra*. Other courts impose an even more rigorous standard, requiring that there be a "reasonable certainty that no possible liability exists" before making such a finding. *Voors v National Women's Health Org.* (ND Ind 1985) 611 F Supp 203, 208. If only a possibility that a right to relief exists, no finding of fraudulent joinder will be made (*Voors v National Women's Health Org., supra*) and the joined defendant's citizenship will be considered and thus prevent removal because of lack of diversity of citizenship.

In *Lewis v Time, Inc.* (ED Cal 1979) 83 FRD 455, 460, the court noted that some courts have applied an "any doubt standard," *i.e.,* that a case must be remanded "if there is any doubt whatsoever regarding the sufficiency or good faith of the plaintiff's allegations." The *Lewis* court rejected that standard, noting that no Ninth Circuit court had held it to apply. 83 FRD at 661. Rather in *Lewis,* a defamation action involving First Amendment considerations, the court applied a "reasonable basis" standard similar to that applied in *Tedder v FMC Corp., supra*, *i.e.,* whether on the facts involved there was a reasonable basis to predict that state law might impose liability. 83 FRD at 463. The court concluded that under the facts as alleged, a prima facie showing of fraudulent joinder had been made and the joined defendant would be disregarded for joinder purposes. The court denied plaintiff's remand motion, but noted that the court would entertain another remand motion, if plaintiff could demonstrate at any time before trial that a bona fide claim had been stated against the joined defendant or that facts existed that raised a real possibility of liability. 83 FRD at 466. See *Goldberg v CPC Int'l, Inc.* (ND Cal 1980) 495 F Supp 233, 239 (courts have found fraudulent joinder when there was "no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against that defendant or seek a joint judgment").

On alleging facts rather than deductions and proving fraudulent joinder by clear and convincing evidence, see §§22.19-22.20.

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§22.21 C. Defendant's Burden to Establish Diversity; When Court May Look Beyond Complaint

When removal is contested, by a motion to remand (see §22.92), on the ground of lack of diversity of citizenship, the defendant that removed the case has the burden of proving that the action is wholly between citizens of different states. *Wilson v Republic Iron & Steel Co.* (1921) 257 US 92, 97, 66 L Ed 144, 42 S Ct 35; *Hunter v Philip Morris USA* (9th Cir 2009) 582 F3d 1039, 1042 (defendant has burden of establishing that removal is proper); *Goldberg v CPC Int'l, Inc.* (ND Cal 1980) 495 F Supp 233, 236. Similarly, the removing defendant has the burden of proving by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount when the complaint does not specify the amount of damages. *Wilson v Republic Iron & Steel Co., supra; Sanchez v Monumental Life Ins. Co.* (9th Cir 1996) 102 F3d 398 (rejecting "converse legal certainty" test of *Hale v Billups of Gonzales, Inc.* (MD La 1985) 610 F Supp 162).

In determining the basis for joinder, *i.e.,* whether there was fraudulent joinder designed to defeat diversity (see §22.19), the court may look beyond the complaint and consider the entire record. *Lewis v Time, Inc.* (ED Cal 1979) 83 FRD 455, 460. On the standard applied by the court to determine if liability exists under state law, see §22.20. On artful pleading exception to the well-pleaded complaint rule concerning federal question jurisdiction, see §22.10.

NOTE: The jurisdictional amount in diversity cases is in excess of $75,000. 28 USC §1332. Consequently, no limited civil case (see chap 6) and not all claims classified as unlimited civil cases meet the threshold for diversity jurisdiction. When the jurisdictional amount is contested, a defendant seeking to remove based on diversity jurisdiction must show by a preponderance of the evidence that this component of diversity jurisdiction exists. *Sanchez v Monumental Life Ins. Co.* (9th Cir 1996) 102 F3d 398, 404. If the amount in controversy is not specified in the complaint, the court may look to "other papers" to determine the amount in controversy. See, *e.g., Birkenbuel v M.C.C. Constr. Co.* (D Mont 1997) 962 F Supp 1305, 1306.

Under the former petition for removal procedure, fraudulent joinder had to be alleged with particularity. The petition had to show facts leading to the conclusion of fraudulent joinder apart from the pleader's deductions. *Wilson v Republic Iron & Steel Co.* (1921) 257 US 92, 97, 66 L Ed 144, 42 S Ct 35; *Goldberg v CPC Int'l, Inc.* (ND Cal 1980) 495 F Supp 233, 239; *Rinehart v Consolidation Coal Co.* (ND WVa 1987) 660 F Supp 1140. Presumably, the rule is the same under the current notice procedure. On burden to prove fraudulent joinder by clear and convincing evidence, see *Parks v New York Times Co.* (5th Cir 1962) 308 F2d 474, 478; *Rinehart v Consolidation Coal Co., supra*. On preparation of notice of removal generally, see §22.76.

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D. Special Rules on Citizenship

§22.22 1. Individuals

Citizenship for the purpose of diversity of citizenship is equated with the individual's domicile (see *Kantor v Wellesley Galleries, Ltd.* (9th Cir 1983) 704 F2d 1088, 1090) not his or her residence (see *Mantin v Broadcast Music, Inc.* (9th Cir 1957) 244 F2d 204).

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§22.23 2. Doe Defendants

Congress, in enacting the Judicial Improvements and Access to Justice Act, added a sentence to 28 USC §1441(a) providing that the citizenship of defendants sued under fictitious names must be disregarded for the purpose of removal. Thus, *Bryant v Ford Motor Co.* (9th Cir 1987) 844 F2d 602, in which the court held that presence of Doe defendants per se destroys diversity jurisdiction, was legislatively overruled (see *Ehrlich v Oxford Ins. Co.* (ND Cal 1988) 700 F Supp 495) and *Bryant* was later vacated (see 886 F2d 1526). Doe defendants are now to be disregarded entirely and thus can never prevent removal based on diversity. On problems that may arise under the rule, see Siegel, Commentary on 1988 Revision, 28 USC §1441(a). On retroactive effect of rule concerning one-year limitation period for removal in diversity cases, see cases cited in §22.73.

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§22.24 3. Corporations

A corporation, for the purpose of diversity jurisdiction under 28 USC §§1332 and removal jurisdiction under 28 USC §1441, is deemed to be a citizen of the state in which it is incorporated, and the state where its principal place of business is located. 28 USC §1332(c); *R.G. Barry Corp. v Mushroom Makers, Inc.* (2d Cir 1979) 612 F2d 651, 654.

Corporate citizenship for purposes of diversity differs from whether a corporation is "doing business" in a state for purposes of that state's "long-arm statute." Citizenship for purposes of diversity also differs from the question of the propriety of venue. Thus, "[a] corporation, by qualifying to do business in a state and by consenting to be sued in the courts of that state, does not become a citizen of that state for diversity purposes, nor does it waive its right to a removal to the federal court." *Sugar Corp. v Environeering, Inc.* (D PR 1981) 520 F Supp 996, 999.

Determining corporate citizenship by ascertaining the state of incorporation should usually pose no problem. Determining corporate citizenship by ascertaining the state in which the corporation's principal place of business is located may be more difficult. Federal courts generally use either the "place of operations" test or the "nerve center test" to determine a corporation's principal place of business. *Tosco Corp. v Communities for a Better Env't* (9th Cir 2001) 236 F3d 495, 502.

For further discussion of diversity jurisdiction over corporations, see §§7.57-7.59.

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§22.25 4. Partnerships

Unlike corporations that may, at most, be the citizen of two states (the state of incorporation, and, if different, the state of the company's principal place of business (see §22.24)), a partnership for purposes of diversity "is a citizen of each state of which a general partner is a citizen." *Lewis v Odell* (2d Cir 1974) 503 F2d 445, 446. The citizenship of the partnership does not change if there is a post-filing change in the citizenship of its partners. *Grupo Dataflux v Atlas Global Group, LP* (2004) 541 US 567, 158 L Ed 2d 866, 124 S Ct 1920 (post-filing change in citizenship of one party does not cure defect in diversity jurisdiction).

When the partnership also contains limited partners, there is conflict in the circuits as to whether the citizenship of the limited partners is also considered in determining diversity jurisdiction, *i.e.,* whether the partnership is also a citizen of each state of which a limited partner is a citizen. See §7.61. There is no Ninth Circuit Court of Appeals opinion directly on point. However, in *Finalco Equip. Invs. X, LP v Welch* (ND Cal 1989) 718 F Supp 1446, the court held that the citizenship of limited partners is relevant for diversity purposes and is to be considered along with the citizenship of the general partners in determining diversity jurisdiction. See *Boulder Creek Co. v Maruko Inc.* (CD Cal 1991) 772 F Supp 1150, 1153 (no diversity between limited partnership member and partnership or other member); *Sage Investors v Group W Cable, Inc.* (D Ariz 1986) 666 F Supp 186, 188 (citizenship of limited partners considered); *Windward City Ctr. v Trans-America Occidental Life Ins. Co.* (D Haw 1985) 613 F Supp 1216, 1219 (citizenship of limited partners considered). Thus, it appears that within the Ninth Circuit the presence of a limited partner plaintiff who has the same citizenship as a defendant will defeat diversity jurisdiction despite the fact that the general partners' citizenship differs from that of defendants. See *Finalco Equip. Invs. X, LP v Welch, supra*.

NOTE: There is no limit to the number of states that a partnership may be a citizen of and, depending on the number of general and limited partners, diversity jurisdiction could become an impossibility. On requirement to allege citizenship of each partner to establish diversity jurisdiction, see *Fifty Assocs. v Prudential Ins. Co.* (9th Cir 1970) 446 F2d 1187, 1190 (insufficient allegations for diversity jurisdiction). See also §22.27.

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§22.26 5. Joint Ventures

It has been held that, for diversity jurisdiction purposes, citizenship of a joint venture is determined by the citizenship of its individual members. *Universal Steel & Metal Co. (1975) Ltd. v Railco* (D Vt 1978) 465 F Supp 7, 9 (joint venture formed by two corporations).

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§22.27 6. Unincorporated Associations

For diversity jurisdiction purposes, an unincorporated association is deemed a citizen of each state in which it has a member that is a citizen. *United Steelworkers of Am. v Bouligny* (1965) 382 US 145, 15 L Ed 2d 217, 86 S Ct 272 (unincorporated labor organization). Thus, when an unincorporated association is a party to a suit and the state citizenship of any of its members is the same as the state citizenship of any opposing party, diversity jurisdiction is lacking in the federal district court and removal is improper on that basis. *Baer v United Servs. Auto. Ass'n* (2d Cir 1974) 503 F2d 393, 395. See generally *Finalco Equip. Invs. X, LP v Welch* (ND Cal 1989) 718 F Supp 1446, 1448 (all members of unincorporated association must be diverse from opposing party). This rule may make it impossible to obtain diversity jurisdiction over large unincorporated associations, particularly when their operations are interstate.

NOTE: Because unincorporated associations are citizens of all states in which their members are domiciled, the party seeking to obtain diversity jurisdiction must plead the citizenship of its individual members to ensure federal jurisdiction. For example, in *Baer v United Servs. Auto. Ass'n* (2d Cir 1974) 503 F2d 393, 397, the court ruled that because the citizenship of the members of the association were not alleged, the complaint was defective in that it failed to show diversity of citizenship on its face and thus failed to negate the possibility that diversity did not exist. See also *Fifty Assocs. v Prudential Ins. Co.* (9th Cir 1970) 446 F2d 1187, 1190 (rule stated that "citizenship of each member of an unincorporated association must be alleged").

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§22.28 7. Aliens

Until recently, diversity jurisdiction did not extend to controversies between aliens, *i.e.,* diversity was lacking when both the plaintiff and defendant were aliens. See *Trinanes v Schulte* (SD NY 1970) 311 F Supp 812. Similarly, the presence of aliens on both sides of a controversy to which a citizen of a state of the United States was also a party destroyed diversity jurisdiction based on 28 USC §1332(a)(2). *Corporation Venezolana de Fomento v Vintero Sales Corp.* (2d Cir 1980) 629 F2d 786, 790; *Trans World Hosp. Supplies Ltd. v Hospital Corp.* (MD Tenn 1982) 542 F Supp 869. The Judicial Improvements and Access to Justice Act enacted on November 19, 1988, has modified 28 USC §1332(a). As modified, 28 USC §1332(a) provides that, for the purposes of 28 USC §§1332(a), 1335, and 1441 (removal), an alien admitted to the United States for permanent residence is deemed a citizens of the state in which the alien is domiciled. Thus, diversity may now exist between aliens if either a plaintiff or a defendant is an alien who has been admitted to the United States as a permanent resident because the alien "qualifies as a citizen of the state in which he [or she] is in fact domiciled" (unless such a grant of jurisdiction is held to violate US Const art III, §2). Siegel, Commentary on 1988 Revision, 28 USCA §1332.

For further discussion, see §§7.63-7.64.

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§22.29 8. States

For the purposes of diversity jurisdiction a state is not a citizen. See *Moor v County of Alameda* (1973) 411 US 693, 717, 36 L Ed 2d 596, 93 S Ct 1785. Therefore, when a state is a real party in interest to a lawsuit there can be no removal based on diversity jurisdiction because a state is not a citizen as required by the removal statute. *People v Kerr-McGee Chem. Corp.* (7th Cir 1982) 677 F2d 571, 575 n5; *Glenmede Trust Co. v Dow Chem. Co.* (ED Penn 1974) 384 F Supp 423, 431. This rule precluding removal also applies when a party is named in the action who actually represents a state and the state is the real party in interest in the action. 384 F Supp at 431.

NOTE: A "municipal subdivision of a state, such as a county, city, town or school district, having a separate corporate entity, is a citizen" for the purposes of diversity jurisdiction and removal. *Oklahoma v Oklahoma Natural Gas Corp.* (10th Cir 1936) 83 F2d 986, 988. See *Moor v County of Alameda, supra* (political subdivision of state, unless simply arm or alter ego of state, is citizen of state for diversity jurisdiction purposes).

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§22.29A E. Class Action Fairness Act of 2005

Congress' enactment of the Class Action Fairness Act of 2005 (CAFA) (Pub L 109-2, 119 Stat 4) amended 28 USC §1332(d) to ease the diversity jurisdiction requirements for certain class suits. See discussion in §7.67. For example, CAFA confers diversity jurisdiction over class actions when the aggregate amount in controversy exceeds $5 million and at least one plaintiff is a citizen of a state or foreign state different from that of any defendant. 28 USC §1332(d)(2)(A)-(C). See *Berry v American Express Publishing Corp*. (CD Cal 2005) 381 F Supp 2d 1118 (remand granted when plaintiff's class action for injunctive relief did not meet $5 million minimum requirement under CAFA).

CAFA also extended federal removal jurisdiction to "mass actions," which are any civil actions in which 100 or more people propose to be treated jointly and the other jurisdictional requirements are met, *e.g.*, the aggregate amount in controversy exceeds $5 million and at least one plaintiff is a citizen of a state or foreign country different from any defendant. 27 USC §1332(d)(11); *Tanoh v Dow Chem. Co.* (9th Cir 2009) 561 F3d 945. The "mass action" provision is fairly narrow. 561 F3d at 953 (case remanded to state court when none of seven separate actions had more than 100 plaintiffs and thus were not "mass actions" under CAFA).

NOTE: Federal removal jurisdiction in a "mass action" is limited to those plaintiffs whose claims meet the $75,000 amount in controversy requirement for federal diversity jurisdiction. 28 USC §1332(d)(11)(B)(i). The Ninth Circuit has not decided whether this means that 100 or more plaintiffs must individually satisfy the $75,000 amount in controversy requirement. 561 F3d at 953 n4.

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V. REMOVAL OF SEPARATE AND INDEPENDENT CLAIMS

§22.30 A. General Rule

Beginning on December 1, 1990, whenever a separate and independent claim or cause of action that is "within the jurisdiction conferred by [28 USC §]1331" (*i.e.,* within the district court's federal question jurisdiction; see §§7.15-7.32) is joined with one or more nonremovable claims or causes of action, the entire case may be removed to the federal court, which then has discretion either to (1) determine all issues in the case or (2) "remand [to the state court] all matters in which state law predominates." 28 USC §1441(c).

NOTE: Before December 1, 1990, a separate and independent claim or cause of action was also removable if it "would [have been] removable if sued on alone," and the district court's discretion to remand was limited to "matters not otherwise within its original jurisdiction."

Prior legislative history. Before 1866, there was no provision for removal concerning separable controversies in a suit between multiple parties. If an entire suit could not be removed because the requisite diversity of jurisdiction was lacking, no part of the suit could be removed. See *Barney v Latham* (1881) 103 US 205, 26 L Ed 514. This rule changed with enactment of the Separable Controversy Act of 1866 (14 Stat 306), which authorized removal of a separable controversy, assuming the requisite diversity of citizenship was present. See *Barney v Latham, supra*. Under the Act, defendants whose citizenship was different from that of plaintiffs were authorized to remove to federal court "a separable controversy" in a suit between them while the remainder of the action, between citizens of the same state, remained in the state court. See *Barney v Latham, supra*. See also 14C Wright, Miller & Cooper, Federal Practice and Procedure, Removal From State Courts §3724 (3d ed 1998). This rule was modified in 1875 by the Judiciary Act of 1875 (18 Stat 470), which provided that when a separable controversy was contained in the action, the entire action rather than just the severable controversy was required to be removed to federal court. See *Barney v Latham, supra*. See also 14A Wright, Miller & Cooper, Federal Practice and Procedure, Removal From State Courts §3724.

In 1948, the law was changed again to require for removability that the claim or cause of action that would be removable if sued on alone be not just "separable," but "separate and independent" from the otherwise nonremovable claims. 62 Stat 937. One of the purposes of Congress in enacting 28 USC §1441(c) was to limit removal from state courts. *American Fire & Cas. Co. v Finn* (1951) 341 US 6, 10, 95 L Ed 702, 71 S Ct 534. See *Lewis v Time, Inc.* (ED Cal 1979) 83 FRD 455, 458. See also *Thornton v Allstate Ins. Co.* (ED Mich 1980) 492 F Supp 645, 648 (in light of congressional policy to limit litigation removed to federal court, few cases deemed to fulfill separate and independent claim or cause of action requirement).

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§22.31 B. Determining What Constitutes Separate and Independent Claim

Under 28 USC §1441(c), the removable claim or cause of action giving rise to jurisdiction must be separate and independent from the nonremovable claims or causes of action. Separate and independent connotes an entirely distinct controversy that differs from and is not dependent on the other causes of action. See *Voors v National Women's Health Org.* (ND Ind 1985) 611 F Supp 203, 209. A claim is deemed separate and independent if (1) it involves an actionable wrong that is separate from the other claims and (2) complete relief may be rendered concerning it "without reference to the other claims and without the presence of the parties to the other claims." *Ehrlich v Oxford Ins. Co.* (ND Cal 1988) 700 F Supp 495, 497.

Conversely, there is no separate and independent claim or cause of action under §1441(c) when a plaintiff seeks relief for a single wrong "arising from an interlocked series of transactions." *American Fire & Cas. Co. v Finn* (1951) 341 US 6, 14, 95 L Ed 702, 708, 71 S Ct 534. Plaintiffs cannot parlay a single wrong into a separate and independent claim or cause of action by multiplying legal theories seeking relief "or by multiplying defendants against whom a remedy is sought for the same injury." *Clarence E. Morris, Inc. v Vitek* (9th Cir 1969) 412 F2d 1174, 1176. It is immaterial that some counts sound in contract and others in tort, particularly when only a single recovery against different defendants would be permitted. *Sessions v Chrysler Corp.* (9th Cir 1975) 517 F2d 759. Whether there is a single wrong is determined by examination of whether or not a single primary right of plaintiff was invaded, not by the number of alleged different causes of action. *American Fire & Cas. Co. v Finn* (1951) 341 US 6, 13, 95 L Ed 702, 798, 71 S Ct 534; *Addison v Gulf Coast Contracting Servs.* (5th Cir 1984) 744 F2d 494, 500. The court will look to plaintiff's pleadings to determine if a claim is separate and independent and properly removable under 28 USC §1441(c). *American Fire & Cas. Co. v Finn* (1951) 341 US 6, 14, 95 L Ed 702, 709, 71 S Ct 534; *Boggs v Lewis* (9th Cir 1988) 863 F2d 662. For cases in which no separate claim or cause of action was found, see *Chappell v SCA Servs.* (CD Ill 1982) 540 F Supp 1087, 1093 (single wrong); *Teleco, Inc. v Southwestern Bell Tel. Co.* (WD Okla 1973) 392 F Supp 690 (single incident); *McKinney v Rodney C. Hunt Co.* (WD NC 1978) 464 F Supp 59, 64 (series of interwoven transactions).

NOTE: What constitutes a separate and independent claim or cause of action is determined by federal law. In diversity cases, state law applies to determine the nature or character of plaintiff's claim and federal law applies to determine whether the separate and independent standard of 28 USC §1441(c) has been met. *Thornton v Allstate Ins. Co.* (ED Mich 1980) 492 F Supp 645, 648.

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§22.32 C. Effect of Rule When Federal Question Involved

Removal under 28 USC §1441(c) has been limited, since December 1, 1990, to separate and independent claims or causes of action within the district court's federal question jurisdiction. See §22.30. Therefore, previously decided cases that suggested restrictions on federal question removals may now be of little precedential value. See, *e.g., Owen Equip. & Erection Co. v Kroger* (1978) 437 US 365, 371, 57 L Ed 2d 274, 98 S Ct 2396, in which the court specified that as a constitutional minimum requirement a federal and state claim must arise from a "common nucleus of operative facts" for the federal court to have jurisdiction over the pendent state claim (absent diversity); *American Fire & Cas. Co. v Finn* (1951) 341 US 6, 14, 95 L Ed 702, 71 S Ct 534, holding that no separate and independent claim or cause of action arises from an interlocked series of transactions (see §22.31); *Contemporary Servs. Corp. v Universal City Studios, Inc.* (CD Cal 1987) 655 F Supp 885, 890, which notes (in n6) that removal of the entire case under 28 USC §1441(a) creates a constitutional problem because no separate and independent claim arises from a "common nucleus of operative facts," which would mean that instances in which a federal claim is removable under 28 USC §1441(c) are very limited, and holding that when plaintiffs pleaded a federal claim against certain but not all defendants and pendent state claims arising from a common nucleus of operative facts against the defendants, 28 USC §1441(c) did not bar removability of the case to federal court and that removal was proper under 28 USC §1441(a)-(b) rather than under §1441(c). But see *Shaw v Lady Pac., Inc.* (D Alaska 1983) 577 F Supp 2, in which the court held that 28 USC §1441(c) barred removal of an otherwise removable claim that was not separate and independent from a nonremovable claim. See also *Kinsey v Nestor Exploration Ltd.* (ED Wash 1985) 604 F Supp 1365 (28 USC §1441(c) bars removal).

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§22.33 D. Applicability of Rule When Diversity of Citizenship Involved

When federal court jurisdiction in a case is based on diversity of citizenship, not on the presence of a federal question, it appears that—especially since December 1, 1990 (see §22.30)—removal must be accomplished under 28 USC §1441(a)-(b), without the possibility of assistance from 28 USC §1441(c).

NOTE: It has been suggested that removal under §1441(c) in diversity cases might serve the purpose of permitting removal when a plaintiff has, through inadvertence or improper design, named a nondiverse defendant in addition to the defendants against whom the suit ought to have been limited.

Even before the 1990 change in §1441(c), the instances in which it provided a basis for removal were rare. See, *e.g.,* discussion in *Marriage of Pardee* (CD Cal 1976) 408 F Supp 666, 668 (circumstances under §1441(c) when removal can be effected "are notoriously rare"); *Lewis v Time, Inc.* (ED Cal 1979) 83 FRD 455, 459 (joinder practice "generally negates section 1441(c) jurisdiction"). Whether removal under 28 USC §1441(c) is proper depends on the joinder of claims not on the joinder of parties. See *McKinney v Rodney C. Hunt Co.* (WD NC 1978) 464 F Supp 59, 63, illustrating a claim that was held not to be separate and independent and thus nonremovable under 28 USC §1441(c). But see *Boggs v Lewis* (9th Cir 1988) 863 F2d 662, in which separate and independent claims were found in the following situation: plaintiff brought a negligence action against one defendant, seeking compensation for medical expenses, loss of wages, and loss of earning capacity arising from injuries allegedly caused during a collision. Plaintiff also joined a bad faith claim against defendant's insurer, seeking emotional distress damages from the insurer for refusal in good faith to settle the claim based on the underlying accident in violation of a state statute. The court found that plaintiff's claims involved substantially different transactions and different relief in that one claim was for negligence whereas the claim against the insurer involved the insurer's conduct and events occurring after the accident. The court concluded that the claims were separate for purposes of 28 USC §1441(c) and therefore removal was proper.

NOTE: After removal under 28 USC §1441(c), there may be instances when it is appropriate for a defendant to move to be dropped as a party under Fed R Civ P 21 based on misjoinder of parties. On joinder of defendants generally in state court actions, see CCP §379. See also chap 14. On failure to raise objection of misjoinder of parties by demurrer or answer waiving objection in state court actions, see CCP §430.80. On when there is a waiver of the right to remove by acts done by defendant in state court generally, see §22.74. As seen in *Boggs v Lewis, supra,* there appears to be a small area in which claims are sufficiently related as to allow joinder but sufficiently distinct to not be interlocked and thus permit removal.

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VI. REMOVAL OF OTHER CLAIMS

§22.34 A. Actions Against Foreign States

Under 28 USC §1441(d), any civil action brought in a state court against a foreign state as defined in 28 USC §1603(a) may be removed by the foreign state to the district court "embracing the place where such action is pending." Under 28 USC §1603(a), except as used in 28 USC §1608, a "foreign state" includes not only foreign governments themselves, but also any political subdivision of such a government, as well as any agency or instrumentality of a foreign government as defined in 28 USC §1603(b). On removal there is no right to a jury trial and the action must be tried by the court. 28 USC §1441(d).

PRACTICE TIP: When considering the scope of institutions that may be agencies or instrumentalities of foreign governments, one should not be limited by the general concepts of private ownership common to the American free enterprise system. In many countries, airlines, rail systems, heavy industries, and other businesses are owned or run by the government and may constitute agencies or instrumentalities of that government so as to warrant removal under 28 USC §1441(d).

NOTE: When removal is based on 28 USC §1441(d), for good cause shown, the time limitations of 28 USC §1446(b) may be enlarged at any time. 28 USC §1441(d).

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§22.35 B. Actions Against Federal Officers

Generally, a civil action or criminal prosecution commenced in state court against federal officers is removable by such federal officers to the federal court for the district and division in which the state court is located. See 28 USC §1442. The term "federal officers" is not confined to law enforcement officials, but instead covers a wide range of persons employed by the federal government.

The persons who may remove the case to federal court are specified in 28 USC §1442(a) as follows:

> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue;
>
> (2) A property holder whose title is derived from any such officer where such action or prosecution affects the validity of any law of the United States;
>
> (3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;
>
> (4) Any officer of either House of Congress for an act in the discharge of his official duty under an order of such House.

A person "acting under" a federal officer must assist, or help carry out, the duties or tasks of the federal officer. *Watson v Philip Morris Cos.* (2007) 551 US 142, 168 L Ed 2d 42, 50, 127 S Ct 2301. A company is not acting under a federal officer if a federal regulatory agency supervises and monitors "in great detail" the company's activities. *Watson v Philip Morris Cos., supra*.

When an alien has commenced a personal action in state court against a citizen who is not a state resident and who at the time of the action's accrual was a civil officer of the United States, and jurisdiction over the nonresident defendant has been obtained by personal service, the defendant can remove the case to the federal district court for the district and division where the defendant was served. 28 USC §1442(b).

NOTE: Unlike removal under 28 USC §1441, when a state court suit is for an act done under color of federal office, the right to removal under 28 USC §1442(a) is absolute regardless of whether the suit could be originally brought in federal court. The basis for federal jurisdiction is the "federal interest in the matter." *Willingham v Morgan* (1969) 395 US 402, 406, 23 L Ed 2d 396, 89 S Ct 1813, quoting *Poss v Lieberman* (2d Cir 1962) 299 F2d 358, 359. Moreover, the defendant need not have the status of a federal officer at the time suit is commenced to remove the case to federal court. Rather, the test is whether, at the time the incident complained of occurred, the defendant was a federal officer within the meaning of 28 USC §1442(a). *Camero v Kostos* (D NJ 1966) 253 F Supp 331, 335.

Merely filing a cross-complaint against the Resolution Trust Corporation (RTC) does not enable the cross-complainant or other defendants to obtain removal; without a motion to remove by the RTC, the case must remain in state court. *California v Keating* (9th Cir 1993) 986 F2d 346.

For a case in which a removable claim under 28 USC §1442, and nonremovable claims regardless of the relationship between them and the §1442 claim, was removed to federal court, see *National Audubon Soc'y v Department of Water & Power* (ED Cal 1980) 496 F Supp 499, 508 (word "person" in statute construed to encompass government's agencies).

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§22.36 C. Action Against Military Personnel

A member of the armed forces against whom a state civil action or criminal prosecution is commenced charging that member with liability on account of acts done under color of his or her office or status, or in respect to which he or she claims any right, title, or authority under United States law concerning the armed forces, or under the law of war, may remove the case under 28 USC §1442a to the federal district court for the district where the matter is pending at any time before the trial or final hearing of the matter. Depending on the circumstances, removal may be proper under 28 USC §1442(a). See, *e.g., People v Maxwell* (D Colo 1954) 125 F Supp 18 (criminal prosecution of air force captain removable under 28 USC §1442(a)(1) rather than under 28 USC §1442a).

NOTE: Unlike removal under 28 USC §1441 (see §22.6), jurisdiction exists in the district court to hear a case removed under 28 USC §1442a even if the action could not have been commenced in federal court initially. *Mir v Fosburg* (9th Cir 1980) 646 F2d 342, 344.

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§22.37 D. Civil Rights Cases

A state civil action or criminal prosecution against a person who is denied or cannot enforce a right in state court arising under any law providing for equal civil rights for United States citizens or for all persons within its jurisdiction may be removed by that person to the federal district court for the district and division where the matter is pending. 28 USC §1443(1). Similarly, a defendant subject to a state civil action or criminal prosecution for "any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law" may remove the matter to federal court. 28 USC §1443(2). Thus, removal under 28 USC §1443 applies both to (a) persons who engage in activities safeguarded by federal civil rights acts and who face civil or criminal prosecution as a result of such acts, and (b) those who refuse to engage in activities based on a claim of civil rights and who find themselves the subject of a civil or criminal lawsuit as a result thereof.

NOTE: Both the Civil Rights Act of 1964 (see generally 42 USC §§2000a—2000h-6) and the Fair Housing Act of 1968 (42 USC §3601-3619) fall within the scope of 28 USC §1443 as laws providing for equal civil rights. See *Georgia v Rachel* (1966) 384 US 780, 792, 16 L Ed 2d 925, 86 S Ct 1783 (Civil Rights Act); *Emigrant Sav. Bank v Elan Mgmt. Corp.* (2d Cir 1982) 668 F2d 671, 673 (Fair Housing Act).

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Source: Civil Litigation/California Civil Procedure Before Trial/22 Removal to Federal Court/§22.38 E. Actions Brought Against United States Concerning Property on Which United States Has or Claims Lien

§22.38 E. Actions Brought Against United States Concerning Property on Which United States Has or Claims Lien

Any state action brought under 28 USC §2410 against the United States is removable by the United States to the federal district court for the district and division where the action is pending. 28 USC §1444. Under 28 USC §2410, when the United States claims or has a lien on real or personal property, for its protection, the United States may be named a party in a civil action or suit in federal court, or in state court having jurisdiction over the subject matter

- To quiet title to the property;
- To foreclose a mortgage or other lien on the property;
- To partition the property;
- To condemn the property; or
- For interpleader or in the nature of interpleader regarding the property.

Thus, such an action or proceeding brought in state court is removable under 28 USC §1444.

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VII. CROSS-CLAIMS AGAINST PLAINTIFF OR THIRD PARTIES

§22.39 A. Generally Removal by Cross-Defendants Prohibited

By its express terms, 28 USC §1441(a) limits removal of civil actions over which district courts have original jurisdiction to "the defendant or the defendants" in such action. A plaintiff who chooses a state forum to litigate a matter and thereafter is named as a defendant in the defendant's cross-complaint is not deemed a defendant within the meaning of the statute and cannot remove the action to federal court, even when the cross-claim states a separate and independent claim. *Shamrock Oil & Gas Corp. v Sheets* (1941) 313 US 100, 85 L Ed 1214, 61 S Ct 868; *Southland Corp. v Estridge* (CD Cal 1978) 456 F Supp 1296. A party who has availed himself or herself of the jurisdiction of the state court initially should not be entitled to remove the action to federal court. 456 F Supp at 1300. The court in *Southland* left open the question of whether a plaintiff who sues a co-citizen on a nonfederal claim may remove the case if the defendant cross-claims against the plaintiff for a separate and independent federal claim, noting that in this instance the plaintiff might argue that plaintiff "never had the opportunity to choose the federal rather than the state forum." 456 F Supp at 1300 n6.

Similarly, third parties named as cross-defendants (*i.e.,* third party defendants) are not included in the term "defendant" as used in 28 USC §1441(a) (*White v Baltic Conveyor Co.* (D NJ 1962) 209 F Supp 716, 719), and in the absence of a separate and independent claim being asserted (see §22.40) cannot remove the action to federal court. See *Burlingham, Underwood, Barron, Wright & White v Luckenbach S.S. Co.* (SD NY 1962) 208 F Supp 544, 546 ("mere existence of diversity of citizenship between a defendant and a third-party defendant does not authorize removal under" 28 USC §1441(b)); *Jamison v Schneider* (Kan 1983) 561 F Supp 1087. See also *Hyde v Carder* (Ky 1970) 310 F Supp 1340 (when no diversity or other basis for jurisdiction exists between original parties, "removal cannot be supported solely on the diversity of the third party litigants").

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§22.40 B. Exception: Removal by Third Party Defendant When Separate and Independent Claim Involved

Unlike 28 USC §1441(a), which limits removal to "the defendant or the defendants" (see §22.39), subsection (c) has no such limitation. Instead, it provides only that when separate and independent removable claims are joined with otherwise nonremovable ones, "the entire case may be removed" (see §§22.30-22.33); no mention is made of by whom. There is a split of authority in the circuits as to whether third party defendants can remove such claims to federal court under 28 USC §1441(c).

It appears that in California when separate and independent claims are involved, removal by a third party defendant under 28 USC §1441(c) is proper. In *Motor Vehicle Cas. Co. v Russian River County Sanitation Dist.* (ND Cal 1981) 538 F Supp 488, 491, the court recognized that there was authority outside California holding that "the right of removal does not attach to third-party defendants" but indicated that the better view was to permit removal by a third party defendant under 28 USC §1441(c). In holding that no separate and independent claim was involved in the case before it, the court noted that "[t]he correct rule is when a truly separate and independent claim is made against a third party defendant, which would be removable on its own, the fact that the removing party is not the original defendant does not impair the right of removal under federal law." See *Coleman v A & D Mach. Co.* (ED Cal 1969) 298 F Supp 234 (court held that third party defendants have right to remove under 28 USC §1441(c), but that no separate and independent claim involved in case). See also *Southland Corp. v Estridge* (CD Cal 1978) 456 F Supp 1296, 1301 (court noted that separate and independent claims are removable by third party defendants like any other defendants who have not voluntarily chosen to use state court). But see *Fountain Park Cooperative, Inc. v Bank of America* (CD Cal 1968) 289 F Supp 150, 153 (third party defendant could not remove under 28 USC §1441(c); subsection refers only to separable part of original complaint, not to third party complaint). No Ninth Circuit Court of Appeals case has been found directly on point.

There are decisions in other circuits that permit removal by a third party defendant under 28 USC §1441(c) when a separate and independent claim is involved. See, *e.g., Carl Heck Eng'rs v LaFourche Parish Police Jury* (5th Cir 1980) 622 F2d 133, 135. However, several circuits and many commentators oppose removal of separate and independent claims by third party defendants. See, *e.g., Thomas v Shelton* (7th Cir 1984) 740 F2d 478, 486 (allowing removal of entire action brings before court main part action not within its original jurisdiction thus enlarging federal jurisdiction at expense of state jurisdiction; in broad run of third party cases removal improper under 28 USC §1441(c); however, may be limited class of parties, *e.g.,* the United States, when special consideration might be given). See also *Morris v Marshall County Bd. of Educ.* (ND WVa 1983) 560 F Supp 43; *Lowe's of Montgomery, Inc. v Smith* (ND Ala 1977) 432 F Supp 1008, 1012 (allowing removal brings into court suit between original parties that has no independent basis for federal jurisdiction and is unwarranted extension of the federal judicial power).

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§22.41 VIII. PENDENT CLAIM JURISDICTION

Before December 1, 1990, when the concept of "pendent jurisdiction" was replaced by "supplemental jurisdiction" (see §§7.33-7.47), it had been held that whenever a federal claim was the basis for removal (see §§22.6-22.15) the federal district had pendent jurisdiction (*i.e.,* judicial power) over joined state claims that "derive from a common nucleus of operative fact." (*United Mine Workers of Am. v Gibbs* (1966) 383 US 715, 725, 16 L Ed 2d 218, 86 S Ct 1130). That the state claims arose from a common nucleus of operative facts was the constitutional minimum required for the court to exercise jurisdiction over those claims in the absence of diversity of citizenship. *Owen Equip. & Erection Co. v Kroger* (1978) 437 US 365, 371, 57 L Ed 2d 274, 98 S Ct 2396; *Contemporary Servs. Corp. v Universal City Studios, Inc.* (CD Cal 1987) 655 F Supp 885, 890 n6. The exercise of pendent jurisdiction by the court was discretionary rather than a matter of plaintiff's right. *United Mine Workers of Am. v Gibbs, supra*. Thus, *e.g.,* if the federal claim were dismissed, the court could remand the state claim. *Carnegie-Mellon Univ. v Cohill* (1988) 484 US 343, 98 L Ed 2d 720, 108 S Ct 614 (remand generally preferable to dismissal). Similarly, when it appeared that state issues substantially predominated in terms of proof, or concerning the issues, the court could remand the state claims. See *Carnegie-Mellon Univ. v Cohill, supra; United Mine Workers of Am. v Gibbs* (1966) 383 US 715, 726, 16 L Ed 2d 218, 86 S Ct 1130. Conversely, if the state claim were closely tied to federal policy, the argument for the court to exercise its pendent jurisdiction is strong. 383 US at 727. Aside from jurisdictional considerations, a court may separate federal and state claims for trial, *e.g.,* when there is a "likelihood of jury confusion in treating divergent legal theories of relief." *United Mine Workers of Am. v Gibbs*, *supra*.

NOTE: The holdings in these cases should be viewed with caution in light of December 1, 1990, changes wrought by the adoption of 28 USC §1367 (see §§7.33-7.36) and the amendment of 28 USC §1441 (see §§22.30-22.33).

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IX. ACTIONS SPECIFICALLY MADE NONREMOVABLE BY STATUTE

§22.42 A. Actions Against Railroads

The Federal Employers' Liability Act (FELA, 45 USC §§51-60) authorizes an action to recover damages for personal injuries or death of a railroad employee. Although a plaintiff can elect to file a claim in federal court under FELA, if such a claim is filed in state court (see 45 USC §56) against a railroad or its receiver or trustees, removal of the claim to federal court is specifically prohibited by 28 USC §1445(a). See *Balzeit v Southern Pac. Transp. Co.* (ND Cal 1983) 569 F Supp 986, 987.

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§22.43 B. Actions Against Carriers

An action commenced in state court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments under 49 USC §11706, or a carrier providing transportation or service under 49 USC §14706, cannot be removed to federal court unless the matter in controversy exceeds $10,000, exclusive of interest and costs. 28 USC §1445(b).

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§22.44 C. Actions Arising Under State Workers' Compensation Laws

A civil action commenced in state court that arises under that state's workers' compensation laws is not removable to federal court. 28 USC §1445(c).

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§22.45 D. Other Nonremovable Actions

Many other actions, other than those discussed in §§22.42-22.44, are specifically made nonremovable by other statutes scattered throughout the United States Code. Although a federal court would have jurisdiction if the action were commenced in federal court in the first instance, these statutes prohibit the case from being removed if the action is first commenced in state court. For example, the federal courts and state courts have concurrent jurisdiction over suits brought under the Securities Act of 1933 (15 USC §§77a-77aa). See 15 USC §77v. If such a suit is brought in state court rather than federal court, however, the suit cannot be removed to federal court. 15 USC §77v. See *Abing v Paine, Webber, Jackson & Curtis* (D Minn 1982) 538 F Supp 1193, 1195. Similarly, federal courts and state courts have concurrent jurisdiction over actions brought under the Jones Act (46 USC §688). *Engel v Davenport* (1926) 271 US 33, 37, 70 L Ed 813, 46 S Ct 410; *Reynolds v Royal Mail Lines, Ltd.* (SD Cal 1956) 147 F Supp 223, 225, aff'd (9th Cir 1958) 254 F2d 55. Although a claim under the Jones Act is a federal claim for purposes of federal question jurisdiction under 28 USC §1331 (*Romero v International Terminal Operating Co.* (1959) 358 US 354, 359, 3 L Ed 2d 368, 79 S Ct 468), cases arising under the Jones Act that are brought in state court are not removable to federal court. See *Gonsalves v Amoco Shipping Co.* (2d Cir 1984) 733 F2d 1020 (removal prohibition in 28 USC §1445(a) (see §22.42) applies because 46 USC §688(a) makes remedies of railroad employees applicable to seamen).

NOTE: Before trying to remove an action to district court, it is necessary to consult more than just 28 USC §1445 to ascertain which cases are nonremovable. Counsel must also be conversant with the substantive and procedural sections of the statutes pertaining to any claims asserted in the lawsuit.

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§22.46 E. Effect When Actions Made Nonremovable by Statute Are Joined With Otherwise Removable Actions

Under 28 USC §1441(a), except as otherwise provided by act of Congress, an action is removable if the district court would have original jurisdiction over it. See §§22.6-22.29. When an action that the district court would otherwise have original jurisdiction over is expressly made nonremovable by congressional legislation (see §§22.42-22.45), that action, even when joined with other removable causes of action, cannot be removed under 28 USC §1441(a) because removal under §1441(a) is permissible only if there is no act of Congress prohibiting removal. See *Abing v Paine, Webber, Jackson & Curtis* (D Minn 1982) 538 F Supp 1193, 1195.

When an otherwise removable action under 28 USC §1441 is joined with an action made nonremovable by 28 USC §1445, or any other statute, there is uncertainty as to whether the case can be removed under 28 USC §1441(c), which authorizes removal of the entire case when a separate and independent claim or cause of action within 28 USC §1331 federal question jurisdiction is joined with a nonremovable claim or cause of action (see §§22.30-22.33). In such instances, there is a conflict between the statutory policies permitting removal under 28 USC §1441 and prohibiting removal under 28 USC §1445 or other statute involved.

No Ninth Circuit case has been found resolving this issue although in *Balzeit v Southern Pac. Transp. Co.* (ND Cal 1983) 569 F Supp 986, the court in a footnote raised the issue of whether plaintiff's Federal Employers' Liability Act (FELA) (45 USC §§51-60) claim would be removable under §1441(c) despite the statutory prohibition (under 28 USC §1445(a)) against removing FELA claims. The court noted that there was scant authority on this issue and the cases were in conflict, but concluded that it did not have to decide the issue because the non-FELA claims arose out of state law and thus did not present a federal question that would fall within the court's original and therefore removal jurisdiction. 569 F Supp at 987 n4. See *Gonsalves v Amoco Shipping Co.* (2d Cir 1984) 733 F2d 1020, in which a Jones Act claim was joined with a maintenance and cure claim. The court held that §1445(a) does not override §1441(c) and that §1441(c) applies to claims made nonremovable by statute. 733 F2d at 1022. The court, however, concluded that the maintenance and cure claim was not sufficiently distinct from the Jones Act claim arising from same set of operative facts and thus was not separate and independent for purposes of §1441(c) (see §22.30) to warrant removal. 733 F2d at 1026. See also *Abing v Paine, Webber, Jackson & Curtis* (D Minn 1982) 538 F Supp 1193, 1196 (when complaint alleges cause of action under Securities Act of 1933 that is nonremovable under 15 USC §77v, action not removable under §1441(a), but is removable under §1441(c) if another otherwise removable cause of action alleged that is separate and independent within the meaning of §1441(c)).

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X. WHETHER TO SEEK REMOVAL

§22.47 A. Removal Discretionary

When removal is authorized, it is discretionary with the defendant, or other party entitled to file a notice of removal, as long as the removal notice is filed within the required time frame. On procedure generally, see §§22.67-22.99. Whether to seek such removal, however, should be given the most careful consideration, because the differences between proceeding in state and federal court can be considerable. Sections 22.47-22.66 discuss some of the differences that counsel should consider before removing a case to federal court.

NOTE: Removal is not only an issue for defendants. Because the plaintiff is generally the "master of his or her complaint," plaintiff will make the key initial decisions that will determine whether removal is possible. Plaintiff can shape the likelihood of removal by the way the claim is alleged in the complaint. Thus, plaintiff's counsel should consider the possibility for removal long before the complaint is filed. Plaintiff's counsel should also be familiar with the rules pertaining to removal if the defendant improperly removes the case to federal court and the plaintiff is required to make a remand motion (see §22.92).

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B. Practical Considerations

1. Where Case Will Be Litigated and Tried

§22.48 a. Centralized Location of Federal Courts

The first issue to consider with respect to removal is where the case will be litigated and tried. The number of federal trial courts in each state differs. For example, the federal trial courts in California are divided into four districts, the Northern District, located in San Francisco, Oakland, and San Jose, the Eastern District, located in Sacramento and Fresno, the Central District, located in Los Angeles and Orange County, and the Southern District, located in San Diego.

With only a limited number of federal courthouses in California, compared with numerous state superior courts, many lawyers will find federal courts to be geographically distant as compared to superior courts. Attorneys may wish to avoid removing a case to a courthouse many miles from their office, particularly when frequent court appearances are anticipated, when there is a desire to reduce costs, or when trial appears to be a realistic possibility and the attorney does not wish to be far removed from the resources of his or her office during trial.

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§22.49 b. Possible Venue Change

Because the federal courts operate on a nationwide basis, it is possible that a case removed to a district court may later either be transferred to another district court or consolidated with one or more actions in another district court anywhere in the country.

Under 28 USC §1404(a), for the convenience of parties and witnesses, a district court may transfer any civil action to any other district "where it might have been brought." Thus, in appropriate circumstances, a case removed to federal court becomes subject to a change of venue to a district court outside the state. Conversely, although state court procedure also provides for change of venue motions, any such new venue for the state action must be in the same state as the pending action.

In addition to a change of venue, when an action is removed to federal court, in appropriate circumstances the action is also subject to being transferred to an out-of-state district court pursuant to the federal multidistrict litigation procedure. Under 28 USC §1407(a), when actions involving common questions of fact are pending in different districts, they may be "transferred to any district for coordinated or consolidated pretrial proceedings." Unlike a change of venue order in which the case is transferred permanently, a case transferred to another district court under a multidistrict litigation order may be returned to the district court from which it was transferred for trial unless the action has previously terminated, the parties stipulate to try the case in the transferee court, or a 28 USC §1404(a) change of venue motion has been granted. On federal multidistrict litigation procedure generally, see 28 USC §1407 and Rules 1-25 of the Rules of Procedure of The Judicial Panel on Multidistrict Litigation.

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2. Pretrial Considerations

§22.50 a. Time to Demand Jury Trial

In state court, in cases not subject to the Trial Court Delay Reduction Act (Govt C §§68600-68620), a demand for a jury trial is usually made at the case management conference. See Cal Rules of Ct 3.727(13).

NOTE: For discussion of demanding jury trial in state court actions, see chap 41.

In federal court, Fed R Civ P 38(b) requires that a demand for jury trial be made by serving the demand in writing on the other parties not later than 14 days after the service of the last pleading directed to such issue triable as of right by a jury, and filing the demand with the court. The pleadings directed to this issue can include complaints, counterclaims, cross-claims, third party complaints, and answers to complaints, cross-claims, third party complaints, and replies to counterclaims. A demand for a jury trial will often be endorsed on such a pleading. Local court rules and judges' standing orders must also be consulted to learn whether any special local requirements apply.

NOTE: When a defendant desires a jury trial and removes the case to federal court before having answered, it appears that the defendant must comply with Fed R Civ P 38(b). See *South African Airways v Tawil* (SD NY 1987) 658 F Supp 889; *Pawlak v Metropolitan Life Ins. Co.* (D Mass 1980) 87 FRD 717, 718 n1. Under these circumstances, presumably Fed R Civ P 38(b) also applies to any other party who desires a jury trial who has not requested one in state court. If the defendant has filed an answer in state court before removal, however, Fed R Civ P 81(c) applies. Under Rule 81(c)(3)(B), if all necessary pleadings have been served, the party filing the notice of removal must demand a jury trial within 14 days after the notice of removal is filed. Any other party must demand a jury trial within 14 days after being served with the notice of removal. A party who has made an express demand for a jury trial before removal in accordance with state law (which is not often the case), however, need not demand a jury trial after removal. Fed R Civ P 81(c)(3)(A). Local court rules and judges' standing orders should also be consulted to determine if there are any local requirements concerning a jury demand after removal. On computing 14-day period under Rule 81(c)(3) when demand for jury trial is served by mail, see *Tushner v United States Dist. Court* (9th Cir 1987) 829 F2d 853 (applying 10-day period previously provided by Rule 81(c)(3)).

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§22.51 b. Attorney Time

In certain districts, it may be more time consuming and demanding for the attorney to litigate the same case in federal court than state court because of detailed and extensive "local rules" adopted by the district court. For example, in the Central District of California a local rule requires a meeting of the parties, the exchange of documents, and the exchange of witness lists 40 days before the final pretrial conference. See CD Cal Local R 16.2. Compliance with this and other local rules requires time and expense that may not be required in a state court action.

There may not be a significant difference in attorney time in litigating the case in federal or state court, however, if the local district court has not adopted such extensive local rules as indicated above. Moreover, to the extent that state courts have adopted local rules (*e.g.*, fast-track rules) similar to local federal court rules, any possible difference in expense in attorney time in litigating the case either in state or federal court is diminished.

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§22.52 c. Single Judge Assignment

Federal courts use a single assignment system, which means that each case is assigned to a specific judge the day it is filed, and this judge remains with the case for all purposes (except perhaps discovery), through and including trial. On the other hand, state courts have traditionally used a master calendar system under which the various phases of the case proceed before different judges, *e.g.,* one judge will hear law and motion matters and another judge will preside over the trial. Certain state courts, however, are moving in the direction of single assignment, either experimentally or for a certain portion of their cases. In theory, cases in which a judge is assigned for all purposes to remain with the case from the date of filing until trial should enable the judge to acquire a more comprehensive grasp of the case and should enable the case to receive more consistent treatment. The assignment of a single judge for all purposes may have the effect of causing certain counsel to moderate their behavior because they know that they will be with that judge throughout the case.

Because of the single assignment system and the greater resources available to federal judges, some attorneys believe the possibility exists that a case filed in federal court may receive closer scrutiny and greater analysis than one filed in state court. Most federal judges have two full-time law clerks, as well as two or three externs, all of whom serve one particular judge only. In state court, a judge may have only a single research attorney available, who may have to be shared among different judges. In addition, depending on the county, the number of matters heard by a state court judge at a given time may be greater than for a federal judge. For example, although it is not uncommon for lawyers in Los Angeles superior court to find several dozen matters on a judge's motion calendar every day, in federal district court for the central district, where there is a "motion day" only once a week, there are usually fewer matters on calendar.

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§22.53 d. Time to Trial; Trial Date

This area is in a state of flux, so the conventional wisdom, which is that federal cases go to trial faster than state cases, may no longer apply in certain locations. With the advent of the delay reduction rules, the stated goals of certain superior courts are now approximately the same as the time-to-trial standards in federal court. On the delay reduction rules, see chap 40.

A good rule of thumb for time to trial in federal court is about 1 year for the majority of cases, and 18 to 24 months for complex cases. A practitioner should check with the local superior court to ascertain current times to trial in his or her community by way of contrast. These range from less than a year to almost 5 years.

Once a trial date has been selected, the practice of trial dates being postponed by the court due to caseload constraints has been much less common in district court than in state courts in the large metropolitan areas.

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§22.54 e. Discovery; Privileges

Counsel considering removal should be aware of the differences in procedure for discovery in federal and state court. For example, Fed R Civ P 26(a) requires every party to disclose certain basic information (*e.g.*, names—and addresses and telephone numbers, if known—of individuals likely to have discoverable information; copies or descriptions of discoverable documents and electronically stored information) without waiting for a discovery request. On federal discovery practice generally, see 8 Wright, Miller & Marcus, Federal Practice and Procedure §§2001-2070 (2d ed 1994). On state court discovery procedure generally, see California Civil Discovery Practice (4th ed Cal CEB 2006).

Magistrates often hear discovery disputes in federal court, and many go to great lengths to resolve such disputes informally and speedily. For example, some magistrates allow and even encourage attorneys to call and speak to them during the middle of a deposition in order to rule on objections and instructions not to answer. The witness may be directed to answer immediately by the magistrate. Such a procedure can obviate the need for a discovery motion, speeding the litigation and providing significant savings for the client. As a result, many attorneys believe federal court provides more flexibility in resolving anticipated discovery disputes than state court.

NOTE: Certain state judges in single assignment programs (see §22.52) have begun to adopt similar procedures. On appointment of a referee or commissioner in state court to resolve discovery disputes, see Civil Discovery §1.29.

Discovery disputes involving claims of privilege present choice-of-law questions not present in state court actions. When federal jurisdiction is based on diversity (see §22.16), the court generally applies the law of the state in which it sits. Fed R Evid 501. See *Blackledge v Martin K. Eby Constr. Co.* (8th Cir 1976) 542 F2d 474, 476 n1 (privileges created by state law apply in diversity action). See also *Simon v G.D. Searle & Co.* (8th Cir 1987) 816 F2d 397, 402 (state law on attorney-client privilege applied); *Samuelson v Susen* (3d Cir 1978) 576 F2d 546 (state conflict-of-law rule applied). When jurisdiction is based on a federal question (see §22.6), the court generally applies federal common law, but, if there is no controlling federal statute, the court may turn to state law for guidance. Fed R Evid 501. *Lewis v U.S.* (9th Cir 1975) 517 F2d 236; *Gulliver's Periodicals, Ltd. v Chas. Levy Circulating Co.* (ND Ill 1978) 455 F Supp 1197, 1200. See *In re Grand Jury Subpoena* (WD Mo 1978) 460 F Supp 150 (in nondiversity-jurisdiction civil case, question of privilege governed by federal privilege law).

The attorney work product doctrine, first articulated by the United States Supreme Court in *Hickman v Taylor* (1947) 329 US 495, 91 L Ed 451, 67 S Ct 385, is an exception to the choice-of-law rules set forth in Fed R Evid 501. The privilege for attorney work product has been "substantially codified" in Fed R Civ P 26(b)(3). *Holmgren v State Farm Mut. Auto. Ins. Co.* (9th Cir 1992) 976 F2d 573, 576. The work product privilege is separate and distinct from the attorney-client privilege, and whether diversity or federal question jurisdiction is involved, federal law applies to claims that the work product privilege protects information from disclosure. *Handgards, Inc. v Johnson & Johnson* (ND Cal 1976) 413 F Supp 926, 929. See also *Holmgren v State Farm Mut. Auto. Ins. Co.* (9th Cir 1992) 976 F2d 573 (applying federal work product rules in diversity case).

On differences between state and federal law on attorney-client privilege as applied to corporations, compare *D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468, with *Upjohn Co. v U.S.* (1981) 449 US 383, 66 L Ed 2d 584, 101 S Ct 677. On differences in rules governing production of tax returns in federal and state court, see §22.64.

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§22.55 f. Monetary Sanctions

Under the Civil Discovery Act (CCP §§2016.010-2036.050), the court must award monetary sanctions for violation of certain of its provisions unless the court finds that the party subject to the sanction acted with "substantial justification" or that there are other circumstances making imposition of the sanction unjust. See, *e.g.,* CCP §2023.030(a), CCP §§2025.430, 2025.440(a), 2025.450(c)(1)-(2).

When there is no specific statute providing for sanctions in state court, sanctions are usually sought under CCP §128.7. This section applies to complaints or petitions filed after December 31, 1994. See CCP §128.7(i). Note that this section specifically does not apply to discovery matters. CCP §128.7(g). Code of Civil Procedure §128.7 is based on Fed R Civ P 11. Section 128.7(b) is virtually identical to Fed R Civ P 11(b), except for one very significant difference. Under CCP §128.7(b)(1), the presenter certifies that the paper is not being presented "primarily" for an improper purpose; under Fed R Civ P 11(b), the presenter certifies that the paper is not being presented for "any" improper purpose. Under Fed R Civ P 11(b) an attorney (or unrepresented party) who signs a pleading, motion, or other paper certifies that, to the best of his or her knowledge, information, and belief, formed after reasonable inquiry under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

If the pleading, motion, or other paper is signed in violation of Rule 11, the court on its own motion or on motion of a party may impose appropriate sanctions. As of December 1, 1993, sanctions for violations of Rule 11 are no longer mandatory.

Both Fed R Civ P 11 and CCP §128.7 contain "safe harbor" provisions that permit the offending party to withdraw or correct the objectionable pleading or conduct before the motion for sanctions is filed. To comply with the "safe harbor" provision of Fed R Civ P 11(c)(1)(A), a party seeking sanctions must file a notice of motion for sanctions on the opposing party at least 21 days before the conclusion of the case. At the conclusion of the 21-day period, the party seeking sanctions may file the notice of motion with the court. If the offending party withdraws or corrects the sanctionable conduct within 21 days, however, no sanctions may be imposed. See *Ridder v City of Springfield* (6th Cir 1997) 109 F3d 288, 296.

There are numerous other federal sources for the award of sanctions. For example, federal courts are authorized to award sanctions against an attorney who unreasonably and vexatiously multiplies the proceedings in a case under 28 USC §1927. Federal discovery sanctions are contained in Fed R Civ P 30(g) and Fed R Civ P 37. In addition, local district court rules may contain broad authorization for the granting of sanctions. See, *e.g.,* CD Cal Local R 83.7, which among other things authorizes sanctions for failure to comply with any of those local rules.

Because CCP §128.7 is virtually identical to Fed R Civ P 11, California courts may look to federal decisions interpreting Rule 11 to interpret §128.7, when the language is the same. *Scripps Mem. Hosp. v California Employment Comm'n* (1944) 24 C2d 669, 151 P2d 109. On sanctions under Fed R Civ P 11 in the context of a federal appeal, see *Rockwell Int'l Credit Corp. v United States Aircraft Ins. Group* (9th Cir 1987) 823 F2d 302, overruled on other grounds in *Partington v Gedan* (9th Cir 1991) 923 F2d 686, 688. But see *Leigh v Engle* (7th Cir 1988) 858 F2d 361, 370 n5 (Rule 11 sanctions not available on appeal). See also Fed R App P 38 on sanctions for frivolous appeals. On sanctions for frivolous appeal in state court, see CCP §907; Cal Rules of Ct 8.276(a); *Marriage of Flaherty* (1982) 31 C3d 637, 650, 183 CR 508 (appeal simply without merit is not frivolous and sanctions should not be awarded; appeal frivolous only when "prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and

completely without merit").

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§22.56 g. Pleadings; Stipulations

In state court, the pleadings must allege ultimate facts. See CCP §425.10(a)(1) (complaints and cross-complaints); 5 Witkin, California Procedure, *Pleading* §1182 (5th ed 2008) (affirmative defense). On drafting complaints, see chap 15. If the complaint is not verified, a general denial is sufficient to put in issue the material allegations of the complaint. CCP §431.30(d). On verifying complaints, see §§15.14-15.21.

In federal court, a party needs only to file a "notice pleading" (*i.e.,* "a short and plain statement of the claim showing that the pleader is entitled to relief") to plead ultimate facts. Fed R Civ P 8; 4 Witkin, Procedure, *Pleading* §379. A party must plead allegations of fraud or mistake with particularity. Fed R Civ P 9(b). A party that intends to deny all allegations of a pleading may respond with a general denial. A party that does not intend to deny all allegations must either specifically deny certain allegations or generally deny all except those specifically admitted. Fed R Civ P 8(b)(3).

NOTE: In federal court, written stipulations between counsel affecting the progress of the case must usually be approved by the judge to be effective. See CD Cal Local R 7.1; ED Cal Local R 83-143; SD Cal Local R 7.2.

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§22.57 h. Disqualification of Judge

In state court, counsel can file a peremptory challenge in accordance with CCP §170.6, consisting of an affidavit or declaration in substantially the form specified in CCP §170.6(a)(5), and disqualification of the judge is required. Except for a successful appellant after appeal, a party is permitted only one such challenge. CCP §170.6(a)(3). On disqualification of judge in state court generally, see California Trial Practice: Civil Procedure During Trial §§6.26-6.78 (3d ed Cal CEB 1995).

No equivalent peremptory challenge procedure requiring automatic disqualification exists in federal court. As a result, the judge assigned on the day the complaint is filed is generally the judge throughout the case unless counsel can establish grounds for disqualification under 28 USC §§144, 455. On judge's personal bias or prejudice within the meaning of 28 USC §144, see *In re Cooper* (1st Cir 1987) 821 F2d 833. On judge's duty to determine legal sufficiency of affidavit of personal bias or prejudice, see *U.S. v Sibla* (9th Cir 1980) 624 F2d 864 (discussing relationship between 28 USC §§144 and 455).

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§22.58 i. Possible Remand of Pendent State Claims

When federal jurisdiction exists under 28 USC §1332 due to diversity of citizenship (see §22.16), the district court has jurisdiction over all causes of action and will retain all such causes of actions. This may not be true when removal is based on federal question jurisdiction under 28 USC §1331 (see §22.6). Federal causes of action are often joined in the same complaint with state causes of action. The federal courts have jurisdiction over state claims under concepts of "supplemental" or "pendent" jurisdiction. See §22.41. Whether to exercise such jurisdiction may be discretionary with the court, which may remand state causes of action without prejudice. See *Carnegie-Mellon Univ. v Cohill* (1988) 484 US 343, 98 L Ed 2d 720, 108 S Ct 614 (remand generally preferable to dismissal). The following examples illustrate the above:

EXAMPLE 1: *A,* who lives in California, sues *B,* who lives in Texas, for breach of contract, fraud, and violation of the Racketeer Influenced and Corrupt Organization Act (RICO) (18 USC §§1961-1968), in a California state court. *B* removes the action to a California district court. In this case, there can be no remand of any of the counts, because the district court has diversity jurisdiction over the entire action, separate and apart from its federal question jurisdiction over the RICO claim.

EXAMPLE 2: *A* sues *B* for fraud, conversion, and violation of RICO. Assume that removal based on diversity is not warranted, either because *A* and *B* are not diverse, or because the action was filed in the state in which *B* is domiciled (see §22.16). In this case, removal is still proper because the district court has federal question jurisdiction over the RICO claim, but it is within the court's discretion to remand the fraud and conversion causes of action because they are state claims that are merely pendent to the RICO count. If the court remands the pendent claims, unless *A* is permitted to dismiss the RICO cause of action without prejudice in the federal court and file it in state court, *A* could be compelled to proceed against *B* in district court on the RICO cause of action and in state court against *B* on the remanded state claims.

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§22.59 j. Summary Judgment Standards

Because of the single judge assignment (see §22.52) and the legal standard the district court applies when deciding a summary judgment motion, many attorneys believe that a federal judge is more likely to grant summary judgment than a state court law and motion judge. On federal standards for summary judgment motions, see Fed R Civ P 56. The United States Supreme Court has interpreted Fed R Civ P 56 in a trio of cases commonly referred to as the "*Celotex* trilogy." See *Celotex Corp. v Catrett* (1986) 477 US 317, 322, 91 L Ed 2d 265, 106 S Ct 2548 (party seeking summary judgment not required to produce affirmative evidence negating nonmoving party's claim if, after adequate discovery, it appears that nonmoving party does not have sufficient evidence to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); *Anderson v Liberty Lobby, Inc.* (1986) 477 US 242, 254, 91 L Ed 2d 202, 106 S Ct 2505 (judge must consider applicable substantive evidentiary standard, *i.e.,* preponderance of evidence or clear and convincing standard); *Matsushita Elec. Indus. Co. v Zenith Radio Corp.* (1986) 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348 (when moving party has carried burden under Fed R Civ P §56(c), nonmoving party must show specific facts establishing genuine issue for trial). See also *Nissan Fire & Marine Ins. Co. v Fritz Cos.* (9th Cir 2000) 210 F3d 1099, 1105 (even after *Celotex*, party moving for summary judgment cannot require nonmoving party to produce evidence supporting claim or defense by mere assertion that nonmoving party does not have sufficient evidence to support essential element or claim or defense).

On summary judgment in state court, see chap 36.

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§22.60 k. Judicial Arbitration

Unlike state courts, where a case may be subject to judicial arbitration (see CCP §§1141.10-1141.31, Cal Rules of Ct 3.810-3.830), federal courts have no requirement that a case be subject to judicial arbitration unless a local court rule so provides. The United States District Court for the Northern District of California is an example of a federal district court that has local court rules providing for arbitration of certain types of cases. See ND Cal Local R 16-8.

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3. Trial Considerations

§22.61 a. Jury Composition

Because there are only several federal district courts in the entire state, the jury pool for any particular district court is larger than that for state courts. The composition of a jury in any particular federal court is less likely to represent the particular area in which the court sits than it would in a state court.

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§22.62 b. Juror Voir Dire

In state court, counsel generally conduct the voir dire examination of prospective jurors. On state court practice generally, see California Trial Practice: Civil Procedure During Trial §§8.30-8.72 (3d ed Cal CEB 1995). In federal district court, this rarely happens. Instead, district court judges often do not allow attorney voir dire at all, but conduct it themselves. Usually district judges will, at most, entertain requested voir dire questions in written form from counsel before the trial, and will, as they deem appropriate, incorporate as few or as many proposed questions into the court's own voir dire as the judge believes to be proper.

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c. Evidentiary Considerations

§22.63 (1) Differences Between State and Federal Rules of Evidence

Counsel considering removal should bear in mind that once the case is removed the federal rules of evidence rather than the California Evidence Code apply even in diversity of citizenship cases (see Fed R Evid 101, 1101; *Gibbs v State Farm Mut. Ins. Co.* (9th Cir 1976) 544 F2d 423, 428 n2). Although there are similarities between the state and federal rules of evidence, differences do exist. The following highlights some of those differences:

- **Hearsay exceptions:** The California Evidence Code sets forth a number of exceptions to the hearsay rule in Evid C §§1220-1350. Hearsay evidence is inadmissible unless it fits within an enumerated exception in the Evidence Code. This is not the case in federal court. Under the Federal Rules of Evidence, any statement not specifically covered by the specified exceptions to the hearsay rule, but having equivalent circumstantial guarantees of trustworthiness, may be admitted if the requirements of Fed R Evid 807 are met.
- **Foundational requirements:** Foundational requirements for the admission of certain evidence may differ in state and federal court. Compare, *e.g.,* Evid C §§1270-1272 with Fed R Evid 803(6) (business-record exception to the hearsay rule).
- **Attorney-client and work product privileges:** See discussion in §22.54 concerning attorney-client and work product privileges and when state rules concerning the attorney-client privilege apply.
- **Criminal convictions:** Evidence of conviction for a prior crime is admissible to attack a witness's credibility in federal court whenever the crime involves dishonesty or false statements. Fed R Evid 609(a). See *U.S. v Lester* (9th Cir 1984) 749 F2d 1288, 1300 (misdemeanor conviction). In state court, however, such evidence is not admissible to attack credibility unless the conviction was for a felony. Evid C §788.

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§22.64 (2) Tax Returns

Tax returns and information contained in them are deemed absolutely privileged in state court and in the absence of waiver are not generally subject to discovery or use at trial. See Evid C §1040; *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283 (sales tax returns); *Aday v Superior Court* (1961) 55 C2d 789, 13 CR 415 (state and federal corporate tax returns); *Webb v Standard Oil Co.* (1957) 49 C2d 509, 319 P2d 621 (state and federal personal income tax returns); California Civil Discovery Practice §§3.119, 3.181, 7.96 (4th ed Cal CEB 2006); Jefferson's California Evidence Benchbook §§42.6, 42.10 (4th ed CJA-CEB 2009). See also *Crest Catering Co. v Superior Ct* (1965) 62 C2d 274, 42 CR 110 (employment tax returns); *Brown v Superior Court* (1977) 71 CA3d 141, 139 CR 327 (W-2 forms). On waiver, see *Wilson v Superior Court* (1976) 63 CA3d 825, 134 CR 130 (suit against accountant for negligent advice concerning tax consequences of sale of real property; taxpayer waived privilege by placing content of returns directly in issue); Civil Discovery §3.166; Evidence Benchbook §42.1. See also *Sammut v Sammut* (1980) 103 CA3d 557, 560, 163 CR 193 (privilege upheld; grounds for waiver discussed).

In federal court in federal question cases, however, there is no absolute privilege against discovery or use at trial of tax returns or the information in them. In appropriate instances when the tax returns are shown to be relevant to the litigation, they may be subject to discovery. See, *e.g., Heathmam v United States Dist. Court* (9th Cir 1974) 503 F2d 1032 (defendant's accountants required to deliver income tax returns together with accounting materials prepared in doing returns). See also *Premium Serv. Corp. v Sperry & Hutchinson Co.* (9th Cir 1975) 511 F2d 225, 229 (no absolute privilege from discovery for tax returns; however, public policy against unnecessary disclosure). The following example illustrates the point: *A* sues *B* for securities fraud, claiming that as a result of *A*'s misstatements and omissions, he invested $500,000 in an oil and gas scheme that produced no returns. *B* alleges that, regardless of the merit of *A*'s claims, *A* should be entitled to a maximum of $350,000 in actual damages because *A* deducted $150,000 from his taxes over the years as a result of the investment. Assuming that this offset was appropriate (such offsets are limited in the securities fraud area), *A*'s tax returns would probably be ordered produced in federal court. A different result would likely occur in state court.

In diversity cases in federal district courts in California, presumably the state privilege concerning tax returns will be held to apply under Fed R Evid 501. No Ninth Circuit Court of Appeals decision has been found on point, however. See generally §22.54.

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§22.65 d. Jury Size; Three-Fourths or Unanimous Verdict

California civil matters within the appellate jurisdiction of the court of appeal are tried before 12 jurors or any lesser number that the parties agree on in open court. Cal Const art I, §16; CCP §220. Under Cal Const art I, §16, the legislature may provide for eight jurors, or a lesser number as agreed to by the parties in open court, for trials that are not within the appellate jurisdiction of the court of appeal (*i.e.,* limited civil cases). Three-fourths of the jurors (*e.g.,* 9 out of 12) must agree on the verdict. Cal Const art I, §16; CCP §618. On alternate jurors, see CCP §234.

In federal district court for civil cases, generally by local rule, a jury may consist of as few as six or as many as 12 jurors, depending on how many the judge determines are needed. Fed R Civ P 48(a). Unlike in state court, the jurors must unanimously agree on the verdict (unless the parties have stipulated otherwise). See Fed R Civ P 48(b); 9A Wright & Miller, Federal Practice and Procedure §2492 (3d ed 1998). Although logic suggests that it is easier to obtain 9 out of 12 votes than 6 out of 6, as a practical matter few civil cases result in a mistrial in federal court due to a jury's inability to reach a verdict.

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§22.66 4. Post Trial; Registering or Entering Judgment Outside State

Being able to easily have judgment entered in another state so as to enable enforcement of the judgment may be a consideration in a case in which a defendant from whom recovery is expected does not have sufficient assets within the state to satisfy a judgment, but does have significant asset outside the state that may be transferred. Under 28 USC §1963, a federal district court judgment that has become final by appeal or expiration of the time to appeal may be registered in any other district by filing a certified copy of such judgment in the other district. A district court judgment may also be registered in the same manner in another district even before the judgment becomes final by appeal or expiration of the time to appeal by order of the court that entered the judgment on good cause shown. 28 USC §1963. Once a district court judgment is registered in accordance with §1963, it has the same effect as a district court judgment of the district where registered and may be enforced in the same manner. 28 USC §1963. On complying with any state law requirements to register, record, docket, or index the judgment to create a lien, see 28 USC §1962. See also Debt Collection Practice in California §7.53 (2d ed Cal CEB 1999). On complying with state practice and procedure for executing on a federal judgment unless a federal statute provides otherwise, see Fed R Civ P 69(a). On discovery in aid of executing on judgment under federal rules of civil procedure or under state law, see Fed R Civ P 69(a).

On the other hand, when a California state court judgment has been entered the procedure for obtaining entry of a judgment in another state based on it may be more cumbersome than the registration procedure provided for federal district court judgments. The law of the state in which a judgment is desired to be entered must be followed. For California procedure for obtaining a judgment based on a sister state judgment, see CCP §§1710.10-1710.65. See also Debt Collection §§7.45-7.48.

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XI. REMOVAL TIMING AND PROCEDURES

A. Time Limitations

1. When Initial Pleading Contains Removable Claim

§22.67 a. 30-Day Rule

The right to remove exists only briefly and will be lost unless it is exercised in an expeditious fashion. Under 28 USC §1446(b), a notice of removal (see §§22.76-22.90) in a civil action or proceeding must be filed within 30 days after the defendant receives "through service or otherwise," a copy of the initial pleading that sets forth the removable claim, or within 30 days after the defendant is served with a summons if the initial pleading has been filed in court but service of it is not required on the defendant, whichever period is shorter. The United States Supreme Court has interpreted "through service or otherwise" to mean that the defendant's time to remove is triggered by formal service of the complaint. *Murphy Bros. v Michetti Pipestringing, Inc.* (1999) 526 US 344, 143 L Ed 2d 448, 119 S Ct 1322. Depending on the various states' service and filing requirements, the removal period begins to run as follows (*Murphy Bros. v Michetti Pipestringing, Inc., supra*):

- If the summons and complaint are served simultaneously, the removal period begins to run at once.
- If the defendant is served with the summons, but the complaint is supplied to the defendant later, the removal period begins to run from the defendant's receipt of the complaint.
- If the defendant is served with the summons and the complaint is filed in court, but service of the complaint is not required, the removal period runs from the date the complaint becomes available through filing.
- If the complaint is filed in court before it is served, the removal period begins to run when the summons is served.

Thus, in California, if a case is removable based on the original complaint, it must be removed within 30 days after defendant is formally served with the summons and complaint, regardless of when the complaint was filed in court. 28 USC §1446(b). See *Murphy Bros. v Michetti Pipestringing, Inc., supra*.

The 30-day period in which to remove the case to federal court is not extended by a stipulation by counsel extending the time to answer, plead, move, or otherwise respond to the complaint. See *Transport Indem. Co. v Financial Trust Co.* (CD Cal 1972) 339 F Supp 405.

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§22.68 b. Receipt of Letter No Longer Starts 30-Day Period

The language of 28 USC §1446(b) provides that the defendant must file a notice of removal within 30 days after receipt of the complaint "through service or otherwise." Formerly, "or otherwise" was interpreted to mean that the plaintiff could initiate the 30-day period by mailing the defendant a letter enclosing a copy of the complaint that had been filed in state court. Now, under *Murphy Bros. v Michetti Pipestringing, Inc.* (1999) 526 US 344, 143 L Ed 2d 448, 119 S Ct 1322, the complaint must be formally served to trigger the start of the 30-day period within which the defendant must file a notice of removal. See §22.67.

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§22.69 c. Cases Involving Multiple Defendants

In cases when multiple defendants are served, unless they are served on the same day, the 30-day removal period (see §22.67) will have run as to the first served defendant before the expiration of the running of this period for subsequently served defendants. The removal statute does not directly address multiple defendant cases. 28 USC §1446(b). Although the Ninth Circuit has not addressed the issue, there is a split among the federal circuits, and among the district courts in the Ninth Circuit, about how to determine the deadline for removal when multiple defendants are served at different times. See *Smallwood v Allied Pickfords, LLC* (SD Cal, Sep. 29, 2009, No. 08-cv-2196z) 2009 US Dist Lexis 91141 (discussing "first-served" and "last-served" approaches, and concluding that "last-served" approach is preferable); *United Steel v Shell Co.* (9th Cir 2008) 549 F3d 1204, 1209 n2 (declining to resolve conflict); *Griffith v American Home Prods. Corp.* (ED Wash 2000) 85 F Supp 2d 995, 998.

The traditional rule, known as the "first-served defendant rule," construes 28 USC §1446(b) as creating a single 30-day window for removal, which begins to run when the first defendant is served; if the first served defendant fails to remove within 30 days, a later-served defendant cannot remove even if the first defendant consents to the removal. See, *e.g.*, *Brown v Demco, Inc.* (5th Cir 1986) 792 F2d 478, 481; *Smith v Mail Boxes, Etc., Inc.* (ED Cal 2002) 191 F Supp 2d 1155, 1159; *McAnally Enters. v McAnally* (CD Cal 2000) 107 F Supp 2d 1223, 1229; *Transport Indem. Co. v Financial Trust Co.* (CD Cal 1972) 339 F Supp 405, 409.

In *Brierly v Alusuisse Flexible Packaging, Inc.* (6th Cir 1999) 184 F3d 527, 533, 533 n3, cert denied (2000) 528 US 1076, 145 L Ed 2d 667, 120 S Ct 790, the Sixth Circuit held that a later-served defendant has 30 days from the date of service to obtain the consent of earlier-served defendants and to remove a case to federal court. See *Lewis v City of Fresno* (ED Cal 2008) 627 F Supp 2d 1179 and *Ford v New United Motors Mfg.* (ND Cal 1994) 857 F Supp 707, 708 (rejecting first-served defendant rule). *Brown* and *Griffith* represent polar opposites in terms of the equities involved, and illustrate a possible reason for the conflict in authority. In *Brown,* a later-served defendant attempted to remove a case to federal court after it had been litigated in state court for 4 years. The court of appeals refused to permit removal, reasoning that any unfairness to the last served defendant was more than outweighed by the unfairness to the plaintiff that would result from removal. *Brown v Demco, Inc.* (5th Cir 1986) 792 F2d 478, 482. In *Griffith,* the defendant seeking removal was served on the last day on which the first-served defendant could have sought removal. To comply with the first-served defendant rule, the defendant had only 1 day to research whether a basis for removal existed, to decide whether to file a petition for removal, and to attempt to gain the consent of the other defendants. *Griffith v American Home Prods. Corp.,* 85 F Supp 2d at 1001.

The Fourth Circuit has chosen a third approach. A defendant served after the first defendant's 30-day removal period has lapsed may not petition to remove the case, but has 30 days from the date of service to join in another defendant's valid removal petition. *McKinney v Board of Trustees of Mayland Community College* (4th Cir 1992) 955 F2d 924, 926 n3, 928; *Princeton Running Co. v Williams* (D DC, Sept. 5, 2006, No. 05-1461 (PLF)) 2006 US Dist Lexis 62622 (adopting "intermediate rule" of *McKinney*; defendant, added by amendment in trade secret misuse litigation that had been pending for 2 years, not permitted to remove case when there was no valid petition for removal to join).

For discussion of requirement that all defendants consent to removal, see §§22.77-22.84.

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2. When Amended Pleading, Motion, Order, or Other Paper Establishes Right to Removal

§22.70 a. 30-Day Rule

Under 28 USC §1446(b), when a "case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of" diversity jurisdiction more than 1 year after the action was commenced. On 1-year limitation period beyond which removal is prohibited in diversity cases, see §22.73. On voluntary-involuntary rule limiting removal, see §22.72.

A key word in 28 USC §1446(b) is "first." Although many pleadings, motions, orders, or other papers may allow a party to ascertain that a case has become removable, there is only one "first such paper, and it is this first paper which begins the running of the 30-day period."

While the meaning of a pleading, motion, and order is generally known, the term "other papers" sufficient to start the running of the 30-day period under 28 USC §1446(b) is often viewed expansively by the courts. In *Riggs v Continental Baking Co.* (ND Cal 1988) 678 F Supp 236, 238, the court noted that "[t]he elements of removability must be specifically indicated in official papers before the statutory period begins to run," and held that a deposition at which defendant first ascertained the facts indicating removability constituted an "other paper" under §1446(b). At the deposition in *Riggs*, defendant first ascertained that plaintiff was a member of a union who was employed pursuant to a collective bargaining agreement subjecting the case to §301 of the Labor Management Relations Act (29 USC §185). See §22.15. See also *Ezon v Cornwall Equities Ltd.* (SD Tex 1982) 540 F Supp 885, 888 (removal within 30 days of deposition timely). It has also been held that discovery documents may be "other papers" within the meaning of the statute. See, *e.g., Lee v Altamil Corp.* (MD Fla 1978) 457 F Supp 979 (discovery documents subsequent to complaint).

The 30-day removal period of §1446(b) may begin to run on the receipt of actual notice by the defendant that the case has become removable, even when the notice is oral, *e.g.,* by telephone, rather than by a document. See *Mike Silverman & Assocs. v Drai* (CD Cal 1987) 659 F Supp 741, 746 (telephone notice of voluntary dismissal of a defendant). See also *Heniford v American Motors Sales Corp.* (D SC 1979) 471 F Supp 328, 334 (case became removable based on diversity of citizenship jurisdiction during closing argument; plaintiff's counsel told jury that plaintiff sought to eliminate particular defendant from any possibility of liability thus causing court to align that defendant with plaintiff for purposes of diversity of citizenship jurisdiction). In *Babasa v Lenscrafters, Inc.* (9th Cir 2007) 498 F3d 972, the court held that a letter from plaintiff that stated estimated damages in excess of the jurisdictional requirement was sufficient to notify defendant that the case was removable.

It has also been held that the phrase "other paper" within the meaning of 28 USC §1446(b) cannot refer to pleadings filed in a separate and distinct lawsuit not involving the same parties which has not been consolidated. *Growth Realty Cos. v Burnac Mortgage Invs., Ltd.* (D PR 1979) 474 F Supp 991, 996.

On when a defendant may have to remove before the 30-day period expires, see §22.74. On commencement of 30-day period when multiple defendants are involved generally, see §22.69.

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§22.71 b. Unequivocal Action Creating Removal Jurisdiction Required

In the context of diversity of citizenship jurisdiction, courts have generally held that the 30-day removal period (see §22.67) does not begin to run until the actions taken by plaintiff to make the case removable are unequivocal in nature. Thus, *e.g.,* in *Schmidt v Capital Life Ins. Co.* (ND Cal 1986) 626 F Supp 1315, 1318, the court, in holding removal timely, indicated that the 30 days does not begin to run until "the plaintiff unequivocally effects an abandonment of any resident defendants and thereby creates diversity." The court noted as follows (626 F Supp at 1318):

> a defendant need not speculate on or anticipate an abandonment from the plaintiff's mere expressions of intent or other equivocal action. Rather, the defendant is entitled to await affirmative and certain action by a plaintiff confirming such abandonment before exercising the right of removal.

See also *Smith v Executive Fund Life Ins. Co.* (MD La 1986) 651 F Supp 269 (30-day removal period does not begin to run until defendant can reasonably and intelligently conclude from pleadings and other papers that amount in controversy is in excess of jurisdictional amount). On requirement of plaintiff's voluntary act, see §22.72.

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§22.72 c. Plaintiff's Voluntary Act Required for Change Rendering Case Removable

The courts have evolved a rule known as the voluntary-involuntary rule to determine whether a subsequent change in the case will result in removal when the case stated in the initial pleading is not removable. Under this rule for the case to become removable and the 30-day period of 28 USC §1446(b) (see §22.67) to begin to run, the change rendering the case removable must result from plaintiff's voluntary act (*e.g.,* by voluntarily amending the pleadings or dismissing a nondiverse defendant) rather than by a court's order on the merits of an issue (*e.g.,* a directed verdict in favor of a nondiverse defendant). See *Self v General Motors Corp.* (9th Cir 1978) 588 F2d 655 (final judgment entered against nondiverse defendant leaving only diverse defendant in case; removal by diverse defendant improper because judgment is a court order and a decision on the merits; case remanded). See also *Atlanta Shipping Corp. v International Modular Hous., Inc.* (SD NY 1982) 547 F Supp 1356, 1360 (removal proper even though diversity did not exist at time of commencement of action when diversity created by plaintiff's stipulation dismissing nondiverse party); *White v Hughes* (WD Tenn 1975) 409 F Supp 1005, 1008 (defendant's cross claim not a voluntary action by plaintiff and cannot be basis for removal under 28 USC §1446(b)).

An exception to the rule requiring plaintiff's voluntary act to bring about a change rendering the case removable exists when a state court dismisses a nondiverse defendant who has been fraudulently joined. Removal under these circumstances was held proper in *Cook v Pep Boys—Mannie, Moe & Jack Inc.* (ED Pa 1985) 641 F Supp 43 (granting of motion for judgment on the pleadings by nondiverse defendant). See *Abels v State Farm Fire & Cas. Co.* (WD Pa 1988) 694 F Supp 140, 143 (exception recognized but did not apply under facts of case). See also *Vidmar Buick Co. v General Motors Corp.* (ED Ill 1985) 624 F Supp 704 (exception recognized). On fraudulent joinder generally, see §§22.19-22.21, 22.80.

On 30-day period for filing a notice of removal under 28 USC §1446(b) beginning to run on receipt of notice by defendant (*e.g.,* at a deposition or during a phone conversation) that the case is or has become removable, see §22.70.

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§22.73 3. One-Year Limitation Period Beyond Which Removal Prohibited in Diversity Cases

In 1988, 28 USC §1446(b) was amended to provide, for the first time, that a case may not be removed on the basis of jurisdiction conferred under 28 USC §1332 (*i.e.,* diversity jurisdiction) more than 1 year after the action is commenced. As a result, diversity cases must be removed within 30 days after they first become removable (see §§22.67, 22.70), or within 1 year of commencement of the case, whichever first occurs. 28 USC §1446(b). There is no such 1-year limitation period for federal question cases, and they need only be removed within 30 days after they first become removable (see §§22.67, 22.70), whenever that occurs.

In California state court an action is deemed commenced when the complaint is filed (see CCP §350), and the summons and complaint may be served within 3 years after commencement of the action (CCP §583.210). It has been held, however, that a defendant may file an effective removal notice within 30 days after first receiving a copy of the initial complaint even though that complaint was filed more than a year earlier, and that the 1-year limitation in §1446(b) applies only to cases removed on the basis of something other than the initial pleading. *Zogbi v Federated Dep't Store* (CD Cal 1991) 767 F Supp 1037 (removal proper even though complaint filed more than 3 years before). See also *Greer v Skilcraft* (ND Ala 1989) 704 F Supp 1570, 1582 (commencement for purposes of the 1-year limitation period defined as the date of filing the complaint in state court accompanied by a bona fide effort to have it served). The *Zogbi* court was not persuaded to adopt a contrary position by such cases as *Rezendes v Dow Corning Corp.* (ED Cal 1989) 717 F Supp 1435 (summons and complaint served more than 1 year after complaint filed in state court; removal of diversity case held improper, remand ordered); *Coman v International Playtex, Inc.* (ND Cal 1989) 713 F Supp 1324, 1328 ("commencement" in removal cases governed by law of state where action originated; removal improper more than 1 year after complaint filed; retroactivity of §1446(b) amendment). See *Phillips v Allstate Ins. Co.* (CD Cal 1989) 702 F Supp 1466 (retroactivity of 1-year limitation period of 28 USC §1446(b); notice of removal untimely for case commenced 3 years earlier; dictum that when a nondiverse defendant dismissed more than 1 year after action filed, 1-year limitation period of §1446(b) bars other defendants from removing).

One unresolved issue concerns whether the concept of fraudulent joinder (see §§22.19-22.21) may be held to override the 1-year limitation imposed by 28 USC §1446(b), *i.e*., if defendant first acquires information concerning fraudulent joinder after the 1-year period, may defendant thereafter remove despite §1446(b)? Of course, if defendant ascertains information concerning fraudulent joinder within the 1-year period of §1446(b), defendant should file a timely notice of removal within the appropriate 30-day period specified in §1446(b) (see §§22.67-22.72). See generally *Delatte v Zurich Ins. Co.* (MD La 1988) 683 F Supp 1062 (removal based on fraudulent joinder untimely when not made within 30 days after settlement with other nondiverse defendants). See also *Cook v Pep Boys—Mannie, Moe & Jack Inc.* (ED Pa 1985) 641 F Supp 43, 47 n2 (time limits of 28 USC §1446(b) ignored when removal based on fraudulent joinder of nondiverse defendant and removal petition (now notice) "need only be filed within a reasonable time after defendant learns of the fraudulent joinder"; petition filed within 30 days after state court ruling on motion for judgment on the pleadings held timely).

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§22.74 4. Waiver of Right to Remove by Acts Done in State Court Within 30-Day Period

A defendant who participates in the merits of the case in state court when grounds for removal exist will waive the right to remove (see *Baker v National Blvd. Bank* (ND Ill 1975) 399 F Supp 1021) even when the 30-day period of 28 USC §1446(b) (see §§22.67-22.72) has not as yet expired. A defendant cannot first experiment in state court before removing the case. See *Gore v Stenson* (SD Tex 1984) 616 F Supp 895 (defendant who takes some substantial defensive action in state court action before filing notice of removal may waive right to removal).

Generally for waiver to occur the defendant's intent to waive the right to remove to federal court and submit to the state court's jurisdiction must be clear and unequivocal, and the defendant's actions must be inconsistent with the defendant's right to remove. 616 F Supp at 898. There is an exception, however, to this rule. Inadvertent waiver can occur when a defendant takes certain action in state court that is "'deemed to constitute a submission to its jurisdiction.'" *Chicago Title & Trust Co. v Whitney Stores, Inc.* (ND Ill 1984) 583 F Supp 575 (defendant acted in manner inconsistent with intent to seek federal jurisdiction; because exception arises out of defendant's action, it is more akin to estoppel than waiver) quoting *Bedell v H.R.C. Ltd.* (ED Ky 1981) 522 F Supp 732, 737.

Thus, when grounds for removal exist, a defendant who files a permissive counterclaim in state court before filing a notice of removal thereby voluntarily submitting to the court's jurisdiction waives the right to remove. *Isaacs v Group Health, Inc.* (SD NY 1987) 668 F Supp 306. Similarly, a defendant waives the right to remove by first asserting a cross-claim against another defendant in state court. *Isaacs v Group Health, Inc., supra*. On uncertainty concerning the effect of filing a compulsory counterclaim, see *Paris v Affleck* (MD Fla 1977) 431 F Supp 878.

Although the right to removal is waived when a defendant participates in the merits of the action in state court before filing a notice of removal, there is no waiver when the defendant only takes part "in preliminary action, such as pleading or opposing a preliminary injunction." *Baker v National Blvd. Bank* (ND Ill 1975) 399 F Supp 1021, 1022 (intervention; motion to vacate injunction continued pending decision on motion to remand; action only amounted to protecting intervenor's interest in state court action). Thus, it has been held that the filing of only an answer asserting a general denial is an action which is "preliminary and non-conclusive in character and [does] not actually submit the merits of a claim for a binding decision." *Gore v Stenson* (SD Tex 1984) 616 F Supp 895, 897. Similarly, motions to vacate temporary restraining orders and injunctions have been held to constitute preliminary actions that do not actually submit the claim to a binding decision and thus do not constitute a waiver of the right to remove. See *Bedell v H.R.C. Ltd.* (ED Ky 1981) 522 F Supp 732, 738; *Beasley v Union Pac. R.R.* (D Neb 1980) 497 F Supp 213, 216. See also *Cella, Adler & Tilles v Brown* (ED Mo 1905) 136 F 439, aff'd on other grounds (8th Cir 1906) 144 F 742 (appearance and hearing on preliminary motions concerning injunctions, attachment, and other provisional remedies do not waive right to removal). On effect of general demurrer, compare *Alley v Nott* (1884) 111 US 472, 28 L Ed 491, 4 S Ct 495 (waiver of right to removal when removal sought after demurrer filed and hearing held) with *Whiteley Malleable Casting Co. v Sterlingworth Ry. Supply Co.* (CC Ind 1897) 83 F 853 (mere filing of answer and demurrer without hearing on demurrer before removal sought did not constitute waiver) and *Duncan v Associated Press* (CC Cal 1897) 81 F 417, 422 (no waiver when demurrer preceded removal). On taking of a deposition being held not to have waived right to remove case, see *Duvall v Wabash Ry.* (WD Mo 1923) 9 F2d 83.

NOTE: When an action becomes removable right before trial or during trial "the intention to remove [must] be voiced immediately." *Chicago Title & Trust Co. v Whitney Stores, Inc.* (ND Ill 1984) 583 F Supp 575. Compare *Waldron v Skelly Oil Co.* (ED Mo 1951) 101 F Supp 425 (plaintiff's attorney during opening statement dismissed nondiverse defendants; remaining diverse defendant held to have waived right to remove because defendant's attorney did not immediately request court to permit defendant's attorney to take steps to remove case but instead waited until plaintiff's attorney finished opening statement to do so) and *Walker v American Tel. & Tel.* (SD Tex 1988) 684 F Supp 475 (settlement conference held during state court trial in which nondiverse defendant dismissed; at moment nondiverse defendant dismissed, diverse defendant had duty to immediately give notice of intent to remove and waiting between 15 minutes to 1 hour before giving such notice constituted an estoppel of the right to remove) with *Heniford v American Motors Sales Corp.* (D SC 1979) 471 F Supp 328 (nondiverse defendant dismissed

during closing argument; held no waiver of right to remove when diverse defendant, on reconvening of the court before trial advanced further, notified plaintiff and court of intent to remove and moved that state court proceedings be terminated; removal papers filed in federal court before verdict during jury deliberations). See also *Chicago Title & Trust Co. v Whitney Stores, Inc., supra* (waiver of right to remove by obtaining agreed continuance of trial date without stating intent to remove in interim).

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§22.75 5. Effect of Failure to Remove Within Statutory Period; Waiver of Objection

The 30-day period for filing a notice of removal specified in 28 USC §1446(b) (see §§22.67-22.72) is not jurisdictional, but is a formal procedural requirement. *Fristoe v Reynolds Metals Co.* (9th Cir 1980) 615 F2d 1209, 1212; *Abadjian v Gulf Oil Corp.* (CD Cal 1984) 602 F Supp 874. See *Brown v Demco, Inc.* (5th Cir 1986) 792 F2d 478, 481; *Transport Indem. Co. v Financial Trust Co.* (CD Cal 1972) 339 F Supp 405. But see *U.S. ex rel Walker v Gunn* (9th Cir 1975) 511 F2d 1024, 1026 (untimely removal in criminal case under 28 USC §1446(c); court without jurisdiction to try merits). Thus, when a notice of removal is untimely filed, a timely objection to it by a motion to remand (see 28 USC §1447(c); §22.92) will defeat removal. See *Fristoe v Reynolds Metals Co., supra*. Plaintiff, however, may waive the defect or be estopped from raising it by conduct such as failing to timely object to the late removal. *Fristoe v Reynolds Metals Co., supra* (untimely objection). See *Transport Indem. Co. v Financial Trust Co., supra* (conduct constituting waiver or estoppel discussed).

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B. Procedure

§22.76 1. Preparation of Notice of Removal; Content

A defendant, or defendants, desiring to remove a case to federal court must file a notice of removal in the United States district court for the district in which the action is pending. The notice should contain a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders with which the defendant or defendants have been served. 28 USC §1446(a). The notice of removal must be signed pursuant to Fed R Civ P 11. 28 USC §1446(a).

NOTE: Because the removing party has the burden of establishing removal jurisdiction if a motion to remand is made (see §22.92), the party removing the action should ensure that burden has been met by preparing a proper and factual removal notice, which includes all relevant facts required to show jurisdiction, requesting judicial notice wherever appropriate, and timely filing the notice of removal and all appropriate pleadings and other documents with the court. On federal court's discretion to award just costs and any actual expenses, including attorney fees, incurred as a result of an improper removal, see §22.93.

On alleging with particularity claim of fraudulent joinder of defendants, see §22.80. On filing notice of removal and other documents, see §§22.85-22.88. On requirement that all defendants join in notice and specifying in notice explanation for absence of codefendants, see §§22.77-22.83. On form for notice of removal, see §22.98.

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§22.77 a. Requirement That All Defendants Join in Notice of Removal

Unless an exception exists (see §§22.78-22.83), the general rule is that all defendants must join in the notice of removal. See *Fristoe v Reynolds Metals Co.* (9th Cir 1980) 615 F2d 1209, 1213; *Thornton v Allstate Ins. Co.* (ED Mich 1980) 492 F Supp 645, 647. See also *McKinney v Rodney C. Hunt Co.* (WD NC 1978) 464 F Supp 59, 62 ("unanimity among all parties substantively entitled to remove is required").

It is not sufficient to have a single defendant or even a majority of defendants seek removal. All must do so, or removal will be held to be improper. See, *e.g., Schmidt v National Org. for Women* (ND Fla 1983) 562 F Supp 210, 212; *McKinney v Rodney C. Hunt Co., supra; Reiken v Nationwide Leisure Corp.* (SD NY 1978) 458 F Supp 179, 182. See also *Adams v Aero Servs. Int'l, Inc.* (ED Va 1987) 657 F Supp 519 (when removal made under 28 USC §1441(a) or §1441(b) defendants must be treated collectively and all who may properly join in removal petition (notice of removal) must join in or consent to it unless an exception exists).

All the defendants need not sign the notice of removal, however, for them to join in the removal. It is sufficient if the other defendants simply consent to the action being removed and timely file such a consent. *Hernandez v Six Flags Magic Mountain, Inc.* (CD Cal 1988) 688 F Supp 560, 562.

On removal period in cases involving multiple defendants, see §22.69. On form for joinder of defendants in notice of removal, see §22.99.

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b. Exceptions to Requirement of Joinder by All Defendants

§22.78 (1) Nonserved Defendants

Only those defendants who have been served need join in the notice of removal. They can remove by themselves. *Salveson v Western States Bankcard Ass'n* (9th Cir 1984) 731 F2d 1423, 1429; *Adams v Aero Servs. Int'l, Inc.* (ED Va 1987) 657 F Supp 519, 521 n2. See *Knowles v American Tempering, Inc.* (ED Pa 1985) 629 F Supp 832, 835 (removing defendant need not obtain joinder of unserved codefendant).

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§22.79 (2) Formal or Nominal Parties

Only necessary or indispensable parties are required to join in the notice of removal. *Folts v City of Richmond* (ED Va 1979) 480 F Supp 621, 624. Nominal or formal parties may be disregarded for removal purposes and need not join in the notice of removal. *Knowles v American Tempering, Inc.* (ED Pa 1985) 629 F Supp 832, 835; *Folts v City of Richmond, supra*. See *Adams v Aero Servs. Int'l, Inc.* (ED Va 1987) 657 F Supp 519, 521 n2 (nominal or formal defendants are exception to rule requiring joinder of all defendants). On joinder of formal or nominal parties not defeating diversity of citizenship jurisdiction, see §22.17.

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§22.80 (3) Fraudulently Joined Defendants

Fraudulently joined defendants are disregarded for the purpose of determining diversity of citizenship and need not be joined in a notice of removal. See *Polyplastics, Inc. v Transconex, Inc.* (1st Cir 1983) 713 F2d 875, 877. Under the former petition for removal procedure, supporting facts apart from personal deductions had to be stated in the petition to show fraudulent joinder. *Goldberg v CPC Int'l, Inc.* (ND Cal 1980) 495 F Supp 233, 239. See *Saylor v General Motors Corp.* (ED Ky 1976) 416 F Supp 1173, 1176 (fraudulently joinder must be pleaded with particularity). See also §22.21. Presumably, this rule has not changed under the current notice of removal procedure. For further discussion on what constitutes fraudulent joinder and fraudulent joinder generally, see §§22.19-22.21, 22.72.

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§22.81 (4) Separate and Independent Claims

When a separate and independent claim is the basis for removal under 28 USC §1441(c) (see §§22.30-22.33), only the defendant or defendants to that claim must join in the notice of removal. See *Reiken v Nationwide Leisure Corp.* (SD NY 1978) 458 F Supp 179, 182; *International Union of Operating Eng'rs, Local 400 v Sletten Constr. Co.* (D Mont 1974) 383 F Supp 855, 856 n1. See also *Thomas v Shelton* (7th Cir 1984) 740 F2d 478, 483 (unlike for removal under §1441(a) consent of all defendants is not required for removal under §1441(c)); *Knowles v American Tempering, Inc.* (ED Pa 1985) 629 F Supp 832, 835 (party against whom separate claim asserted need not obtain joinder of other defendants).

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§22.82 (5) Federal Officers

When an action is brought against a federal officer or officers as enumerated in 28 USC §1442 and others, and removal is sought under 28 USC §1442, a federal officer alone may file a notice of removal without joinder of the other defendants. *Bradford v Harding* (2d Cir 1960) 284 F2d 307; *Jones v Elliot* (ED Va 1950) 94 F Supp 567. See *Perez v Rhiddlehoover* (ED La 1965) 247 F Supp 65, 70 (immaterial that all defendants did not join in removal; if rule otherwise plaintiff could always defeat removal by joining a defendant that would not remove). On removal under 28 USC §1442 generally, see §§22.35-22.36.

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§22.83 c. Specifying Exceptions to Joinder of Defendants Requirement In Notice of Removal

When fewer than all the defendants join in the notice of removal because an exception applies (see §§22.77-22.82), the notice of removal must set forth an explanation for the nonjoinder of all nonjoined defendants. See *Knowles v American Tempering, Inc.* (ED Pa 1985) 629 F Supp 832, 835 n1. Otherwise, the notice of removal will be insufficient on its face to perfect removal. See *Wallis v Southern Silo Co.* (ND Miss 1973) 369 F Supp 92.

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§22.84 d. Plaintiff's Waiver of Defect That All Defendants Not Joined in Notice of Removal

A failure of all defendants to join in or consent to removal is a technical or procedural irregularity rather than a jurisdictional defect. *Roberts v Vulcan Materials Co.* (MD La 1983) 558 F Supp 108; *Albonetti v GAF Corp.—Chem. Group* (SD Tex 1981) 520 F Supp 825. Thus, plaintiff may waive this defect by failing to timely object, going to trial on the merits, or any other conduct that indicates acquiescence. *Roberts v Vulcan Materials Co., supra*. On 30-day limitation period under 28 USC §1447(c) to move to remand based on any defect other than lack of subject matter jurisdiction, see §22.92.

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2. Filing Notice of Removal and Other Requirements

§22.85 a. Timely Filing in Federal Court; Automatic Removal

The notice of removal should be filed in the federal district court for the district and division within which the action is pending. 28 USC §1446(a). It must be filed within the appropriate time period specified in 28 USC §1446(b). See *Murphy Bros. v Michetti Pipestringing, Inc.* (1999) 526 US 344, 143 L Ed 2d 448, 119 S Ct 1322. On time limitation to file notice of removal, see §§22.67-22.75. Before filing the notice counsel should ascertain if any federal local rules apply and if there are any local cover sheet and filing fee requirements. On removing claim related to a bankruptcy case, see 28 USC §1452.

No court order from federal or state court is required to effect removal. Instead, the mere act of filing the removal notice in federal court, giving notice to all adverse parties (see §22.87), and filing a copy in state court (see §22.88) effects removal. 28 USC §1446(d). See *Libhart v Santa Monica Dairy Co.* (9th Cir 1979) 592 F2d 1062, 1064 (removal accomplished merely by defendant filing verified petition (now notice of removal, see §22.76)).

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§22.86 b. Other Papers to Be Filed With Notice in Federal Court

The defendant or defendants removing the action to federal court must file with the notice of removal (see §22.85) a copy of all process, pleadings, and orders that have been served on the defendant or defendants in the state court action. 28 USC §1446(a). In appropriate circumstances counsel may also wish to attach discovery documents or responses to the notice of removal. In *Visicorp v Software Arts, Inc.* (ND Cal 1983) 575 F Supp 1528, discovery and discovery requests were held not to constitute "process, pleadings or orders" within the meaning of 28 USC §1446(a). Counsel who desire to attach discovery documents or responses should ascertain if there are any local court rules that either require it or prohibit this from being done.

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§22.87 c. Prompt Written Notice to Adverse Parties

Promptly after the notice of removal is filed in federal court (see §22.85) the removing defendant or defendants must give each adverse party written notice of the filing of the notice of removal. 28 USC §1446(d).

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§22.88 d. Promptly File Copy of Notice in State Court

The party removing the action is also required to promptly file a copy of the notice of removal with the clerk of the state court in which the action is pending. 28 USC §1446(d). The state court is thereafter prohibited from taking further action unless the case is remanded to the state court. 28 USC §1446(d). See *Jones v Cargill Nutrena Feed Div.* (SD Ala 1987) 665 F Supp 907 (until all requirements of 28 USC §1446(d) (former 28 USC §1446(e)) fulfilled state court retains jurisdiction and may proceed with case).

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§22.89 3. Amending Notice of Removal

Before expiration of the 30-day removal period under 28 USC §1446(b) (see §§22.67-22.72), it appears that a notice of removal may be amended at any time by the defendant or defendants. See *Mullins v King's Entertainment Co.* (ED Mich 1987) 663 F Supp 61, 64; *Winters Gov't Secs. Corp. v Cedar Point State Bank* (SD Fla 1978) 446 F Supp 1123, 1127. After the 30-day period cases in which the court has granted leave to amend fall into "two loosely defined categories of cases: 'mislabeling' and 'lack of specificity' cases." *Smiley v Citibank (South Dakota)* (CD Cal 1993) 863 F Supp 1156. In the "lack of specificity" cases, the defendant sets forth the correct statute and legal theory for removal but does not include all the facts necessary for removal. See, *e.g., Barrow Dev. Co. v Fulton Ins. Co.* (9th Cir 1969) 418 F2d 316 (failure of petition for removal (now notice, see §22.76) to disclose corporation's state of incorporation and principal place of business merely defective allegation rather than a nullity; amendment permitted). In the mislabeling cases, the notice of removal and the entire file of the proceedings contain sufficient facts and legal theories to support removal, but the notice sets forth the improper statutory section for removal. See, *e.g., National Audubon Soc'y v Department of Water & Power* (ED Cal 1980) 496 F Supp 499, in which the court held that defendants who plead federal question jurisdiction are permitted to amend the applicable code section on which jurisdiction is based. Defendants who plead diversity as the basis for removal, however, may not amend their notice to plead federal question jurisdiction after the 30-day removal period has run. *Smiley v Citibank (South Dakota), supra*. In determining whether an amendment will cure a defect in form or add new substance under the former petition for removal procedure (see §22.76), the court ruled that it was not limited to the petition and the motion to amend the petition, but should review the entire file to ascertain what the file fairly reflects at the time the court considers the motion. *National Audubon Soc'y v Department of Water & Power* (ED Cal 1980) 496 F Supp 499, 503. If the file contained the necessary factual allegation omitted in the initial petition for removal, the amendment was held to merely clarify a defective allegation and the amendment would be upheld. See *National Audubon Soc'y v Department of Water & Power, supra*. Presumably the same rule applies to the notice of removal procedure.

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§22.90 4. Removability Determined at Time Notice Filed

Whether a case is removable is determined by the pleadings as of the time the notice of removal is filed. However, if the plaintiff after removal "seeks to join additional defendants whose joinder would destroy subject matter jurisdiction," the court has the discretion to either (a) deny joinder or (b) grant joinder and remand the action to state court. 28 USC §1447(e). Under the former petition procedure (see §22.76), later conduct or amendments could not generally be used to oust the federal court of its jurisdiction if removal jurisdiction existed when the petition was filed. See *Blankenberg v Commercial Ins. Co.* (ND Cal 1987) 655 F Supp 223, 226 n5. See also *Libhart v Santa Monica Dairy Co.* (9th Cir 1979) 592 F2d 1062, 1065 (to determine removability based on federal question jurisdiction, look to complaint at time petition (now notice, see §22.76) filed); *Littlefield v Continental Cas. Co.* (CD Cal 1979) 475 F Supp 887, 889 (must be complete diversity between parties for diversity of citizenship jurisdiction (see §§22.16-22.29); diversity tested at time of filing of removal petition).

NOTE: If federal claims and pendent state claims are joined in the complaint and after removal the plaintiff amends its complaint to dismiss the federal claims, the court may remand the pendent state claims. *Carnegie-Mellon Univ. v Cohill* (1988) 484 US 343, 98 L Ed 2d 720, 108 S Ct 614. See §22.41.

NOTE: Concerning diversity of citizenship, under 28 USC §1441(a) defendants sued under fictitious names (Doe defendants) are disregarded. See §22.23.

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§22.91 5. Proceeding in Federal Court After Removal; Avoiding Waiver of Jury Trial

Pleadings filed in state court have force and effect in federal court after removal and need not be refiled (unless the court requires repleading). *Granny Goose Food, Inc. v Brotherhood of Teamsters, Local 70* (1974) 415 US 423, 435, 39 L Ed 2d 435, 94 S Ct 1113. See Fed R Civ P 81(c)(2). Similarly, interlocutory state court orders, *e.g.,* injunctions or attachments, have the same force and effect in federal court after removal that they had in state court. 415 US at 436. See 28 USC §1450. A motion must be brought in federal court to change or modify the order. See *Granny Goose Food, Inc. v Brotherhood of Teamsters, Local 70, supra*; *Aybar v F. & B. Mfg. Co.* (D PR 1980) 498 F Supp 1184, 1194.

If the defendant has not answered the complaint, the defendant must answer it or present other defenses or objections available under the federal rules of civil procedure within the longest of "21 days after receiving—through service or otherwise—a copy of the initial pleading setting forth the claim for relief; or 21 days after being served with the summons for an initial pleading on file at the time of service; or 7 days after the notice of removal is filed." Fed R Civ P 81(c). The future course of the proceedings after removal are governed by federal rather than state law. *Granny Goose Food, Inc. v Brotherhood of Teamsters, Local 70, supra*.

If the plaintiff has not served one or more defendants with process, plaintiff must complete service on such defendants in the same manner as if the case had been originally filed in the district court. 28 USC §1448. A state court summons that has been issued but not served before removal becomes null and void on removal, and new process under Fed R Civ P 4 must be issued by the federal court. *Beecher v Wallace* (9th Cir 1967) 381 F2d 372. On proceeding in federal court when state service has not been perfected at time of removal or when the process served proves to be defective, see 28 USC §1448; *Beecher v Wallace, supra*. On issuance and service of process in federal court actions and time limitations, see Fed R Civ P 4.

With regard to the right to a jury trial, if all the necessary pleadings have been served at the time of removal, the defendant must demand a jury trial within 14 days after filing the notice of removal and the plaintiff must demand a jury trial within 14 days after being served with the notice of removal. Fed R Civ P 81(c). A party, however, who has expressly demanded a jury trial in accordance with state law before removal need not demand one after removal. Fed R Civ P 81(c). When a defendant does not file an answer to the complaint until after removal, the period specified in Fed R Civ P 38(b), requiring the demand to be made no later than 14 days after service of the last pleading directed to the issue triable by the jury, applies. See *Pawlak v Metropolitan Life Ins. Co.* (D Mass 1980) 87 FRD 717. Counsel should check local court rules to ascertain if there are any special local requirements and time limitations on demanding a jury trial. For further discussion, see §22.50.

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6. Objecting to Removal

§22.92 a. Noticing Motion to Remand; Time Limitation

The method to object to an improper removal of the case to federal court is for the aggrieved party to notice a motion to remand the action back to state court. A motion to remand must be made within 30 days after the filing of the notice of removal under 28 USC §1446(a) (see §§22.85-22.88) when the basis for the motion is any defect other than lack of subject matter jurisdiction. 28 USC §1447(c); *Gray v Moore Business Forms, Inc.* (ND Cal 1989) 711 F Supp 543. There is no time limit for the motion, however, when the basis for the motion is that the district court lacks subject matter jurisdiction. 28 USC §1447(c). See also *International Union of Operating Eng'rs v County of Plumas* (9th Cir 2009) 559 F3d 1041 (party that asserted subject matter jurisdiction in its removal petition not precluded from challenging subject matter jurisdiction on appeal). Nor does the 30-day time limit apply to a remand motion based on a forum selection clause specifying state court as the appropriate forum, although the district court has discretion "to deny such a motion if it is not raised on a timely basis." *Kamm v Itex Corp.* (9th Cir 2009) 568 F3d 752, 757 (forum selection clause is not a "defect" to which 28 USC §1447(c) time limit applies).

For more detailed discussion of motions to remand generally, see 16 Moore & Coquillette, Moore's Federal Practice, Removal §107.41[1][d] (3d ed 1997); 14C Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction and Related Matters §3739 (3d ed 1998).

The issue of improper removal may also be raised in opposition to a motion to dismiss. See *Karambelas v Hughes Aircraft Co.* (9th Cir 1993) 992 F2d 971; *Jackson v Southern Cal. Gas Co.* (9th Cir 1989) 881 F2d 638, 641 n2.

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§22.93 b. Burden of Removability Lies With Moving Party; Costs and Attorney Fees

When remand is sought (see §22.92), the burden is on the party that removed the case to federal court to establish that removal jurisdiction exists and that removal is proper. See *Green v Mutual of Omaha* (ND Cal 1982) 550 F Supp 815, 819; *Littlefield v Continental Cas. Co.* (CD Cal 1979) 475 F Supp 887, 889. See also *Mutual Liab. Ins. Co. v Flintkote Co.* (SD NY 1983) 565 F Supp 843, 845 (removing party opposing remand motion for fraudulent joinder has burden to establish, by competent proof, right to federal forum). On drafting notice of removal to show removal jurisdiction, see §22.76.

If the court determines that removal was improper, the "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as result of the removal." 28 USC §1447(c).

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c. Reviewability of Court Order

§22.94 (1) When Remand Granted; Multiple Proceedings

The general rule is that a district court's remand order—based on a timely raised defect in removal procedure or on lack of subject matter jurisdiction (the grounds for remand specified in 28 USC §1447(c))—is not reviewable by appeal under 28 USC §1447(d). *Powerex Corp. v Reliant Energy Servs., Inc.* (2007) 551 US 224, 168 L Ed 2d 112, 121, 127 S Ct 2411. See also *Things Remembered, Inc. v Petrarca* (1995) 516 US 124, 133 L Ed 2d 461, 116 S Ct 494; *Gravitt v Southwestern Bell Tel. Co.* (1977) 430 US 723, 52 L Ed 2d 1, 97 S Ct 1439. A remand order in a civil rights case that was removed to federal district court under 28 USC §1443 (see §22.37) may be reviewed by appeal or otherwise. 28 USC §1447(d).

Although an appellate court may lack jurisdiction to review a remand order under 28 USC §1447(d), the court may review a district court's award of attorney fees under 28 USC §1447(c). *Dahl v Rosenfeld* (9th Cir 2003) 316 F3d 1074, 1077. The U.S. Court of Appeals for the Ninth Circuit has held that the federal removal statute (28 USC §1447(c)) does not allow a district court to remand a case sua sponte for a nonjurisdictional defect in procedure. *Kelton Arms Condominium Owners Ass'n v Homestead Co.* (9th Cir 2003) 346 F3d 1190.

When a remand order is not based on 28 USC §1447(c), appellate review of the remand order under 28 USC §1291 may be appropriate. See *Quackenbush v Allstate Ins. Co*. (1996) 517 US 706, 714, 135 L Ed 2d 1, 116 S Ct 1712. See also *California Dep't of Water Resources v Powerex Corp.* (2008) 533 F3d 1087, 1092 (appellate review of decision to decline supplemental jurisdiction under 28 USC §1367(c)); *Scott v Machinists Auto. Trades Lodge No. 190* (9th Cir 1987) 827 F2d 589 (remand order of pendent state claims for defamation and intentional infliction of emotional distress reviewable); *Clorox v United States Dist. Court* (9th Cir 1985) 779 F2d 517 (appellate review available when remand order based on resolution of substantive law issue apart from jurisdictional decision); *Pelleport Invs. v Budco Quality Theatres* (9th Cir 1984) 741 F2d 273 (remand order based on forum selection clause).

PRACTICE TIP: Counsel should consider filing both a notice of appeal and a petition for mandamus when the appropriate procedure to review a reviewable remand order is unclear. See *Clorox,* 779 F2d at 519 (remand order which is appealable under 28 USC §1291 is not reviewable by mandamus).

Despite the fact that review of a remand order may be barred by 28 USC §1447(d), that portion of a district court's remand order awarding attorney fees to the plaintiff is reviewable under 28 USC §1291. *Schmitt v Insurance Co. of N. Am.* (9th Cir 1988) 845 F2d 1546, 1550.

Counsel should bear in mind that a certified copy of the remand order must be mailed by the federal court clerk to the clerk of the state court. 28 USC §1447(c). See *Spanair S.A. v McDonnell Douglas Corp.* (2009) 172 CA4th 348, 355, 90 CR3d 864 (jurisdiction not returned to state court until district court clerk mailed copy of remand order to superior court, nearly 3 years after district court's order was entered). Before this certification to the state court, the federal district court may grant a rehearing to correct an error. See *Bucy v Nevada Constr. Co.* (9th Cir 1942) 125 F2d 213, 217. See also *Seedman v United States Dist. Court* (9th Cir 1988) 837 F2d 413. After certification to the state court, however, the federal court cannot vacate a remand order issued under 28 USC §1447(c) (*Seedman v United States Dist. Court, supra*) and the state court may proceed with the case (28 USC §1447(c)).

PRACTICE TIP: When the district court grants a remand order and counsel opposing it believes that it is a reviewable order and adequate reason for reconsideration exists, to avoid having to proceed in two forums, *i.e.,* in state court with the case on remand and in federal court with review of the remand order, counsel might give thought to requesting the district court to reconsider its remand order before a certified copy of it is mailed to the clerk of the state court. To be able to accomplish this, however, counsel may have to request the district court judge to stay issuance of the remand order for a stated period of time unless a local court rule provides for such a stay. If the court refuses the request or does not vacate its order, or if such a request is not made, a stay of the state court proceeding pending review of the remand order will be required to avoid having to proceed both in state and

federal court. Counsel should first consider obtaining a stay order from the court of appeals under 28 USC §2283 and, if the court refuses, should then consider requesting the state court to stay its proceedings pending review of the remand order in the federal appellate courts.

Documents in the federal court's file are not automatically sent to the state court. Plaintiff must request the papers that plaintiff desires to be sent to the state court. On effect given to pleadings filed in federal court before remand to defeat default in state court proceeding, see *Laguna Village, Inc. v Laborers' Int'l Union* (1983) 35 C3d 174, 179, 197 CR 99.

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§22.95 (2) When Remand Denied

An order denying remand standing alone is not final or appealable. *Poirrier v Nicklos Drilling Co.* (5th Cir 1981) 648 F2d 1063; *Wilkins v American Export-Isbrandtsen Lines, Inc.* (2d Cir 1968) 401 F2d 151. Rather, the order may be reviewed on appeal from a final judgment "or by interlocutory appeal if the refusal to remand is certified under" 28 USC §1292(b). *Sheeran v General Elec. Co.* (9th Cir 1979) 593 F2d 93, 97. To preserve an objection to removal and to be able to have the issue of an improper denial of remand reviewed on appeal from a final judgment, however, the party must seek an interlocutory appeal from the district court's order denying the remand motion. *Johnson v Mutual Benefit Life Ins. Co.* (9th Cir 1988) 847 F2d 600 (although objection to removal made, to preserve objection filing of interlocutory appeal required); *Sorosky v Burroughs Corp.* (9th Cir 1987) 826 F2d 794, 798 (Ninth Circuit cases require interlocutory appeal). If the party seeking review does not do this and a trial is had on the merits, the issue that may be reviewed on appeal is not whether the case was properly removed, but whether the district court has jurisdiction at the time judgment is entered. *Caterpillar Inc. v Lewis* (1996) 519 US 61, 136 L Ed 2d 437, 117 S Ct 467; *American Fire & Cas. Co. v Finn* (1951) 341 US 6, 95 L Ed 702, 71 S Ct 534; *Lewis v Time, Inc.* (9th Cir 1983) 710 F2d 549, 552. Failure to remand a case that was improperly removed to federal court is not fatal to any judgment if the district court has jurisdiction at the time judgment is entered. *Caterpillar Inc. v Lewis, supra*. See *Grubbs v General Elec. Credit Corp.* (1972) 405 US 699, 702, 31 L Ed 2d 612, 617, 92 S Ct 1344 (when case tried on merits without objection after removal, issue reviewed is whether district court would have original jurisdiction had case been filed in court).

For a case in which a denial of remand was reviewed before a final judgment without district court certification under 28 USC §1292(b), see *O'Halloran v University of Wash.* (9th Cir 1988) 856 F2d 1375 (when appeal from order denying remand joined with appeal from order granting or denying injunction, court will review issue of denial of remand without waiting for certification or final judgment).

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Source: Civil Litigation/California Civil Procedure Before Trial/22 Removal to Federal Court/§22.96 d. Time to Respond to Complaint After Remand

§22.96 d. Time to Respond to Complaint After Remand

When a defendant has improperly removed a case to federal court without filing a response in the original court and the case is remanded, CCP §430.90 specifies the time the defendant has to respond.

If the defendant has not generally appeared the defendant has 30 days to make a motion to dismiss (CCP §583.250), or to quash service of summons or to stay or dismiss (CCP §418.10), if the court has not ruled on a similar motion before removal to federal court. CCP §430.90(a)(1).

If the defendant has not filed an answer in the original court, the defendant has 30 days (a) to answer or (b) to demur or file a motion to strike, provided an answer was not filed in federal court and a demurrer or motion to strike that raises the same or similar issues was not ruled on by the original court before removal or the federal court before remand. CCP §430.90(a)(2). If the demurrer or motion to strike is denied, the defendant has 30 days to answer, unless the answer was filed with the demurrer or motion to strike. CCP §430.90(a)(2). The 30 days to respond is calculated from the date the original court receives the order of remand. CCP §430.90(b).

PRACTICE TIP: On remand, the federal court clerk merely mails a certified copy of the remand order to the clerk of the state court. 28 USC §1447(c). Cautious counsel may want to file an additional notice in the now-revived state court action, and attach any appropriate federal court pleadings, such as an answer, because the federal court will not provide any pleadings in its file to the state court. If counsel does not act, the state court will continue to treat the action as removed and stayed on its docket.

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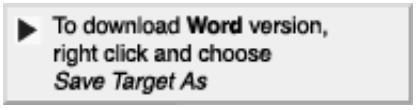
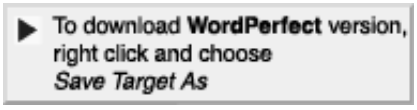
§22.97 XII. CHECKLIST: PROCEDURE FOR EVALUATING REMOVAL OF ACTION TO FEDERAL COURT





For defendants

- Determine whether grounds for removal exist
- Is a federal question involved?
- Is there diversity of citizenship?
- If so, is the requisite jurisdictional amount involved?
- Are there separate and independent claims?
- Is removal authorized by a particular statute?
- Prepare Notice of Removal
- Have all defendants join in Notice of Removal
- Is there an exception to joinder of defendants requirement?
- File Notice of Removal in federal court
- Serve copies of Notice of Removal on adverse parties and file copy in state court
- Avoid waiving right to jury trial

For plaintiffs

- Determine whether removal was improper
- If so, timely notice a motion to remand action back to state court

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Source: Civil Litigation/California Civil Procedure Before Trial/22 Removal to Federal Court/ XIII. FORMS/§22.98 A. Form: Notice of Removal

XIII. FORMS

§22.98 A. Form: Notice of Removal

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF REMOVAL (28 USC §1446)**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE _ _[*SPECIFY*]_ _ **DISTRICT OF CALIFORNIA; THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF** _ _[*SPECIFY*]_ _ **; PLAINTIFF,** _ _[*NAME*]_ _ **, AND** _ _[*HIS/HER/ITS*]_ _ **ATTORNEY(S) OF RECORD:**

Defendant, _ _[*name*]_ _ **, through** _ _[*his/her/its*]_ _ **attorney(s) of record, hereby provides notice of removal of this case from the Superior Court of the State of California, in and for the County of** _ _[*specify*]_ _ **to this Court. This removal is based on the following grounds:** _ _[*Specify grounds; see Comment for example*]_ _**.**

1. By reason of the foregoing, the above-described action is a civil action which may be removed to this Court by defendant pursuant to the provisions of _ _[*specify appropriate Code section(s), e.g., 28 United States Code §1441(a)-(b)*]_ _ **because** _ _[*specify, e.g., it is an action arising under the laws of the United States over which this district court has original jurisdiction; see Comment for another example*]_ _**.**

2. On the date specified below, a copy of this notice is being served on plaintiff's attorney and a copy of this notice is being filed with the clerk of the Superior Court for the State of California, County of _ _[*specify*]_ _**.**

[*Add if appropriate*]

3. All defendants that are required to join in this notice of removal have joined. Attached as Exhibit _ _ **and incorporated by reference is their joinder in notice of removal.**

Date: _ _ _ _ _ _

Respectfully submitted,

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file in federal district court); ___ copies (file one copy in federal court with original if required by local rule (see, *e.g.,* CD Cal Local R 11-4.1); serve one copy on each adverse party; file one copy with clerk of state

court); ___ office copies. Some district courts require parties to file all documents electronically (see, *e.g.,* ED Cal Local R 5-134).

Comment: On time limitations for filing notice of removal and content, see §§22.67-22.89. On form for joinder of removal, see §22.99. The following is an example of what might be filled in the form under the grounds for removal:

1. On the fifth day of March, 2000, an action was commenced by plaintiff, Jones Investments, against defendant, Smith Corporation, in the Superior Court of the State of California in and for the County of Los Angeles, entitled "*Jones Investments, a Texas general partnership, plaintiff, v Smith Corporation; Does 1 through 100, inclusive, defendants,*" bearing Los Angeles Superior Court Case No. _ _ _ _ _ _, by filing a complaint for breach of contract, fraud, and rescission. A copy of the complaint is attached as Exhibit 1 and incorporated by reference.

2. Defendant first received this complaint on March 12, 2000, when John Johnson, attorney of record for plaintiff Jones Investments, enclosed the summons and complaint with a cover letter and a notice of acknowledgment and receipt of service addressed to John A. Apple, Sweet & Apple. The cover letter was dated March 10, 2000; the envelope was postmarked March 10, 2000, and was received by Sweet & Apple on March 12, 2000.

3. The complaint alleges that Jones Investments is a Texas general partnership with its principal place of business located in the County of Dallas, State of Texas, and that Smith Corporation is a Delaware corporation with its principal place of business in the State of New York.

4. Defendant is informed, believes, and alleges that the general partners of Jones Investments are Al Jones, who is domiciled in the County of Dallas, State of Texas; Bob Jones, who is domiciled in the County of Dallas, State of Texas; and Jeff Brown, who is domiciled in the County of Dallas, State of Texas. Defendant requests that this Court take judicial notice of the motor vehicle registration statements of Al Jones, Bob Jones, and Jeff Brown pursuant to Rule 201(b)(1)-(2) of the Federal Rules of Evidence. Copies of their motor vehicle registration statements are attached in the aggregate as Exhibit 2 and incorporated by reference. Exhibit 2 demonstrates that Jones, Jones, and Brown reside in the County of Dallas, State of Texas. Defendants also request that this Court take judicial notice, pursuant to Rule 201(b)(1)-(2) of the Federal Rules of Evidence, of the general partnership agreement recorded in the County of Dallas, State of Texas, which demonstrates that Al Jones, Bob Jones, and Jeff Brown are the general partners of plaintiff Jones Investments. A copy of the general partnership agreement is attached as Exhibit 3 and incorporated by reference.

5. A copy of the articles of incorporation of Smith Corporation are attached as Exhibit 4 and incorporated by reference. Exhibit 4 demonstrates that Smith Corporation is, as alleged in plaintiff's complaint, a Delaware corporation with its principal place of business located in the State of New York. Defendant requests that this Court take judicial notice of defendant's articles of incorporation pursuant to Rule 201(b)(1)-(2) of the Federal Rules of Evidence.

6. Paragraph 14 of plaintiff's first claim for relief states that, by reason of the facts alleged in that claim for relief, plaintiff has been damaged in a sum not less than $3,500,000, according to proof. In paragraph 20 of the second claim for relief, plaintiff alleges that it has been damaged in a sum not less than $3,500,000, according to proof. In paragraph 24 of the third claim for relief, plaintiff alleges that it has been damaged in a sum not less than $3,500,000, according to proof. These damage allegations are also pleaded in the first paragraph of the prayer to plaintiff's complaint.

7. By reason of the foregoing, the above-described action is a civil action which may be removed to this Court by defendant Smith Corporation pursuant to the provisions of 28 U.S.C. §1441(a) and 28 U.S.C. §1332, because this action is between citizens of different states and the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

Note: Counsel should check local federal district court rules for form and formatting rules of court papers and other requirements (*e.g.,* cover sheet, filing fee).

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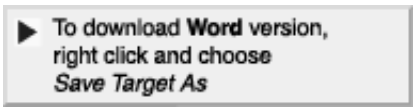
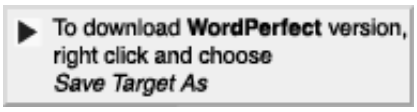
§22.99 B. Form: Joinder in Notice of Removal





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

UNITED STATES DISTRICT COURT
_ _ _ _ _ _ DISTRICT OF CALIFORNIA

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**JOINDER IN NOTICE OF**
vs	)	**REMOVAL**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

Defendant(s), _ _[*name(s)*]_ _, _ _[*join/joins*]_ _ **in defendant** _ _[*name*]_ _**'s notice of removal, dated** _ _[*specify*]_ _**, concerning the above-captioned action.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file in federal district court); ___ copies (file one copy in federal court with original if required by local rule (see, *e.g.,* CD Cal Local R 11-4.1); serve one copy on each adverse party; file one copy with clerk of state court); ___ office copies. Some district courts require parties to file all documents electronically (see, *e.g.,* ED Cal Local R 5-134).

Comment: On requirement that all defendants join in the notice of removal and exceptions, see §§22.77-22.82. This document should be attached to the notice of removal as an exhibit (see §22.98).

Note: Counsel should check local federal district court rules for form and formatting rules of court papers and other requirements (*e.g.,* cover sheet, filing fee).

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23

Demurrers

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I. INTRODUCTION

§23.1 A. Scope of Chapter

Like a motion to strike or a motion for judgment on the pleadings, a demurrer attacks matters appearing on the face of pleadings filed by another party. This chapter covers the procedures for preparing and opposing demurrers filed in civil actions in California state courts. It discusses description and use (see §§23.3-23.14), and demurrers to complaint (see §§23.15-23.38), to cross-complaints (see §§23.39-23.41), and to answers (see §§23.42-23.47). It also discusses responsive procedures (see §§23.48-23.49), reply papers (see §23.50), hearing and court ruling (see §§23.51-23.57), and posthearing procedures (see §§23.58-23.67). For a diagnostic checklist and forms, see (§§23.68-23.75).

For information on other responsive procedures, such as motions to strike and answers—either of which may be filed with a demurrer—see chaps 24 (motions to strike) and 25 (answers).

NOTE: As used in this chapter, the words "plaintiff," "defendant," and "complaint" include "cross-complainant," "cross-defendant," and "cross-complaint."

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§23.2 B. Governing Law

The controlling statutory authority is found in CCP §§430.10-430.80. A demurrer is generally treated like a motion. California Rules of Court 3.1103(c) provides that all law and motion rules (Cal Rules of Ct 3.1100-3.1302) apply to demurrers unless the context or subject matter requires otherwise. In addition, Cal Rules of Ct 3.1320 provides several special requirements that apply only to demurrers. The Judicial Council has preempted local rules on demurrers, unless such rules are required or permitted by statute or rule. Cal Rules of Ct 3.20(a). See §11.2.

NOTE: Local rules implementing the Trial Court Delay Reduction Act (Govt C §§68600-68620) are among the rules otherwise permitted by rule and statute. Cal Rules of Ct 3.20(b).

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II. DESCRIPTION AND USE

§23.3 A. Function

A demurrer can be used at the pleading stage of litigation to challenge the legal sufficiency of allegations in an opponent's pleadings. See CCP §§430.10-430.80, 589, 591. *Smeltzley v Nicholson Mfg. Co.* (1977) 18 C3d 932, 136 CR 269. "Pleadings" include complaints, cross-complaints, and answers. CCP §422.10 (demurrers themselves are also "pleadings").

The majority of demurrers are filed against complaints (or cross-complaints), but demurrers may also be used to attack answers. See §§23.42-23.47.

A demurrer tests issues of law, not fact; thus, a ground for objecting to an opponent's pleading can be raised by demurrer only if it (CCP §430.30):

- Appears on the face of the pleading; or
- Is based on a matter from which the court is required to or may take judicial notice.

See *Banerian v O'Malley* (1974) 42 CA3d 604, 610, 116 CR 919; *James v Superior Court* (1968) 261 CA2d 415, 67 CR 783.

The grounds for demurring to a complaint or cross-complaint are the same as the grounds for objecting in an answer. See CCP §§430.10-430.20. A demurrer is appropriate when the ground for objecting appears on the face of the pleading; an answer is proper when the ground does not appear on the face of the pleading. CCP §430.30(a)-(b). A party may demur and answer at the same time (CCP §430.30(c)), or demur and move to strike at the same time (see CCP §435(c)).

On demurrer, it is not the court's role to decide that the complaint is false in whole or in part; rather, a demurrer admits the truth of all material facts properly pleaded. *William v Southern Cal. Gas Co.* (2009) 176 CA4th 591, 600, 98 CR3d 258.

PRACTICE TIP: Theoretically, a demurrer can resolve a meritless action, but this is rare. If the demurrer is granted, the courts generally permit the opposing party to amend the defective cause of action or defense. Although a demurrer helps to clarify the causes of action or defenses and to narrow the theories that the opposing party will rely on at trial, it has the disadvantage of alerting the opposing party at an early stage in the case to the weaknesses of the pleadings. For further discussion of tactics to consider before filing a demurrer, see §23.6.

If a defendant has not previously made an appearance, filing a demurrer is a general appearance in an action. CCP §1014.

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§23.4 B. General and Special Demurrers Distinguished

In general, the Code of Civil Procedure makes no distinction between "general" and "special" demurrers. See CCP §§430.10-430.90. However, the California Rules of Court distinguish the two (see Cal Rules of Ct 3.1320(f)); special demurrers are not allowed in limited civil cases (CCP §92(c)), and case law is replete with references to "general" and "special" demurrers. See 5 Witkin, California Procedure, *Pleading* §§951-953 (5th ed 2008).

The distinction rests on the particular ground for the demurrer. A "general demurrer" refers to:

- A complaint or cross-complaint on the ground that the pleading fails to state facts sufficient to constitute a cause of action (CCP §430.10(e)); or
- An answer on the ground that the pleading fails to state facts sufficient to constitute a defense (CCP §430.20(a)).

A demurrer on any of the remaining grounds in CCP §430.20 or §430.10 (*e.g.,* uncertainty, lack of legal capacity to sue) is considered a "special demurrer." For discussion of the specific grounds for demurrer, see §§23.22-23.36.

Failure to demur or answer constitutes a waiver of the grounds for a special demurrer, but the grounds for a general demurrer may be raised at any time during litigation, even though the time to demur or answer has passed. On alternative procedures, see §§23.7-23.14 (motion for judgment on the pleadings or objection to evidence at trial based on same grounds as general demurrer).

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Source: Civil Litigation/California Civil Procedure Before Trial/23 Demurrers/§23.5 C. Availability

§23.5 C. Availability

Demurrers can be used in both limited and unlimited civil actions in California trial courts. See CCP §§421-422.20. However, a special demurrer is not allowed in a limited civil case. CCP §92(c). A demurrer can state objections to:

- A complaint or cross-complaint (CCP §430.10), including a complaint in intervention (CCP §387) and a complaint for unlawful detainer (CCP §1170).
- An amended complaint or a cross-complaint. See CCP §586.
- An answer (CCP §430.20) or an amended answer (CCP §471.5).
- A peremptory writ or an application for a writ of review (CCP §§1069.1, 1089, 1105, 1109; Cal Rules of Ct 8.487(b)(1)). See California Civil Writ Practice §§8.40-8.44 (4th ed Cal CEB 2008).

Demurrers are not used in:

- Small claims proceedings;
- Federal court civil actions; or
- Proceedings under the Family Code (see Cal Rules of Ct 5.108).

NOTE: In federal court, a defendant may challenge the legal sufficiency of pleadings by a motion to dismiss for failure to state a claim on which relief can be granted under Fed R Civ P 12(b)(6) (sometimes called the federal demurrer).

In family law cases, some of the objections raised in other civil actions by demurrer can be raised by a motion to quash under family law rules. See Cal Rules of Ct 5.121, 5.122(a)(2).

A defendant corporation in a shareholder derivative suit may only demur to the standing of a plaintiff. *Patrick v Alacer Corp.* (2008) 167 CA4th 995, 1008, 84 CR3d 642.

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§23.6 D. Tactical Considerations

In deciding whether to demur to a complaint, defense counsel should consider not only whether a demurrable defect appears on the face of the complaint, but also whether demurring is likely to produce a practical benefit for the defendant more effectively than will alternative procedures. See §§23.7-23.14.

JUDICIAL PERSPECTIVE: It is not good practice to file a demurrer solely to delay progress of the action, to inconvenience the plaintiff's counsel, or to build a fee. Judges lose patience with attorneys whose demurrers do not seem reasonably calculated to narrow issues or produce useful clarification of the pleadings, and it wastes time to file a demurrer for an amendment that the plaintiff would have made if asked.

A demurrer is a valuable procedure for obtaining an early hearing on legal issues such as the plaintiff's right to proceed with the action and the validity or sufficiency of the stated causes of action, theories, and allegations. A successful demurrer can narrow the bases on which the plaintiff may proceed and have a salutary effect on settlement negotiations. It can also resolve the entire action before the defense needs to frame an answer and incur further expense. After a demurrer is sustained, the plaintiff may be forced to restate and add allegations that may make the amended complaint easier to answer or suggest additional affirmative defenses to the defendant.

Even when a complaint is technically demurrable, however, there are reasons to refrain from demurring. The plaintiff will usually be given an opportunity to amend a defective complaint. See §23.53. The effort and expense of preparing the moving papers and attending the hearing may thus outweigh the benefits gained even if the demurrer is sustained. Often, defense counsel can state objections to the complaint and challenge the validity of the action more expeditiously by an answer or another procedure. See §23.8.

Finally, filing a demurrer may compel the plaintiff's attorney, perhaps for the first time, to research and thoroughly analyze the bases of the action, permitting the plaintiff to cure defects early and focus attention and energy on the tenable aspects of the action.

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§23.7 E. Alternative Procedures

There are several procedures that will achieve the same objectives as demurrers. See §§23.8-23.14.

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§23.8 1. Answer

An answer, in addition to denials and affirmative defenses, can state grounds for objections to the complaint and can state them whether or not they appear on the face of the complaint, although filing an answer does not itself obtain a ruling on the objections. See chap 25.

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§23.9 2 Motion to Strike

A motion to strike (CCP §436), whether or not filed with a demurrer, addresses defects not reachable by demurrer. This motion, made within the time to answer, can (1) eliminate sham, irrelevant, or redundant matters from a pleading; (2) raise objections that do not appear on the face of the pleading if the motion attacks matters not filed in conformity with law, rule, or court order; and (3) attack parts of a cause of action, count, or defense. See chap 24.

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§23.10 3. Motion for Judgment on Pleadings

The grounds for a motion for judgment on the pleadings are the same as for a general demurrer. Unlike a demurrer, this motion can be made at any time on the ground that all or part of the pleading fails to state facts sufficient to constitute a cause of action or defense. Because there is no time requirement, the motion is often made after an answer has been filed. On motions for judgment on the pleadings, see chap 27.

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§23.11 4. Motion Under CCP §437c for Summary Judgment or Summary Adjudication

A summary judgment can terminate a lawsuit, and a summary adjudication can eliminate causes of action or claims. Affidavits and declarations are filed in support of a motion for summary judgment or summary adjudication; thus, the motions test evidentiary defects in the plaintiff's case that do not appear on the face of the pleadings and cannot be raised by demurrer. A motion under CCP §437c may not be made until 60 days after the general appearance in the action of the party against whom the motion is directed. CCP §437c(a). These motions are usually not made until after some discovery has been completed. See chap 36.

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§23.12 5. Motion to Dismiss

Although no statutory authority exists for a motion to dismiss in state courts, defendants have sometimes been permitted to use a paper called a "motion to dismiss" after the time has passed to demur and to state the objection that the complaint fails to state facts sufficient to constitute a cause of action. See *Timberlake v Schwank* (1967) 248 CA2d 708, 56 CR 799. In these instances, the "motion to dismiss" operates as a motion for judgment on the pleadings or as a motion for summary judgment. See generally 5 Witkin, California Procedure, *Pleading* §§1004-1006 (5th ed 2008).

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§23.13 6. Discovery

Uncertainty about the factual bases of a party's claims or defenses should be dispelled by interrogatories, depositions, and other discovery methods. See *Dahlquist v State* (1966) 243 CA2d 208, 212, 52 CR 324. See generally California Civil Discovery Practice (4th ed Cal CEB 2006).

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§23.14 7. Objection to Evidence

At trial, a party can object to evidence offered by the opponent on the ground that the evidence is irrelevant because the facts stated in the pleadings are not sufficient to constitute a cause of action or defense, and thus there is no issue on which to receive the evidence. The objection to evidence may then be treated as a general demurrer or as a motion for judgment on the pleadings. Trial judges faced with an objection that could have been raised by demurrer or motion for judgment on the pleadings at an early stage of the litigation, however, are liberal in permitting the parties to amend the pleadings to permit the proof. See 5 Witkin, California Procedure, *Pleading* §1002 (5th ed 2008).

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III. DEMURRER TO COMPLAINT

A. Preparing Demurrer; Examples

§23.15 1. Multiple Party Variations

A joint demurrer filed by two or more defendants may be overruled if the complaint is good as to any one defendant. *Myers v County of Orange* (1970) 6 CA3d 626, 630, 86 CR 198. But see *Majestic Realty Co. v Pacific Lighting Corp.* (1974) 37 CA3d 641, 112 CR 423 (rule limited to special demurrers). See generally 5 Witkin, California Procedure, *Pleading* §961 (5th ed 2008).

A demurrer filed on behalf of fewer than all defendants, even if some of them were sued by fictitious names, should clearly indicate the names of the demurring defendant or defendants. The caption of the demurrer must state immediately below the case number the name of the demurring party and the name of the party whose pleading is the subject of the demurrer. Cal Rules of Ct 3.1320(e).

Counsel who represents more than one defendant should consider whether all should join in a single demurrer or to file a separate demurrer for each. Even counsel who believes that the grounds for demurring are equally valid for all defendants may wish to use an introductory line indicating that the grounds are asserted separately for each. For example:

Defendants _ _[*name*]_ _, _ _[*name*]_ _, and _ _[*name*]_ _ each demur individually, and not jointly with any other party, to each cause of action on the following grounds: _ _[*State each ground in separate, numbered paragraphs*]_ _.

Alternatively, the effect of separate demurrers can also be achieved by dividing a single paper into parts, using a separate introductory line to introduce the grounds stated for each demurring defendant.

Care should be used when demurring to a complaint filed by two or more plaintiffs, particularly if a ground for demurring may be good against only one plaintiff. Separate introductory lines may be used to distinguish grounds asserted against one plaintiff from grounds asserted against another. For example:

Defendant, _ _[*name*]_ _, demurs to each cause of action alleged by _ _[*name*]_ _ in the complaint on the following grounds: _ _[*State each ground in separate, numbered paragraphs*]_ _.

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§23.16 2. Stating Grounds Separately

Each ground for objecting to a complaint that is to be raised by a demurrer must be specified distinctly; otherwise, the demurrer may be disregarded. CCP §430.60. Each ground must be in a separate paragraph and state whether it applies to the entire complaint, cross-complaint, or answer, or only to specified causes of action or defenses. Cal Rules of Ct 3.1320.

If two or more grounds for an objection are stated conjunctively in a demurrer, the demurrer may be overruled unless all the grounds exist. *Kraner v Halsey* (1889) 82 C 209, 212, 22 P 1137; *Butler v Wyman* (1933) 128 CA 736, 740, 18 P2d 354. Thus, using the introductory line, "Defendant demurs on each of the following grounds," is preferable to "Defendant demurs on all the following grounds" or "Defendant demurs on the grounds of X and Y."

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§23.17 3. Demurring to All or Part of Complaint

A demurrer may be taken to the whole complaint or to any of its causes of action. CCP §430.50. However, it is risky to assert a ground for demurrer against the whole complaint if the complaint contains several causes of action because a demurrer that attacks an entire pleading may be overruled if one of the causes of action is not vulnerable to the objection. *Lord v Garland* (1946) 27 C2d 840, 850, 168 P2d 5; *Skipper v Gilbert J. Martin Constr. Co.* (1957) 156 CA2d 82, 86, 318 P2d 732. See *Warren v Atchison, Topeka & Santa Fe Ry.* (1971) 19 CA3d 24, 29, 96 CR 317.

If the plaintiff has stated each cause of action separately in the complaint, the defendant may use headings in the demurrer to show which objections apply to each cause of action. For example:

Defendant, _ _[*name*]_ _, demurs to each cause of action in the complaint as follows:

OBJECTIONS TO FIRST CAUSE OF ACTION: _ _[*State each objection in separate, numbered paragraphs*]_ _.

OBJECTIONS TO SECOND CAUSE OF ACTION: _ _[*State each objection in separate, numbered paragraphs*]_ _.

Alternatively, the form of demurrer may be as follows:

1. The First Cause of Action does not state facts sufficient to state a cause of action. CCP §430.10(e).

2. The First Cause of Action is uncertain in that in Paragraph 1 plaintiff is identified as a corporation and in Paragraph 2 as a partnership. CCP §430.10(f).

3. The Second Cause of Action does not state facts sufficient to state a cause of action. CCP §430.10(e).

For sample form of demurrer to complaint, see §23.72.

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§23.18 4. Invoking Judicial Notice

If any ground of objection stated in the demurrer is based on a matter of which the court may take judicial notice under Evid C §§452-453, counsel should identify the matter in the demurrer or in the accompanying memorandum, request judicial notice, and provide the court and each party with a copy of the material. If the material to be judicially noticed is part of a file in the court in which the action is being heard, the party must specify in writing the part of the file to be judicially noticed and arrange with the court clerk to have the file in the courtroom at the hearing. Cal Rules of Ct 3.1306(c).

A request for judicial notice must be made in a separate document listing the specific items the party wishes to have judicially noticed and must comply with Cal Rules of Ct 3.1306(c). Cal Rules of Ct 3.1113(*l*). For further discussion and form, see §§12.59, 12.143. Local rules should be consulted for special requirements for requesting judicial notice.

NOTE: Although a court may take judicial notice of documents pertinent to issues raised by a demurrer, whether, on demurrer, the court accepts the accuracy of the contents of the judicially noticed documents depends on the circumstances. *C.R. v Tenet Healthcare Corp.* (2009) 169 CA4th 1094, 1103, 87 CR3d 424. There are basically three approaches: (1) the court will not consider the truth of a document's contents unless it is a judgment, statement of decision, or order; (2) the court may accept the truth of statements made by a party, but not by third parties or an opponent; and (3) the court will accept the contents of the document only when there is not and cannot be a factual dispute about that which is sought to be judicially noticed, and, as a general rule, the truthfulness and interpretation of a document's contents are disputable. *C.R. v Tenet Healthcare Corp., supra.* See also *William v Southern Cal. Gas Co.* (2009) 176 CA4th 591, 98 CR3d 258 (although on demurrer court could take judicial notice of discovery responses, it erred in concluding from responses that complaint allegations were false).

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B. Timing

§23.19 1. When to File

A demurrer to a complaint must be filed within 30 days after service of the complaint. CCP §430.40(a). It may be possible to obtain an extension of time either by stipulation or by means of an ex parte application to a judge of the court in which the action is pending. CCP §1054; Cal Rules of Ct 2.20.

WARNING: Counsel's ability to stipulate with other counsel to an extension of time to demur or answer may be significantly curtailed by local rules implementing the Trial Court Delay Reduction Act (Govt C §§68600-68620). See chap 40.

See §22.96 for discussion of the time to respond after remand from federal court.

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§23.20 2. Avoiding Default

Filing a timely demurrer (*i.e.,* within the time specified in a summons or such further time as allowed) prevents the plaintiff from taking judgment by default. CCP §585. The court can grant a plaintiff's motion to strike a late-filed demurrer (see chap 24) and, if no answer is then on file, grant plaintiff judgment by default. *Buck v Morrossis* (1952) 114 CA2d 461, 250 P2d 270.

Filing a demurrer may not be sufficient to avoid entry of default if the demurrer is not eventually calendared for hearing. In *Barragan v Banco BCH* (1986) 188 CA3d 283, 232 CR 758, the defendant demurred on the ground of a pending action involving substantially the same causes of action and issues. Before the court ruled on the demurrer, the parties removed it from the calendar, and the plaintiff agreed to forgo the second lawsuit until completion of the first. More than a year after entry of judgment in the first action, plaintiffs repeatedly requested the defendant to recalendar its demurrer; the defendant refused to do so, and plaintiffs obtained an entry of default. The court of appeal found that the trial court had properly refused to set aside the default, that the defendant had abandoned its demurrer by not recalendaring it, and that the demurrer was moot because there was no longer another action pending.

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§23.21 3. Consider Filing Answer Simultaneously

A demurrer is usually filed and ruled on before the answer is filed. Then, if the demurrer is sustained and the complaint amended, the answer need respond only to the allegations in the amended complaint. A demurrer to a cause of action may be filed without answering other causes of action. Cal Rules of Ct 3.1320(b).

If the demurrer is overruled, the defendant has 10 days after service of notice of the decision in which to file an answer, unless the judge specifies more or less time or the parties waive notice (CCP §§472a-472b; Cal Rules of Ct 3.1320(g)). Defendants may ask for, and sometimes are granted, additional time to file an amended pleading.

Alternatively, a defendant can file a demurrer and an answer at the same time. CCP §§430.30(c), 472a. Thus, a defendant can demur to one or more causes of action and simultaneously answer others. See 5 Witkin, California Procedure, *Pleading* §949 (5th ed 2008).

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Source: Civil Litigation/California Civil Procedure Before Trial/23 Demurrers/§23.22 C. Grounds

§23.22 C. Grounds

Under CCP §430.10, the grounds for demurrer to a complaint or cross-complaint are:

- The court has no jurisdiction of the subject matter of the cause of action alleged in the pleading.
- The pleading does not state facts sufficient to constitute a cause of action.
- The person who filed the pleading has no legal capacity to sue.
- Another action is pending between the same parties on the same cause of action.
- There is a defect or misjoinder of parties.
- The pleading is uncertain ("uncertain" includes ambiguous and unintelligible).
- In an action arising from a contract, it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct.
- No certificate of merit was filed as required by CCP §411.35 (actions for damages arising from professional negligence of an architect, a professional engineer, or a land surveyor) (see §23.36).

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§23.23 1. Matters on Which Grounds Based

A demurrer searches for defects in the allegations of the pleading. The prayer for relief is not subject to demurrer. *Ramsden v Western Union* (1977) 71 CA3d 873, 138 CR 426. Generally, facts and evidentiary matters extrinsic to the pleading may not be considered by the court. In rare situations, however, the demurring party has been permitted to allege facts in a demurrer or introduce evidence to support the demurrer in order to show that grounds for a demurrer exist. See, *e.g., Middlebrook-Anderson Co. v Southwest Sav. & Loan Ass'n* (1971) 18 CA3d 1023, 1038, 96 CR 338. For further discussion, see 5 Witkin, California Procedure, *Pleading* §948 (5th ed 2008).

The face of the defective pleading may be read as if it included matters of which the court may take judicial notice. *Bohrer v County of San Diego* (1980) 104 CA3d 155, 163 CR 419. Thus, whether or not a party formally requests a matter to be judicially noticed, recitals in exhibits and admissions in previous pleadings in the same case can be examined by the court in ruling on a demurrer. See also *Able v Van Der Zee* (1967) 256 CA2d 728, 734, 64 CR 481 (court properly considered requests for admissions in sustaining demurrer).

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§23.24 2. Grounds That Are Not Waived

Each ground for objection to a complaint listed in CCP §430.10, except "no jurisdiction" (CCP §430.10(a)), and the ground in CCP §430.10(e) ("pleading does not state facts sufficient to constitute a cause of action"), is waived unless raised by a timely demurrer or answer. CCP §430.80; *Collins v Rocha* (1972) 7 C3d 232, 239, 102 CR 1. These two grounds may be raised at any time during litigation, even when the time to demur or answer has expired.

Similarly, a failure to demur to an answer constitutes a waiver of the grounds for objection in CCP §§430.20(b) ("answer is uncertain") and 430.20(c) ("whether the contract is written or oral") but not the ground in CCP §430.20(a) ("answer does not state facts sufficient to constitute a defense"). (CCP §430.80(b)). On demurrers to answers, see §§23.42-23.47.

PRACTICE TIP: If the time to demur has passed, counsel should consider moving for judgment on the pleadings. See discussion of alternative procedures in §§23.7-23.14.

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§23.25 D. Stating Specific Grounds; Examples

If each ground for an objection to a complaint that is to be raised by a demurrer is not specified distinctly, the demurrer may be disregarded. CCP §430.60. See §23.16. The grounds should be stated in the demurrer with argument in support of each ground set out in the supporting memorandum. See *Gardner v Samuels* (1897) 116 C 84, 88, 47 P 935.

The following sections, each beginning with an example, discuss the permissible grounds for demurring to a complaint. Grounds applicable to a particular complaint may be inserted as numbered paragraphs in the demurrer. See form of demurrer in §23.72.

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§23.26 1. Failure to State Facts Sufficient to Constitute Cause of Action

The _ _[*e.g., complaint/first cause of action*]_ _ does not state facts sufficient to constitute a cause of action against _ _[*name of demurring defendant*]_ _.

A general demurrer may be stated in the words of CCP §430.10(e): "The pleading does not state facts sufficient to constitute a cause of action." See *Burke v Maguire* (1908) 154 C 456, 462, 98 P 21. This ground can be effective when:

- The plaintiff has attempted to state a novel cause of action;
- The defendant knows that the plaintiff cannot truthfully allege an essential missing fact or defense; or
- The missing fact, if alleged, would itself provide a basis for objecting to the complaint or cause of action.

An additional clause should be added if the demurrer is made on the basis of a statute of limitations (see §23.27) or on some other specific basis (see §23.25). Otherwise, additional statements of the defects of the complaint should be reserved for the supporting memorandum.

The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failure to demur. See §23.24. If it later develops (*e.g.,* during discovery) that essential elements are missing from the plaintiff's case, that objection can be raised at any time during the proceeding by other procedural means or on appeal. See *Whelan v Wolford* (1958) 164 CA2d 689, 693, 331 P2d 86.

However, the danger in failing to raise the objection by demurrer is that, at later stages of the litigation, a judge may be more liberal in finding that the complaint was adequate or in permitting an amendment to conform to proof. Note that an appeal from a judgment for the plaintiff must be based on failure to prove an essential fact and not on failure to plead it. See *Ades v Brush* (1944) 66 CA2d 436, 444, 152 P2d 519.

PRACTICE TIP: Although a general demurrer can be taken to a complaint that states conclusions of law or evidentiary facts (rather than ultimate facts as required), a defendant who believes that the plaintiff will be able to recast allegations properly may decide not to demur. A general demurrer is rarely granted without leave to amend, and a demurrer to defects that the plaintiff can cure may only alert the plaintiff to those defects early in the case.

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§23.27 a. Barred by Statute of Limitations

The _ _[*e.g., complaint/first cause of action*]**_ _ does not state facts sufficient to constitute a cause of action against _ _**[*name of demurring defendant*]**_ _ in that the action is barred by _ _**[*e.g., Code of Civil Procedure §335.1*]**_ _.**

Although any indication in the demurrer that a statute of limitations is being invoked raises the issue, it is the better practice to cite the code section that bars the action. See *Williams v ILWU* (1959) 172 CA2d 84, 87, 341 P2d 729. The parts of the complaint that show the action to be barred can be specified in the supporting memorandum.

On California's doctrine of equitable tolling doctrine, which may be applied to extend the statutory period, see *Elkins v Derby* (1974) 12 C3d 410, 115 CR3d 410; *Aguilera v Heiman* (2009) 174 CA4th 590, 95 CR3d 18; *Tarkington v California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 1503, 92 CR3d 131.

For statutes of limitations for specific causes of action, see California Business Litigation (Cal CEB 2002); California Tort Damages (2d ed Cal CEB 2002); California Tort Guide (3d ed Cal CEB 1996).

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§23.28 b. Defenses Appearing on Face of Complaint

Occasionally, facts will be alleged in the complaint that create a defense to one or more of its causes of action. If the establishment of a defense does not require factual allegations by the defendant (which would have to be made in an answer), the defendant can obtain an early hearing on the validity of the defenses by a general demurrer. *Halvorsen v Aramark Unif. Servs.* (1998) 65 CA4th 1383, 77 CR2d 383. Defenses that have been raised by a general demurrer include:

- Statute of frauds (*Harper v Goldschmidt* (1909) 156 C 245, 252, 104 P 451);
- Laches (*Neet v Holmes* (1944) 25 C2d 447, 460, 154 P2d 854);
- Plaintiff not real party in interest (*Klopstock v Superior Court* (1941) 17 C2d 13, 18, 108 P2d 906; see *McKinny v Board of Trustees* (1982) 31 C3d 79, 181 CR 549); and
- Res judicata (*Legg v United Benefit Life Ins. Co.* (1960) 182 CA2d 573, 580, 6 CR 73; *Kronkright v Gardner* (1973) 31 CA3d 214, 107 CR 270).

For additional examples, see 5 Witkin, California Procedure, *Pleading* §§963-967 (5th ed 2008).

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§23.29 2. No Jurisdiction of Subject Matter

The Court has no jurisdiction of the subject of _ _[*the/any*]_ _ cause of action alleged in the _ _[*complaint/first cause of action*]_ _.

This objection is not waived by failure to raise it in a demurrer or answer (CCP §430.80), and it may be made at any time during the litigation, or by collateral attack. Raising the objection by demurrer is a way to test jurisdiction at the outset, possibly saving the defendant further effort and expense.

Because the superior court is a court of general jurisdiction, a demurrer on the ground of "no jurisdiction" in that court cannot be based on the plaintiff's failure to allege facts that show jurisdiction; it must be based on allegations in the complaint showing that jurisdiction lies in a different court or in no court. See *Cheney v Trauzettel* (1937) 9 C2d 158, 69 P2d 832. Thus, a demurrer based on the court's lack of jurisdiction is proper if allegations of the complaint show that jurisdiction lies, *e.g.,* in a federal court (see *Olcovich v Grand Trunk Ry.* (1912) 20 CA 349, 129 P 290), the court of another state (see *Getty v Getty* (1933) 130 CA 519, 20 P2d 82), or the Workers' Compensation Appeals Board (see *Buttner v American Bell Tel. Co.* (1940) 41 CA2d 581, 107 P2d 439).

A demurrer for lack of jurisdiction may be used to gain a hearing on questions such as:

- The constitutionality of the statute or ordinance under which the plaintiff proceeds (see *Harden v Superior Court* (1955) 44 C2d 630, 634, 284 P2d 9);
- The propriety of a cross-complaint (see *Tide Water Assoc. Oil Co. v Superior Court* (1955) 43 C2d 815, 820, 279 P2d 35);
- The statutory immunity of a public entity to the plaintiff's alleged cause of action (see *County of Santa Barbara v Superior Court* (1971) 15 CA3d 751, 754, 93 CR 406); or
- The validity of causes of action when plaintiff has not pled compliance with required administrative procedures prior to filing suit (see *Caliber Bodyworks, Inc. v Superior Court* (2005) 134 CA4th 365, 36 CR3d 31).

If a demurrer for lack of subject matter jurisdiction is sustained, and if there is another California court that has jurisdiction, the plaintiff or the defendant may move to transfer the action to the proper court. See CCP §§396-399. It is unclear whether the sustaining of the demurrer or the motion to transfer extends the time to answer the complaint as to parties who have appeared in the action by way of the demurrer or otherwise. A defendant in this situation may wish to file an answer with the demurrer or obtain an extension of time to respond to the complaint.

NOTE: The objection that the court does not have jurisdiction of the person of the defendant is raised by a motion to quash service of summons (see chap 19), not by demurrer.

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§23.30 3. Lack of Legal Capacity to Sue

Plaintiff, _ _[*name*]_ _, does not have the legal capacity to sue in that _ _[*e.g., he is a minor and no guardian has been appointed to represent him*]_ _.

This objection may be used when the plaintiff brings the action in some representative capacity, but the complaint fails to show that the plaintiff actually possesses that capacity to sue. See *Klopstock v Superior Court* (1941) 17 C2d 13, 17, 108 P2d 906; *Kreling v Kreling* (1897) 118 C 413, 50 P 546.

Demurring on this ground is also proper against a complaint that shows on its face that the plaintiff is a nonentity such as an estate. See chap 9. Although a partnership or unincorporated association has the capacity to sue by the name it has assumed (CCP §369.5(a)), failure in the complaint to allege compliance with the filing requirement of Bus & P C §17918 can be raised by demurrer on this ground.

NOTE: Lack of capacity to sue should not be confused with lack of standing to sue. See *Center for Self-Improvement & Community Dev. v Lennar Corp.* (2009) 173 CA4th 1543, 1552, 94 CR3d 74 (corporate incapacity for failure to comply with Rev & Tax C §23305 is a legal disability, not a jurisdictional defect). Lack of capacity to sue is a ground for a special demurrer. Lack of standing to sue, which occurs if plaintiff is not the real party in interest or is not the person in whom the alleged cause of action lies, should be raised by a "general" demurrer for failure to state facts sufficient to constitute a cause of action. See *Parker v Bowron* (1953) 40 C2d 344, 351, 254 P2d 6; *Friendly Village Community Ass'n v Silva & Hill Constr. Co.* (1973) 31 CA3d 220, 224, 107 CR 123.

On the effect on the litigation of the revival of corporate capacity to sue, see *Center for Self-Improvement & Community Dev. v Lennar Corp* (2009) 173 CA4th 1543, 1554, 94 CR3d 74 (procedural steps taken on corporation's behalf during incapacity for failure to comply with Rev & Tax C §23305 were revived when defect cured).

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§23.31 4. Another Action Pending

There is another action pending between the parties to this action on the same cause of action as alleged in the _ _[*complaint/first cause of action*]_ _. That action is No. _ _ _ _ in the _ _ _ _ _ _ Court of _ _ _ _ _ _ County, and defendant asks that the Court take judicial notice of that action under Evidence Code §452(d). A certified copy of the complaint and answer in that action is attached to this demurrer and marked as Exhibit A.

Demurrers on this ground are not favored, but they may be sustained when the parties in the two cases are identical and the causes of action and issues in the two actions are substantially the same. The parties in both actions must also stand in the same relative position as plaintiff and defendant. *Lord v Garland* (1946) 27 C2d 840, 848, 168 P2d 5; *Childs v Eltinge* (1973) 29 CA3d 843, 848, 105 CR 864. The test for sustaining a demurrer on the ground that another action is pending is whether the cases are sufficiently similar that a final judgment in the first action could be pleaded as a bar to the second. *Colvig v RKO Gen., Inc.* (1965) 232 CA2d 56, 73, 42 CR 473.

EXAMPLE: A pending dissolution action did not preclude a wife from bringing a second, separate action against her husband and his business partners in *Beehler v Beehler* (1979) 100 CA3d 376, 161 CR 30. The wife claimed that her interest in certain real property had not been declared, that she had been deprived of funds lawfully due her, and that gifts had been made of community property without her consent. Her husband and his partners as defendants successfully demurred, and a judgment of dismissal was entered. The appellate court reversed the judgment on the ground that the parties and issues in the civil suit were not the same as those in the dissolution. Although the wife could have joined the business associates in the dissolution, she was not required to do so.

A demurrer on the ground that another action is pending is appropriate only if the other action is pending in California; if the action is pending in another state, a stay should be sought by a motion under CCP §430.10 (for inconvenient forum; see chap 21) so that factual matter outside the pleadings can be submitted. *Lord v Garland, supra*; *Leadford v Leadford* (1992) 6 CA4th 571, 8 CR2d 9.

A defendant may bring the existence of the pending action and the names of the parties and issues in that action to the attention of the court by requesting that judicial notice be taken of the records of that court. See §23.18.

The proper order for the judge to make on sustaining a demurrer on the ground of another action pending is not dismissal, but an order abating further proceedings in the present action until termination of the prior action. *Beehler v Beehler, supra; Franchise Tax Bd. v Firestone Tire & Rubber Co.* (1978) 87 CA3d 878, 151 CR 460. See also *Childs v Eltinge, supra*.

If the parties in the first action remain the same and if a judgment on the merits is rendered in that action, the demurring party should be granted leave to amend to plead the res judicata effect of that judgment as a bar to the present action. *Lord v Garland* (1946) 27 C2d 840, 851, 168 P2d 5. If the demurring defendant is dismissed from the prior action or if the prior action is not determined on the merits, "the trial court should hear and decide the rights of the parties in accordance with the issues presented by the pleadings in the second action." 27 C2d at 851. See *Karp v Dunn* (1964) 229 CA2d 192, 195, 40 CR 96.

NOTE: Counsel should check local rules for requirements to report related cases to the court and other parties.

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5. Defect or Misjoinder of Parties

§23.32 a. Defect

There is a defect of parties in that _ _[*name*]_ _ is a necessary party _ _[*plaintiff/defendant*]_ _ under Code of Civil Procedure §389.

The objection that there is a defect of parties (CCP §430.10(d)) focuses on nonjoinder, and the demurrer must specify who else should have been joined or of what the nonjoinder consists. *Kreling v Kreling* (1897) 118 C 413, 420, 50 P 546. See *Union Carbide Corp. v Superior Court* (1984) 36 C3d 15, 201 CR 580 (demurrer raising nonjoinder of allegedly indispensable parties held properly overruled).

Code of Civil Procedure §389 specifies persons who must be joined in an action (see chap 14), and it appears that under that section a defendant, as an alternative to a demurrer, may move the court for an order that the missing person be made a party. See generally 5 Witkin, California Procedure, *Pleading* §972 (5th ed 2008).

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§23.33 b. Misjoinder

There is a misjoinder of parties in that _ _[*name*]_ _ is not a proper party _ _[*plaintiff/defendant*]_ _ because _ _[*specify*]_ _.

A demurrer on this ground must specify the particulars in which a misjoinder is claimed. *Adams v National Auto. Ins. Co.* (1943) 56 CA2d 905, 909, 133 P2d 657 (general language that there was misjoinder of causes of action, and misjoinder of parties defendant not a good plea of misjoinder). However, it appears that designating the persons who are improperly joined is sufficient, and the reasons joinder was improper need not be stated in the demurrer. *Gardner v Samuels* (1897) 116 C 84, 47 P 935 (each defendant distinctly specified in demurrer that he was improperly joined with other defendant; this statement sufficiently called plaintiff's attention to objection to complaint). A demurrer on the ground of misjoinder lies only when the defect appears on the fact of the complaint or matters judicially noticed. *Royal Surplus Lines Ins. Co. v Ranger Ins. Co*. (2002) 100 CA4th 193, 198, 122 CR2d 459.

A defendant who is improperly joined with other defendants in the action can demur on this ground in order to be dismissed from the action; however, it appears that the demurring defendant cannot have other defendants dismissed on the ground that they are improperly joined unless it can be shown that their continued presence is prejudicial. *Gardner v Samuels* (1897) 116 C 84, 90, 47 P 935; *Division of Labor Law Enforcement v Barnes* (1962) 205 CA2d 337, 345, 23 CR 55, disapproved on other grounds in *White Lighting Co. v Shaft* (1968) 68 C2d 336, 66 CR 697. A proper defendant is seldom injured by the joinder of unnecessary or improper parties, plaintiff or defendant, and his or her demurrer ought to be overruled. *Royal Surplus Lines Ins. Co. v Ranger Ins. Co., supra*. See generally 5 Witkin, California Procedure, *Pleading* §973 (5th ed 2008).

Generally, a demurrer on this ground is not the proper procedure for testing the propriety of a class action. See *Vasquez v Superior Court* (1971) 4 C3d 800, 820, 94 CR 796; *Tarkington v California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 1511, 92 CR3d 131 (class suitability should not be decided by demurrer); *Wechsler v Laskey-Weil, Inc.* (1974) 42 CA3d 728, 117 CR 237. But see *Rose v Medtronics, Inc.* (1980) 107 CA3d 150, 166 CR 16 (medical negligence against manufacturer of potentially defective cardiac pacemakers for injuries to plaintiff and other users). In *Rose,* the court, although recognizing that a demurrer is not the preferred means of testing the propriety of a class action, upheld the trial court's ruling dismissing the class action allegations when the complaint on its face did not contain sufficient facts to establish a class interest. The court found that the action was ill suited as a class action because the factual questions and legal issues raised in the pleadings on behalf of 4000 potential claimants were preponderantly diverse rather than common. On hearing procedure for challenging class action, see CC §1781(c).

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§23.34 6. Uncertain, Ambiguous, or Unintelligible

The _ _[*complaint/first cause of action*]_ _ is uncertain in that _ _[*state nature of uncertainty or ambiguity, e.g.,*]_ _:

1. The date of the alleged occurrence cannot be ascertained.

2. It cannot be determined from paragraph 4 whether it is claimed that _ _[*name*]_ _ was the employer of _ _[*name*]_ _ or was _ _[*his/her*]_ _ agent.

3. Lines 20 through 24 on page 2 are unintelligible.

The objection that the complaint or part of it is uncertain includes the objections that it is ambiguous or unintelligible. CCP §430.10(f). If there is more than one respect in which a complaint or cause of action is uncertain, each specification of uncertainty should be raised in a separate, numbered paragraph of the demurrer. However, the demurring party should be selective; numerous specifications of uncertainty are rarely welcomed by law and motion judges.

Examples in which the uncertainty objection was used successfully include:

- The complaint fails to allege a material date such as that of an occurrence or of a contract. See *Williamson v Joyce* (1902) 137 C 151, 69 P 980; *Corum v Hartford Acc. & Indem. Co.* (1945) 67 CA2d 891, 894, 155 P2d 710.
- The complaint is so unintelligible that it is unclear whether particular counts are directed toward the demurring defendant or for what loss the plaintiff seeks recovery. See *Greenberg v Hollywood Turf Club* (1970) 7 CA3d 968, 86 CR 885; *Lapique v Ruef* (1916) 30 CA 391, 158 P 339.
- The pleading alleges conclusions of law without supporting facts. See *Ankeny v Lockheed Missiles & Space Co.* (1979) 88 CA3d 531, 151 CR 828. See generally 5 Witkin, California Procedure, *Pleading* §§974-976 (5th ed 2008).

The special demurrer for uncertainty is not favored and will be overruled if:

- The uncertainty concerns inconsequential matters. See *Baird v Disheski* (1929) 102 CA 452, 283 P 321. See also *Greenberg v Hollywood Turf Club, supra.*
- The allegations of the complaint are sufficiently clear to apprise the defendant of the issues that must be met. *Gressley v Williams* (1961) 193 CA2d 636, 643, 14 CR 496.
- The facts may be presumed to be within the knowledge of the demurring party. *Strozier v Williams* (1960) 187 CA2d 528, 9 CR 683.

Uncertainty about the *legal effect* of the facts alleged in the complaint is not a ground for special demurrer. *County of Santa Clara v Hayes Co.* (1954) 43 C2d 615, 275 P2d 456. Nor does the inclusion of surplus allegations in the complaint render it uncertain. See *Brea v McGlashan* (1934) 3 CA2d 454, 39 P2d 877.

Common counts (*e.g.,* money paid, lent, or received) are not demurrable for uncertainty. *Moya v Northrup* (1970) 10 CA3d 276, 279, 88 CR 783.

PRACTICE TIP: Filing a special demurrer for uncertainty can some times force the plaintiff to allege facts that show lack of jurisdiction (*e.g.,* residence of plaintiff or defendant, place of entering into a contract or place of its performance, or location where a tortious act allegedly occurred).

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§23.35 7. Uncertain Whether Contract Written, Oral, or Implied by Conduct

It cannot be ascertained from the complaint whether the contract _ _[*e.g., on which this action is founded*]_ _ is written, oral, or implied by conduct.

This ground of demurrer may be asserted only against a cause of action founded on a contract. CCP §430.10(g); *Fanucchi v Coberly-West Co.* (1957) 151 CA2d 72, 83, 311 P2d 33. It does not apply to an action based on recognized common counts. See *Moya v Northrup* (1970) 10 CA3d 276, 285, 88 CR 783.

PRACTICE TIP: If this ground for objection is sustained and if the plaintiff amends to show that the contract was oral, a general demurrer raising the statute of frauds may then be considered. See, *e.g., Hills Transp. Co. v Southwest Forest Indus.* (1968) 266 CA2d 702, 72 CR 441.

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§23.36 8. No Certificate of Merit in Action for Malpractice of Architect, Professional Engineer, or Land Surveyor

On or before the date of service of the _ _[*complaint/cross-complaint*]_ _, no certificate was executed by the attorney for _ _[*plaintiff/cross-complainant*]_ _ and filed as required by Code of Civil Procedure §411.35 declaring that:

[*Option 1*]

1. The attorney has reviewed the facts of the case and consulted with and received an opinion from at least one nonparty _ _[*architect/professional engineer/land surveyor*]_ _ as to whether the _ _[*defendant/cross-defendant*]_ _ was negligent in performing the professional services and, on the basis of that review and consultation, believes there is a reasonable and meritorious cause for filing the action.

[*Option 2*]

1. The attorney was unable to obtain a consultation with an _ _[*architect/professional engineer/land surveyor*]_ _ because a statute of limitations would impair the action and the certificate could not be obtained before the impairment of the action.

[*Option 3*]

1. The attorney was unable to obtain the consultation because, after making three good faith attempts with three separate _ _[*architects/professional engineers/land surveyors*]_ _, none would agree to a consultation.

Under CCP §411.35(g), failure to file a certificate is grounds for a demurrer or a motion to strike. A violation of this section may also constitute unprofessional conduct and be grounds for discipline against the attorney. See CCP §411.35(f).

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§23.37 E. Supporting Memorandum; Examples

A party who files a demurrer must file and serve a memorandum in support of each ground stated in the demurrer. Cal Rules of Ct 3.1112(a), 3.1113(a). The absence of a supporting memorandum may be construed as an admission that a *special* demurrer is not meritorious and as a waiver of those grounds. Cal Rules of Ct 3.1113(a). Grounds for a general demurrer are not waived by failure to file a supporting memorandum.

In drafting a memorandum to be filed in support of a demurrer, counsel should consider numbered headings or introductory lines if there is more than one ground for objection to the complaint in order to separate the points and authorities that support each of the grounds, *e.g.:*

1. Supporting the objection that _ _[*plaintiff's first alleged cause of action does not state facts sufficient to constitute a cause of action*]_ _**:**

a. _ _[*State first point in support of first ground for demurrer, with its authorities and tie-in statement*]_ _**.**

b. _ _[*State next point in support of first ground for demurrer*]_ _**.**

2. Supporting the objection that _ _[*state second ground of demurrer followed by its points, listing points and authorities in above format*]_ _**.**

On format of a supporting memorandum generally, see chap 12.

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§23.38 F. Notice of Hearing; Service

A party who files a demurrer must also serve and file a notice of hearing in accordance with CCP §1005. Cal Rules of Ct 3.1320(c). The notice of hearing on a demurrer is generally a separate document. See form in §23.71. However, the hearing date can be noted in the caption to the demurrer and the notice of hearing can be combined with the demurrer itself. Cal Rules of Ct 3.1112(a).

The same time periods required for noticed motions apply to demurrers, *e.g.,* 9 court days' notice of hearing, extension of period if service is by mail. See chap 12. On procedures for orders shortening time, see chap 13.

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IV. DEMURRER TO CROSS-COMPLAINT

§23.39 A. Similarity to Demurrer to Complaint

The grounds for objections in a demurrer to a cross-complaint are the same as for a demurrer to a complaint and may be raised only if they appear on the face of the cross-complaint or from a matter of which the court may take judicial notice. CCP §§430.10, 430.30, 432.10. See §§23.22-23.36.

Because the court can take judicial notice of allegations in the complaint in the action, a demurrer to a cross-complaint may be used to challenge whether the cross-complaint is permissible under CCP §428.10. See *White Lighting Co. v Wolfson* (1968) 68 C2d 336, 353, 66 CR 697; 5 Witkin, California Procedure, *Pleading* §1156 (5th ed 2008). See also *Babb v Superior Court* (1971) 3 C3d 841, 92 CR 179 (mandate to require trial court to sustain demurrer to improper cross-complaint).

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§23.40 B. Timing

The time to file a demurrer to a cross-complaint or an amended cross-complaint is the same as for a demurrer to a complaint, normally within 30 days after service of the cross-complaint. CCP §§430.40, 432.10. See §23.19.

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§23.41 C. Tactical Considerations

Unless the cross-defendant is also the original plaintiff in the action, the reasons to demur to a cross-complaint or to refrain from demurring are generally the same as for demurrers to complaints. See §23.6.

A plaintiff/cross-defendant may have more reason than most defendants to avoid the delay in the progress of the lawsuit caused by the demurrer procedure. It may be wiser to state objections in an answer filed in response to the cross-complaint or to raise legal issues by other procedures. See §23.8. Although sustaining a demurrer to a cross-complaint may eliminate it or some of its causes of action, the demurrer will not spare a plaintiff/cross-defendant from proceeding with the action on issues framed by the original complaint and answer.

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V. DEMURRER TO ANSWER

§23.42 A. Grounds; Waiver; Examples

The grounds for demurrer to an answer, listed in CCP §430.20, are:

- The answer does not state facts sufficient to constitute a defense;
- The answer is uncertain ("uncertain" includes ambiguous and unintelligible); and
- When the answer pleads a contract, it cannot be ascertained whether the alleged contract is written or oral.

Unless each ground for an objection to an answer raised by demurrer is distinctly specified, the demurrer may be disregarded. CCP §430.60. Each ground must be in a separate paragraph and state whether it is directed to the entire answer or to specified defenses. Cal Rules of Ct 3.1320(a). The clauses shown in §§23.26-23.36 can be inserted as numbered paragraphs in the demurrer. See form in §23.74.

Failing to demur to an answer waives all grounds for objecting to the answer except the objection that the answer does not state facts sufficient to constitute a defense. CCP §430.80(b). See discussion in §23.24.

Like a demurrer to a complaint or cross-complaint, a demurrer to an answer (1) searches only for defects in the allegations on the face of the answer or (2) raises matters of which the court must or may take judicial notice. A demurrer may be taken to the whole answer or to one or more defenses raised in it. CCP §430.50(b). However, a ground of demurrer stated against the whole answer may be overruled if the answer contains several defenses, one of which is not demurrable. *Eich v Greeley* (1896) 112 C 171, 173, 44 P 483; *South Shore Land Co. v Petersen* (1964) 226 CA2d 725, 734, 38 CR 392.

PRACTICE TIP: If the answer contains more than one defense, counsel must specifically indicate the defense to which the ground for demurrer applies, *e.g.,* "the first defense is uncertain." Cal Rules of Ct 3.1320(a).

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§23.43 1. Failure to State Facts Sufficient to Constitute Defense

The _ _[*answer/first defense*]_ _ does not state facts sufficient to constitute a defense.

This ground for objection to an answer under CCP §430.20(a) is sometimes called a general demurrer and shares many characteristics with a general demurrer to a complaint, *i.e.,* the objection is not waived by failure to raise it by demurrer. A general demurrer may be sustained to a defense that the law does not recognize, that lacks essential allegations of fact, or that is stated in the form of conclusions. See *Universal Land Co. v All Persons* (1959) 172 CA2d 739, 741, 342 P2d 958; *Youdall v Kaufman* (1921) 55 CA 363, 368, 203 P 448.

A defense that is barred by a statute of limitations is also demurrable on these grounds. *Bradbury v Higginson* (1914) 167 C 553, 140 P 254; *Universal Land Co. v All Persons* (1959) 172 CA2d 739, 742, 342 P2d 958. If a statute of limitations is the basis of the demurrer, the following language may be used to state this ground for objection:

The _ _[*answer/first defense*]_ _ does not state facts sufficient to constitute a defense in that the defense is barred by _ _[*e.g., Code of Civil Procedure section 319*]_ _.

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§23.44 2. Uncertainty

The _ _[*answer/first defense*]**_ _ is uncertain in that _ _**[*specify nature of uncertainty, e.g.*]**_ _:**

1. It cannot be ascertained when the alleged release was given or by whom.

2. Allegations that appear to relate to other possible defenses are mingled with allegations relating to a claimed release.

3. Lines 10 through 20 are unintelligible.

NOTE: "Uncertain" includes ambiguous and unintelligible. CCP §430.20(b).

A demurrer on this ground must specify in what way the answer is uncertain. See, *e.g., Coons v Thompson* (1946) 75 CA2d 687, 171 P2d 443.

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§23.45 3. Uncertain Whether Contract Written or Oral

It cannot be ascertained from the answer whether the contract pleaded in the _ _[*answer/first defense*]_ _ is written or oral.

See CCP §430.20(c). For discussion of demurring to complaint on this ground, see §23.35.

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§23.46 B. Timing

If counsel decides to demur to an answer (or amended answer), the demurrer should be filed within 10 days after service of the answer. CCP §§430.40(b), 471.5(b). On the defendant's motion, the court can strike a late-filed demurrer.

Additional time to file may be obtained by stipulation from defense counsel, or by ex parte application to the court. CCP §§473, 1054; Cal Rules of Ct 2.20. However, counsel should check local rules for any limitations on the ability to stipulate to extension.

A demurrer to an answer is filed and served in the same manner as a demurrer to a complaint, and the time for hearing a demurrer to an answer is set in the same way as for hearing a demurrer to a complaint. See §23.38.

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§23.47 C. Tactical Considerations

A plaintiff or cross-complainant may decide to demur in order to eliminate untenable defenses or to obtain a clarifying amendment of the answer so that the nature of one or more of the stated affirmative defenses can be understood. If the goal is to eliminate matters not amounting to a statement of a defense, a motion to strike is the appropriate procedure. CCP §436. See chap 24. When a demurrer is filed, a motion to strike must be made at the same time. Cal Rules of Ct 3.1322.

If there is more than one defendant or one plaintiff, counsel should be careful to specify on whose behalf and against whom the demurrer is filed. A demurrer filed jointly by two plaintiffs must be overruled if the answer states a defense against either. *Neumann v Moretti* (1905) 146 C 25, 79 P 512.

Reasons not to demur to an answer include the delay involved in the demurrer's being heard and ruled on. It is rare for a court to sustain a demurrer without giving the losing party time to amend the pleading. See §23.53. The gain achieved by demurrer to an answer rarely outweighs the trouble and expense to the demurring plaintiff or cross-complainant, particularly when clarification of the stated defenses can be accomplished more easily through discovery. However, elimination of a defense at the demurrer stage can limit the scope of discovery to be pursued by defendant, which may often be beneficial to a plaintiff or cross-complainant.

Counsel considering a demurrer to an answer should evaluate whether a defense's validity can be appropriately tested at a later stage, *e.g.,* by motion for summary judgment, at a pretrial hearing, or at trial by a motion to exclude evidence. Note that even the striking of all affirmative defenses does not result in termination of the action without trial if the answer also contains denials of material facts. See *South Shore Land Co. v Petersen* (1964) 226 CA2d 725, 733, 38 CR 392.

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VI. RESPONSIVE PROCEDURES

§23.48 A. Amending Pleading Before Hearing

Counsel for the party against whom the demurrer was filed should consider amending the pleading prior to the hearing. Under CCP §472, after the demurrer is filed but before the issue of law is heard, a party may amend the pleading to eliminate defects raised by the demurrer.

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§23.49 B. Filing Opposition Papers

A party may respond to a demurrer by filing and serving a memorandum in opposition to the demurrer at least 9 court days before the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). Opposition and reply papers must be served by personal delivery, fax, express mail, or other method reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c). On opposition papers generally, see chap 12.

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§23.50 VII. DEMURRING PARTY'S REPLY PAPERS

Counsel for the demurring party may file a reply to the party opposing the demurrer if a point of law has been raised in the opposition papers that requires legal research and written argument to rebut effectively. A written reply to the opposition may also assist the court in ruling in the demurring party's favor.

NOTE: Reply papers must be served and filed at least 5 court days before the time set for the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a).

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VIII. HEARING AND COURT RULING

§23.51 A. Hearing

A law and motion judge usually reviews the file before the hearing, often after a workup by a law clerk, and, in some courts, prepares a tentative ruling available to counsel before the calendar is called. Counsel may use the tentative ruling to narrow and focus argument. For discussion of court hearing procedures generally, see chap 12.

At the hearing, counsel against whom the demurrer was filed may learn the judge's position on specific claimed defects and, if the demurrer is sustained, how the complaint can be cured. If one party fails to appear at the hearing on a demurrer, the party who appears may request a decision on the merits. Cal Rules of Ct 3.1320(f). The court has the discretion to continue the hearing for good cause. Cal Rules of Ct 3.1320(f). Failure to appear in support of a special demurrer, however, may be construed by the court as an admission that the demurrer is not meritorious and as a waiver of all grounds in the demurrer. Cal Rules of Ct 3.1320(f). See also CCP §591 (failure of moving party to prosecute demurrer may be construed as waiver of demurrer). If neither party appears, the demurrer may be disposed of on its merits, dropped from the calendar, or restored on notice or on terms the court deems proper, or the hearing may be continued. Cal Rules of Ct 3.1320(f).

PRACTICE TIP: Counsel who does not choose to attend the hearing should give the court notice of nonappearance and submit the matter without an appearance, requesting that the judge rule on the demurrer on the basis of the moving and opposing papers on file. See Cal Rules of Ct 3.1304(c).

If a genuine dispute exists on whether the complaint alleges facts sufficient to establish the elements necessary to maintain a class action, the parties are entitled to an oral hearing before the court rules on the demurrer. *TJX Cos. v Superior Court* (2001) 87 CA4th 747, 749, 104 CR2d 810.

A trial court erred in overruling plaintiffs' demurrer by delivering an order to them very cryptically on the Internet the day before they expected to appear in court. The court of appeal ruled that the trial court erred in denying the parties the opportunity to argue the matter in open court. The Internet is a useful tool and serves many purposes, but is no substitute for a judge and lawyer being able to interact in person. *Medix Ambulance Serv. v Superior Court* (2002) 97 CA4th 109, 113, 118 CR2d 249.

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§23.52 B. Ruling

A judge deciding whether to sustain or overrule a demurrer is guided by a number of general principles. Material facts alleged in a pleading are treated as true for the purpose of ruling on the demurrer. *Gruenberg v Aetna Ins. Co.* (1973) 9 C3d 566, 572, 108 CR 480. The judge also takes as true facts that may be inferred from those expressly alleged. *Harvey v City of Holtville* (1969) 271 CA2d 816, 76 CR 795. However, allegations that are contradicted by facts that the court may take judicial notice of may be disregarded. *Stoney Creek Orchards v State* (1970) 12 CA3d 903, 91 CR 139.

In ruling on a demurrer, specific allegations control general pleadings. *Gentry v EBay* (2002) 99 CA4th 816, 827, 121 CR2d 703. A general allegation that eBay engaged in the sale or offer of sale of collectibles was irreconcilable with a more specific allegation that the individual defendants sold the items to the plaintiffs, using eBay as a venue. The more specific factual allegations control. While inconsistent theories of recovery are permitted, a pleading cannot "blow hot and cold" as to the *facts* positively stated. *Gentry v EBay, supra*.

The court will, however, presume that a party's case is stated as favorably as possible in that party's pleadings. *Vanoni v Western Airlines* (1967) 247 CA2d 793, 56 CR 115. Doubt about the complaint may be resolved against the plaintiff and facts not alleged are presumed not to exist. *Melikian v Truck Ins. Exch.* (1955) 133 CA2d 113, 283 P2d 269 (complaint failed to allege whether acceptance of settlement offer occurred before or after verdict).

Contentions, deductions, or conclusions of fact or law contained in the pleading may not be considered in judging its sufficiency. *Gruenberg v Aetna Ins. Co., supra*. For example, a plaintiff's statement that all administrative remedies have been exhausted cannot substitute for allegations demonstrating that these remedies have in fact been exhausted. *Pan Pac. Prop. v County of Santa Cruz* (1978) 81 CA3d 244, 146 CR 428.

A judge ruling on a demurrer is also required to construe the pleadings liberally with a view toward justice between the parties. CCP §452; *Gentry v EBay* (2002) 99 CA4th 816, 827, 121 CR2d 703; *Cameron v Wernick* (1967) 251 CA2d 890, 60 CR 102. Counsel should note that complaints have been upheld even though the facts were not clearly stated or were intermingled with a statement of irrelevant facts or even though the plaintiff had misconceived the remedy or relief sought. See, *e.g., Gruenberg v Aetna Ins. Co., supra*; *Colvig v RKO Gen., Inc.* (1965) 232 CA2d 56, 66, 42 CR 473. Likewise, judges have ruled on the substance of an objection even if the ground stated in the demurrer was mislabeled. See, *e.g., Youngman v Nevada Irrig. Dist.* (1969) 70 C2d 240, 244 n2, 74 CR 398. However, a demurrer may be overruled if the ground for objection is not one of those listed in CCP §430.10 or is not specifically or clearly stated. See CCP §430.60. In essence, the ruling on a demurrer determines a legal issue on the basis of assumed facts, *i.e.*, those properly alleged in the complaint or answer, regardless of whether they ultimately prove true. For further discussion, see 5 Witkin, California Procedure, *Pleading* §950 (5th ed 2008).

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§23.53 1. Leave to Amend

When a demurrer is sustained, the court may grant leave to amend the pleading on any terms as may be just. CCP §472a(c). The court is required to fix the time within which the amendment or amended pleading must be filed. CCP §472a(c).

The court will sustain a demurrer with leave to amend if there is a reasonable possibility that a defect in the complaint can be cured by amendment. *Minsky v City of Los Angeles* (1974) 11 C3d 113, 118, 113 CR 102. Not to do so is an abuse of discretion. *La Sala v American Sav. & Loan Ass'n* (1971) 5 C3d 864, 876, 97 CR 849 (demurrer sustained without leave to amend when reasonable possibility existed that complaint could have been cured).

Sustaining a general demurrer without leave to amend is not an abuse of discretion if it appears from the complaint that under applicable substantive law there is no reasonable possibility that the defect can be cured by amendment. *Vater v County of Glenn* (1958) 49 C2d 815, 821, 323 P2d 85; *Hoffman v Smithwoods RV Park* (2009) 179 CA4th 390, 407, 102 CR3d 72 (no abuse of discretion to deny leave to amend; plaintiff failed to carry burden of demonstrating reasonable possibility that amendments could cure defects); *Sackett v Wyatt* (1973) 32 CA3d 592, 603, 108 CR 219; *Friendly Village Community Ass'n v Silva & Hill Constr. Co.* (1973) 31 CA3d 220, 107 CR 123 (complaint showed that plaintiffs had no standing to sue); *Spencer v Crocker First Nat'l Bank* (1948) 86 CA2d 397, 194 P2d 775 (no subject matter jurisdiction). A demurrer is properly sustained without leave to amend when the facts are not in dispute and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. *Traverso v Department of Transp.* (2001) 87 CA4th 1142, 1144, 105 CR2d 179.

The courts usually give the plaintiff another chance to amend if a first attempt to cure a defect is unsuccessful, *i.e.,* the amended complaint remains demurrable. After repeated unsuccessful attempts, the court may sustain the demurrer without leave to amend, concluding that it is the absence of facts rather than a lack of skill in stating them that is the cause of the defect. See *Loeffler v Wright* (1910) 13 CA 224, 232, 109 P 269. See also *Banerian v O'Malley* (1974) 42 CA3d 604, 616, 116 CR 919. For further discussion, see 5 Witkin, California Procedure, *Pleading* §§991-993 (5th ed 2008).

NOTE: When the demurrer itself is the subject of a motion to strike (see chap 24), and the demurrer is stricken, if the demurring party has not yet filed an answer, the court must allow an answer to be filed on terms that are just. CCP §472a(c).

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§23.54 2. Decision or Order

The judge who hears a demurrer may overrule it, sustain it with leave to amend, or sustain it without leave to amend. See CCP §472a.

The ruling may be made from the bench, and a minute order entered at the time of the hearing, or the judge may take the demurrer under consideration and rule at a later time. In some courts, the judge will issue a tentative ruling the day before the hearing, then modify or make it final at or after any hearing. An order sustaining or overruling a demurrer is deemed excepted to. CCP §647; *Dumm v Pacific Valves* (1956) 146 CA2d 792, 304 P2d 738.

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§23.55 a. Time to Answer or Amend

A judge who overrules a demurrer to a complaint or cross-complaint when there is no answer on file must allow an answer to be filed or entered on such terms as may be just. CCP §472a(b). If no time is set by the judge, 10 days within which to answer or amend will be deemed to have been granted. Cal Rules of Ct 3.1320(g). In forcible entry, forcible detainer, or unlawful detainer cases, the answer must be filed in five calendar days. CCP §1167.3; Cal Rules of Ct 3.1320(g). When a demurrer is denied after remand from federal court and an answer was not filed with the demurrer, the defendant has 30 days from the date the state court receives the case on remand to answer the complaint. CCP §430.90(a)(2). See §22.96.

If the judge overrules the demurrer at the hearing, counsel for the demurring party may ask the judge to specify the period within which an answer must be filed. A party who seeks more than 10 days to answer or amend can ask the judge to specify a longer time in the decision or order.

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§23.56 b. Statement of Grounds

A judge who sustains a demurrer must include in the decision or order a statement of the specific ground or grounds on which the decision is based. CCP §472d. The statement may be by reference to appropriate pages and paragraphs of the demurrer. CCP §472d. The party against whom the demurrer is sustained may waive these requirements. CCP §472d.

When a demurrer, interposed on both general and special grounds, is sustained in general terms and without specification of reasons, it will be presumed that the trial court ruled only on the general demurrer. *E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 504 n1, 146 CR 614. Counsel's failure to call the absence of specific grounds to the trial court's attention waives the irregularity. *Cohen v Superior Court* (1966) 244 CA2d 650, 654, 53 CR 378.

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§23.57 3. Notice of Decision

The time within which an answer must be filed after a demurrer has been overruled, or an amended pleading must be filed after a demurrer has been sustained, begins to run when the party who must act is served with notice of the court's decision, unless notice was waived in open court and the waiver entered in the minutes or docket. CCP §472b; *Taliaferro v Bekin Realty Co.* (1959) 176 CA2d 240, 1 CR 385. If a notice of decision is served by mail, service is complete when deposited in the mail, in accordance with CCP §1013(a).

The court or prevailing counsel often asks the parties to waive notice, which usually is agreed to in open court. If the demurrer is taken under submission, the California Rules of Court require the clerk to notify the parties of the ruling, but this notification does not constitute service of notice of the court's decision or order described in CCP §472b. See Cal Rules of Ct 3.1109(a)-(c). Although not required to do so, the prevailing party may attach a copy of the order overruling or sustaining the demurrer as an exhibit to the notice of decision. See form in §23.75.

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IX. POSTHEARING PROCEDURES

A. Demurrer to Complaint or Cross-Complaint

1. If Demurrer Overruled

§23.58 a. Motion for Reconsideration

A party affected by an order in a civil action can move for reconsideration of the order within 10 days under CCP §1008. See §§12.113-12.118.

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§23.59 b. Answer

If the demurrer has been overruled, the court must allow an answer to be filed on "such terms as may be just." CCP §472a.

Filing an answer after a demurrer has been overruled deprives the defendant of an opportunity to obtain appellate review of that decision until after judgment is entered in the action, unless the issue is one that can be raised by peremptory writ (see §23.61). Answering the complaint does not waive fundamental defects of substance in the complaint, however, and the overruling of a demurrer that raises such defects can be cited as reversible error on appeal. *Page v Page* (1962) 199 CA2d 527, 532, 18 CR 897.

NOTE: If the defect raised by demurrer is one of form, even though it consists of a formal failure to state a cause of action, filing an answer and going to trial on the issues waive the formal defects, and any error in overruling the demurrer is not, on appeal, deemed prejudicial and reversible. *Baker v Miller* (1923) 190 C 263, 267, 212 P 11; *Goble v Dotson* (1962) 203 CA2d 272, 282, 21 CR 769; *Page v Page, supra*. See generally 5 Witkin, California Procedure, *Pleading* §985 (5th ed 2008).

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§23.60 c. Default and Appeal

An order overruling a demurrer is not appealable and can ordinarily be reviewed only on appeal from a judgment in the action. See *County of Santa Barbara v Superior Court* (1971) 15 CA3d 751, 754, 93 CR 406. Thus, a defendant who wants immediate appellate review of an order overruling a demurrer must decline to answer, suffer the plaintiff's obtaining a default judgment under CCP §§585-587, and appeal from that judgment, unless the extraordinary writ procedure may be used. See §23.61.

Appeal from a default judgment may be taken on jurisdictional grounds or because of basic defects in the pleadings. *Lee v Ski Run Apartments Assocs.* (1967) 249 CA2d 293, 294, 57 CR 496. A default judgment admits only facts that were well pleaded. *Buck v Morrossis* (1952) 114 CA2d 461, 466, 250 P2d 270. Thus a defendant can object on appeal that the complaint failed to state facts sufficient to constitute a cause of action. *Rose v Lawton* (1963) 215 CA2d 18, 19, 29 CR 844. But see *Molen v Friedman* (1998) 64 CA4th 1149, 75 CR2d 651, noting the tension between the *Rose* approach and supreme court opinions holding that the complaint need not state a cause of action if it apprises the defendant of the nature of the plaintiff's demand. Defects that were challenged only by special demurrer, however, cannot be raised on appeal from a default judgment. See *Price v Hibbs* (1964) 225 CA2d 209, 37 CR 270; *Buck v Morrossis, supra.* A defendant's failure to seek relief from default does not waive the right to appeal. See *Bristol Convalescent Hosp. v Stone* (1968) 258 CA2d 848, 859, 66 CR 404.

WARNING: For defense counsel to permit entry of a default judgment against a client is risky; the appellate court may indulge all inferences in favor of the plaintiff. It is better practice to litigate the case on its merits and raise the question of the validity of the pleading after any adverse judgment.

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§23.61 d. Writ of Prohibition

An order overruling a demurrer made on the ground that the court had no jurisdiction of the subject matter of the cause of action alleged in the complaint (CCP §430.10(a)) can be reviewed by prohibition. *Tide Water Assoc. Oil Co. v Superior Court* (1955) 43 C2d 815, 820, 279 P2d 35; *County of Santa Barbara v Superior Court* (1971) 15 CA3d 751, 754, 93 CR 406. See also *Harden v Superior Court* (1955) 44 C2d 630, 634, 284 P2d 9 (testing constitutionality of statute or ordinance); *People v Superior Court* (*Pierpont*) (1947) 29 C2d 754, 178 P2d 1.

A writ of prohibition lies under CCP §§1102-1103 to prevent a trial court from exercising jurisdiction after that court has determined that it has jurisdiction when the defendant has no plain, speedy, and adequate remedy in the ordinary course of law. See *Babb v Superior Court* (1971) 3 C3d 841, 851, 92 CR 179; *Harden v Superior Court, supra*; *Allen v Superior Court* (1959) 171 CA2d 444, 340 P2d 1030. See generally California Civil Writ Practice §§4.2-4.9 (4th ed Cal CEB 2008)

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2. If Demurrer Sustained With Leave to Amend

§23.62 a. Reconsideration; Amendment

After a demurrer to a complaint or cross-complaint has been sustained with leave to amend, the plaintiff may request reconsideration by the court. The same rules apply to a defendant's request for reconsideration after a demurrer has been overruled. See §23.58.

The judge who sustains a demurrer with leave to amend fixes the time within which an amendment or amended pleading must be filed. CCP §472a. If no time is set by the judge, 10 days to amend will be deemed to have been granted. Cal Rules of Ct 3.1320(g). Note, however, that the mandatory relief provisions of CCP §473(b) do not apply to a discretionary dismissal based on the plaintiff's failure to timely file an amended complaint, when dismissal is entered after a hearing in which the court evaluates the reasons for failure to meet the deadline. *Leader v Health Indus. of Am., Inc.* (2001) 89 CA4th 603, 615, 107 CR2d 489.

If an amended pleading is not filed, a motion to dismiss the entire action and for entry of judgment may be made by ex parte application. Cal Rules of Ct 3.1320(h); *Sadler v Turner* (1986) 186 CA3d 245, 230 CR 561 (ex parte motion to dismiss complaint under former CCP §581(3) granted when complaint not amended within time permitted by court). If, however, an amended pleading has been filed after the time allowed, an order striking the amended pleading must be obtained by noticed motion under CCP §1010. Cal Rules of Ct 3.1320(i).

Filing an amended complaint waives any error there may have been in sustaining the demurrer. *Edgar Rice Burroughs, Inc. v Metro-Goldwyn-Mayer, Inc.* (1962) 205 CA2d 441, 446, 23 CR 14.

Amendments should usually be presented in the form of an amended complaint, *i.e.,* a new complaint complete in itself, even if the demurrer was sustained as to only one cause of action. An amended complaint *must* be filed if the demurrer was sustained to the entire complaint. See *Cohen v Superior Court* (1966) 244 CA2d 650, 655, 53 CR 378. In some instances, an amendment to the complaint will suffice. See CCP §§471.5(a), 472a; see chap 16. Whatever form the attorney decides to use, the amendment or amended complaint must be filed and served on all parties to the action. See CCP §465.

After a general demurrer is sustained with leave to amend and the plaintiff does not amend within the time authorized by the court, the plaintiff no longer can voluntarily dismiss the action without prejudice under former CCP §581(1), even if the trial court has yet to enter a judgment of dismissal on the sustained demurrer. *Wells v Marina City Prop.* (1981) 29 C3d 781, 176 CR 104. The *Wells* court held, however, that the right of voluntary dismissal is not barred if exercised before (1) a decision sustaining the demurrer has been made or (2) expiration of the plaintiff's time to amend after the demurrer is sustained. See also *Parsons v Umansky* (1994) 28 CA4th 867, 34 CR2d 144 (plaintiff's right to dismiss without prejudice until expiration of time to amend after demurrer sustained under CCP §581(b)(1) (any time before actual commencement of trial) is consistent with *Wells* interpretation of former CCP §581(1) which contained same actual commencement of trial language).

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§23.63 b. Demurrer or Answer After Amended Complaint Filed

A defendant has 30 days after being served with an amended complaint or amendments to a complaint in which to demur again or answer (see CCP §§430.40(a), 471.5(a)) unless the court has specified a different time (see CCP §586(a)(1)). The time to demur to an amended complaint may be extended in the same way as time to demur to an original complaint may be extended, and a demurrer to an amended complaint should be filed and served in the same way as a demurrer to the original complaint.

Grounds of objection to the original complaint that were overruled should not be reasserted against the amended complaint unless the new or changed allegations make them newly valid. Other grounds may be reasserted if the amendments do not cure the defect, and new or restated allegations in the amended complaint may suggest additional grounds for a demurrer.

PRACTICE TIP: A defendant may choose to answer rather than demur to a defective amended complaint for the same reasons that defendants sometimes choose to answer rather than demur to original complaints. See §23.6. A defendant may also choose not to answer or demur to an amended complaint, but to permit entry of judgment by default (see CCP §§471.5(a), 585-587) and appeal from that judgment. See discussion, including risks that may be involved in choosing this course, in §23.60.

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§23.64 c. Appeal After Dismissal

An order sustaining a demurrer with leave to amend is not appealable. *Bartlett v Hawaiian Village, Inc.* (1978) 87 CA3d 435, 151 CR 392. A plaintiff can, however, obtain appellate review of the sufficiency of a complaint by declining to amend the complaint, obtaining an order of dismissal, which acts as a final judgment, and appealing from that judgment. *Jeffers v Screen Extras Guild, Inc.* (1951) 107 CA2d 253, 237 P2d 51. See generally 5 Witkin, California Procedure, *Pleading* §990 (5th ed 2008). Thus, a plaintiff advancing a novel theory of liability and seeking an inexpensive and expeditious review of it, rather than go to trial, can state as strong a case as possible in the complaint, await an order sustaining the demurrer and judgment of dismissal, and appeal on the clerk's transcript.

Under the one-final-judgment rule, a trial court cannot order dismissal after sustaining a demurrer unless it has sustained the demurrer as to all causes of action without leave to amend. Therefore, the plaintiff cannot appeal from a purported judgment on one cause of action if any other cause is pending. If a demurrer is sustained as to less than the entire complaint, a dismissal should not be granted. The ruling should be embodied in a minute order, and the action should proceed to final judgment on any remaining causes of action. See *U.S. Fin. v Sullivan* (1974) 37 CA3d 5, 11, 112 CR 18. However, if the trial court fails to dispose of all causes of action through inadvertence or mistake, rather than through an intention to retain the remaining causes of action for trial, the appellate court can amend the judgment and dismiss the remaining causes of action, thus preserving the appeal. *Tenhet v Boswell* (1976) 18 C3d 150, 133 CR 10. In *Tenhet,* the trial court sustained demurrers to all causes of action except the first, which sought declaratory relief. The court left no doubt that it considered the plaintiff's claim unsupportable, but it believed that the declaratory relief action could not be disposed of at the pleading stage. The California Supreme Court amended the judgment by ruling in the defendant's favor on the first cause of action and thereafter considered the appeal on the merits.

When a case involves multiple parties and the trial court sustains demurrers to all causes of action involving one party without leave to amend, leaving no issue to be determined for that party, an appeal is proper. *Justus v Atchison* (1977) 19 C3d 564, 139 CR 97, disapproved on other grounds in *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661. If the demurrer is sustained as to the plaintiff's principal cause of action, a judgment of dismissal is also proper and appealable. See generally 9 Witkin, Procedure, *Appeal* §§118-119, 122-125.

Either the plaintiff or the defendant may move for an order of dismissal and entry of judgment after the time to amend has passed. CCP §581(f)(2). The motion may be made by ex parte application under CCP §581(f)(2). Cal Rules of Ct 3.1320(h); *Oppenheimer v Deutchman* (1955) 132 CA2d Supp 875, 879, 281 P2d 650.

If the plaintiff chooses not to amend and files an appeal after dismissal, the appellate court will assume that the complaint to which the demurrer was sustained stated the plaintiff's case as strongly as possible. *Cal Francisco Inv. Corp. v Vrionis* (1971) 14 CA3d 318, 321, 92 CR 201. The facts alleged in the complaint will be taken as true, but the complaint will be strictly construed. *Bradler v Craig* (1969) 274 CA2d 466, 470, 79 CR 401. Moreover, if the plaintiff declines to amend after having been granted leave to do so, dismissal of the action will be affirmed on appeal if the complaint is objectionable on any ground. *Hiemstra v Huston* (1970) 12 CA3d 1043, 1045, 91 CR 269; *Totten v Underwriters at Lloyd's of London* (1959) 176 CA2d 440, 442, 1 CR 520.

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§23.65 3. If Demurrer Sustained Without Leave to Amend

The plaintiff may request reconsideration of an order sustaining a demurrer without leave to amend. CCP §1008; *Davis v Stroud* (1942) 52 CA2d 308, 315, 126 P2d 409. See discussion in §§12.113-12.118.

No appeal lies from an order sustaining a demurrer without leave to amend. *Youngblood v Board of Supervisors* (1978) 22 C3d 644, 651, 150 CR 242. If the trial court sustains a demurrer without leave to amend to less than all causes of action in a complaint, the plaintiff may seek from the reviewing court a writ of mandate directing the trial court to overrule the demurrer. Although appellate courts have generally been reluctant to extend extraordinary relief at the pleading stage, mandamus will lie when it appears that the trial court has deprived a party of an opportunity to plead a cause of action or defense and when extraordinary relief may avert a trial and reversal. *Coulter v Superior Court* (1978) 21 C3d 144, 148, 145 CR 534.

Although an order sustaining the demurrer is not appealable, a judgment of dismissal is an appealable final judgment. *Berri v Superior Court* (1955) 43 C2d 856, 860, 279 P2d 8; *Parenti v Lifeline Blood Bank* (1975) 49 CA3d 331, 334, 122 CR 709, disapproved on other grounds in *Wells v Marina City Props., Inc.* (1981) 29 C3d 781, 789, 176 CR 104. A judgment of dismissal may be entered on the motion of either party after entry of an order sustaining a demurrer without leave to amend, but a formal motion to dismiss the action is not necessary. Entry of a judgment of dismissal follows an order sustaining a demurrer without leave to amend as a matter of course. *Parenti v Lifeline Blood Bank, supra*. The trial judge's refusal to enter a judgment of dismissal after sustaining a demurrer without leave to amend may be reviewed by writ of mandate. *Berri v Superior Court, supra*.

A plaintiff who is unable by mandamus to obtain appellate review of a trial court order sustaining a demurrer without leave to amend to less than all causes of action can obtain review by a direct appeal if the viable causes of action are voluntarily dismissed, a judgment of dismissal is obtained on the causes of action to which a demurrer has been sustained without leave to amend, and a notice of appeal is then filed.

The trial court cannot dismiss an action under CCP §581(f)(1) without a party's request, but a formal or noticed motion is not required; the party against whom judgment is entered has already had the opportunity to be heard in the hearing on the demurrer. See *Oppenheimer v Deutchman* (1955) 132 CA2d Supp 875, 879, 281 P2d 650.

A judgment of dismissal should not be entered after a demurrer is sustained on the ground that another action is pending, but an interlocutory judgment may issue abating the present action until final determination of the pending action. See §23.31.

The question of whether the trial court abused its discretion in sustaining a demurrer without leave to amend can be raised on appeal even if the plaintiff made no request to amend the complaint. CCP §472c. On appeal, the plaintiff-appellant has the burden of showing abuse of discretion. *O'Keefe v Atascadero County Sanitation Dist.* (1971) 21 CA3d 719, 731, 98 CR 878. But the appellate court, like the trial court, is to construe the pleadings liberally with a view to substantial justice between the parties. CCP §452.

An order sustaining a demurrer without leave to amend to fewer than all causes of action in a complaint or a cross-complaint or to an affirmative defense when the demurrer to the entire answer is overruled and an order granting a motion to strike less than the entire pleading is open on appeal from the final judgment in the action when an amended pleading is filed after the court's order. CCP §472c.

If an order sustaining a demurrer without leave to amend is reversed or remanded by a reviewing court, any amended complaint must be filed within 30 days after the clerk of the reviewing court mails notice of issuance of the remittitur. CCP §472b.

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B. Demurrer to Answer

§23.66 1. If Demurrer Overruled

A plaintiff or cross-complainant may request reconsideration of a decision or an order overruling a demurrer to an answer. See discussion in §23.58.

If reconsideration is not requested or not granted, the action must proceed as if the demurrer to the answer had not been filed; facts alleged in the answer will be considered as denied. CCP §472a(b).

A plaintiff cannot obtain appellate review of an order overruling a demurrer to an answer. However, review may be obtained through writ of mandate proceedings if there is a significant legal issue. See *Babb v Superior Court* (1971) 3 C3d 841, 92 CR 179. See discussion in §23.61.

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§23.67 2. If Demurrer Sustained

When a court sustains a demurrer to an answer, it may grant the defendant leave to amend. CCP §472a(c). Judges are usually liberal in granting leave to amend because appellate courts frequently consider denial of leave to be an abuse of discretion. See *PG&E v Minnette* (1949) 92 CA2d 401, 405, 206 P2d 1138. See generally 5 Witkin, California Procedure, *Pleading* §1183 (5th ed 2008); see §23.53. If the defendant amends the answer, the amendment constitutes a waiver of any error that may have occurred in sustaining the demurrer. *Hartke v Abbott* (1931) 119 CA 439, 6 P2d 578.

An order sustaining a demurrer to an answer is not appealable. If the answer contains denials of issuable facts or nondemurrable defenses, the action must proceed to judgment before the defendant can obtain appellate review of the order. See *Warren v Harootunian* (1961) 189 CA2d 546, 11 CR 305 (dismissal improper when defendant declined to amend after general demurrer sustained with leave to amend; even if general demurrer good to special defenses, denial of all material allegations of complaint created issues of fact for trial).

If the sustaining of the demurrer leaves no issues to be decided, and if leave to amend the answer is not granted or the defendant chooses not to amend, the plaintiff or cross-complainant may move for entry of judgment by default under CCP §§585-587. CCP §586(a)(5); Cal Rules of Ct 3.1320(h). On default generally, see chap 38. Thus, it appears that the defendant may obtain appellate review of the sustaining of a demurrer to an answer by not amending, allowing the plaintiff to take judgment by default and then appealing from that judgment. See discussion, including risks that may be involved in choosing this course, in §23.60.

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X. DIAGNOSTIC QUESTIONS

§23.68 A. Defendant

Answers to the following questions may assist defense counsel in evaluating whether a demurrer is appropriate in a particular case:

1. Do any of the following grounds to demur appear from an examination of the face of the complaint or cross-complaint or from matters that may be judicially noticed (see CCP §§430.10, 430.30(a))?

- The court has no jurisdiction over the alleged cause of action.
- The person who filed the pleading lacks legal capacity to sue.
- Another action is pending between the same parties on the same cause of action.
- There is a defect (nonjoinder) or misjoinder of parties.
- The pleading does not state facts sufficient to constitute a cause of action.
- The action is barred by statute of limitations.
- The action is barred by prejudicial delay or laches.
- The action is barred because the plaintiff is not the real party in interest and therefore lacks standing to sue.
- The action is barred by res judicata.

In actions on a contract:

- The plaintiff's claim is based on an illegal transaction.
- The plaintiff's claim is barred by the Statute of Frauds.
- The allegations fail to show either the elements or the existence of a contract.
- The allegations show an inadequacy of consideration.
- It cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct.

In tort actions:

- The allegations in a complaint for defamation disclose a privileged occasion but fail to allege malice. The allegations in a complaint for defamation or malicious prosecution disclose the defense of absolute privilege.
- The pleading is uncertain, ambiguous, or unintelligible.
- In an action for damages for malpractice of an architect, professional engineer, or land surveyor, no certificate of merit has been filed as required by CCP §411.35.

2. If the motion is not made, will your case be prejudiced later in the litigation by your failure to demur?

- Defects of substance are not waived.
- Lack of jurisdiction of the court is not waived if not objected to by demurrer or answer.
- Failure to state facts sufficient to constitute a cause of action or a defense is not waived by failure to demur or to prosecute a demurrer.
- Defects of form appearing on the face of the pleading must be raised by demurrer or they are waived.

3. If the motion is granted, will it materially affect the outcome of the litigation?

4. Will it result in the dismissal of the offending pleading, cause of action, or defense?

5. Will it result in narrowing the issues on which the opposing party may proceed?

6. Will it produce a useful clarification of the pleading, making it easier to respond to it, and perhaps suggesting additional defenses?

7. Will it encourage a favorable settlement by the opposing party?

8. Are there reasons not to demur?

9. If asked, would the opposing party voluntarily amend the pleading to provide the necessary clarification?

10. Will the opposing party be able to correct the defect by amending the defective pleading?

11. Will the effort and expense of the motion outweigh any potential benefits?

12. Can your objections or challenge to the validity of the pleading be done more expeditiously by answer or by another procedure?

13. Will your demurrer merely force the opposing counsel to research and analyze the bases of the action, permitting him to cure defects and focus energy on the tenable aspects of the action?

14. Will another procedure better accomplish the objectives?

- Raise the objection in the answer.
- Move to strike.
- Move for judgment on the pleadings.
- Move for summary judgment.
- Move to dismiss.
- Use discovery to clarify any uncertainty in the pleadings.
- Object to evidence at trial.

On grounds for demurring to complaint, see §23.22. On demurrers in the context of civil libel or slander actions while criminal charges for child abuse are pending, see CC §48.7(c)-(d). On demurrers to a peremptory writ or the application for a writ of review, see Cal Rules of Ct 8.487(b). See also California Civil Writ Practice §§8.40-8.56 (4th ed Cal CEB 2008).

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§23.69 B. Plaintiff

Answers to the following questions may assist the plaintiff's counsel in evaluating whether a demurrer is appropriate in a particular case:

1. Do any of the following grounds to demur appear from an examination of the face of the answer, or from matter that may be judicially noticed (see CCP §§430.20, 430.30(a), 430.50)?

- The answer lacks facts sufficient to constitute a defense.
- The answer is uncertain ("uncertain" includes ambiguous and unintelligible).
- If a contract is pleaded in the answer, it cannot be ascertained from the face of the answer whether the contract is oral or written.

2. Are there other reasons to demur?

3. Will the issue be waived if you do not demur? See CCP §430.80.

4. Will the defendant (or cross-defendant) be unable to allege facts sufficient to constitute an affirmative defense in an amended answer, thereby limiting the scope of discovery?

5. If a contract is pleaded in the answer and if defendant amends to show that the contract was oral, should a general demurrer raising the statute of frauds may then be considered?

6. Are there reasons not to demur?

7. Would a demurrer delay the lawsuit?

8. Would any possible benefit be outweighed by the expense of raising a demurrer because the defendant would be able to cure the defect by amending the answer?

9. Are any of the following better alternatives than a demurrer?

- Move to strike.
- Move for judgment on the pleadings.
- Move for summary judgment.
- Use discovery to clarify uncertainty in the answer.
- Object to evidence at trial.

On grounds for demurring to an answer, see §23.42. For discussion of demurrers to a cross-complaint, see §23.39.

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Source: Civil Litigation/California Civil Procedure Before Trial/23 Demurrers/§23.70 XI. CHECKLIST: PROCEDURE FOR DEMURRER TO COMPLAINT

§23.70 XI. CHECKLIST: PROCEDURE FOR DEMURRER TO COMPLAINT

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Prehearing Procedures

Moving Party

- Decide whether to answer or move to strike at same time, instead of, or in addition to demurrer (see §§23.3-23.14, 23.68)
- Ascertain date demurrer must be filed (CCP §430.40; see §23.19)
- Prepare moving papers
- Notice of motion
- Demurrer (each ground stated separately) (Cal Rules of Ct 3.1320(a); CCP §§430.10, 430.60; see §§23.16, 23.22-23.36)
- Supporting memorandum (see §23.37)
- Proof of service
- Matters to be judicially noticed (see §23.18)
- Statement in writing of relevant part of court file (Cal Rules of Ct 3.1306(c))
- Copy for court and each party
- Serve and file moving papers
- 30 days after service of complaint or cross-complaint, or within time to file a responsive pleading under an extension granted by the court or by stipulation of the parties (CCP §430.40(a)); or
- 10 days after service of answer, if demurring to answer (CCP §430.40(b)); and
- At least 16 court days before hearing date (unless extended because of service by mail) (CCP §1005)

Opposing Party

- Decide whether to amend pleading and file it before hearing on demurrer, or whether to oppose demurrer (see §§23.48-23.49)
- Prepare opposing papers (see §23.49)
- Memorandum in opposition
- Matters to be judicially noticed
- Serve and file opposing papers
- At least 9 court days before hearing (CCP §1005)

Moving Party

- Prepare reply to opposition papers (see §23.58)
- Service at least 5 court days before hearing (CCP §1005)

Hearing on Demurrer

- If no appearance by one party, court may still decide on merits or continue hearing for good cause (Cal Rules of Ct 3.1320(f))
- Failure to appear in support of special demurrer may be construed by court as admission that demurrer lacks merit and as a waiver of all grounds (Cal Rules of Ct 3.1320(f))
- If neither party appears, demurrer may be disposed of on its merits, dropped from calendar, or continued (Cal Rules of Ct 3.1320(f))

See CCP §§1167.3, 1170 on unlawful detainer and forcible entry cases.

Posthearing Procedures

Moving Party If Demurrer Overruled

- Proceed with suit on merits, and appeal after adverse judgment
- If new facts exist, file motion for reconsideration (see §23.58)
- Answer pleading within time specified in order overruling demurrer, or within 10 days if time not specified (Cal Rules of Ct 3.1320(g))
- Allow default judgment to be entered, and appeal from that judgment (risky; see Warning in §23.60)
- If no jurisdiction of subject matter was raised by demurrer and overruled, seek writ of prohibition (see §23.61)

Opposing Party If Demurrer Is Sustained With Leave to Amend

- File amended pleading or amendment to pleading within 10 days or time provided by the court (Cal Rules of Ct 3.1320(g)) *or*
- Decline to amend pleading, allow entry of order of dismissal, and appeal from that judgment (see §23.64)

Moving Party If Demurrer Is Sustained With Leave to Amend

- If new facts exist, bring motion for reconsideration (see §23.62)
- Move to dismiss if pleading not amended with in time provided (Cal Rules of Ct 3.1320(i))

Opposing Party If Demurrer Is Sustained Without Leave to Amend (see §23.65)

- If sustained without leave to amend to less than all causes of action, seek writ of mandate *or*
- Voluntarily dismiss remaining viable causes of action, obtain judgment on dismissal of defective causes of action, and file a notice of appeal
- Request reconsideration of order if new facts exist
- Request court clerk to enter dismissal of action (without prejudice), and appeal this judgment

Moving Party If Demurrer Is Sustained Without Leave to Amend

- Request court clerk to enter dismissal of action

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XII. FORMS

§23.71 A. Form: Notice of Hearing on Demurrer to Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
.**Attorney for Defendant,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF HEARING ON**
vs	)	_ _[*NAME*]_ _**'S DEMURRER**
	)	**TO** _ _[*NAME*]_ _**'S**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**COMPLAINT**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that the demurrer filed with this notice has been set for hearing on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §23.46 on setting the date for hearing in accordance with Cal Rules of Ct 3.1320(c) and CCP §1005.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, "pleading paper" (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§23.72 B. Form: Demurrer to Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	_ _[*NAME*]_ _**'S DEMURRER TO** _ _[*NAME*]_ _**'S COMPLAINT;** _ _[*NOTICE OF HEARING;*]_ _ _ _[*SUPPORTING MEMORANDUM*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
	)	
	)	[*In limited civil case, add:*
	)	**Amount demanded**
	)	_ _[*exceeds/does not exceed*]_ _ **$10,000**]

Defendant, _ _[*name*]_ _**, demurs to each of the causes of action in the complaint of** _ _[*name*]_ _ **on the following grounds:**

_ _[*State each ground for objection separately in numbered paragraph*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: California Rules of Court 3.1320(e) requires that the name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer appear immediately below the case number. Some local court rules may require an attorney's certificate of merits. If so, the following may be placed below the statement of grounds and above the date and attorney's signature: "The undersigned certifies that this demurrer is filed in good faith and not for the purpose of delay." On memorandum in support of demurrer, see §23.37. On format of court papers generally, see chap 11. For discussion of demurrer to complaint, see §§23.15-23.38.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§23.73 C. Form: Demurrer to Cross-Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff/Cross-Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	_ _[*NAME*]_ _**'S DEMURRER TO** _ _[*NAME*]_ _**'S CROSS-COMPLAINT;** _ _[*NOTICE OF HEARING;*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	_ _[*SUPPORTING MEMORANDUM*]_ _
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _
	[*In limited civil case, add:* **Amount demanded** _ _[*exceeds/does not exceed*]_ _ **$10,000**]

_ _[*Plaintiff/Cross-defendant*]_ _, _ _[*name*]_ _**, demurs to each of the causes of action in the cross-complaint of** _ _[*name*]_ _ **on the following grounds:** _ _[*State each ground for objection in numbered paragraph*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The demurrer must specifically identify in the caption the demurring party and the cross-complaint being opposed. See Cal Rules of Ct 3.1320(e). A notice of hearing and a supporting memorandum must accompany a demurrer. See §23.37. The grounds for objecting to a cross-complaint are the same as for objecting to a complaint. For discussion, see §§23.22-23.24. The forms in those sections may be used in a demurrer to a cross-complaint by substituting "cross-complainant" for "plaintiff," "cross-defendant" for "defendant," "cross-complaint" for "complaint," and "answer to cross-complaint" for "answer."

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§23.74 D. Form: Demurrer to Answer

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	_ _[*NAME*]_ _**'S DEMURRER TO** _ _[*NAME*]_ _**'S ANSWER;**
_ _[*Name(s)*]_ _, **Defendant(s)**	_ _[*NOTICE OF HEARING;*]_ _ _ _[*SUPPORTING MEMORANDUM*]_ _
	Hearing: _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _
	[*In limited civil case, add:* **Amount demanded** _ _[*exceeds/does not exceed*]_ _ **$10,000**]

_ _[*Plaintiff/Cross-complainant*]_ _, _ _[*name*]_ _**, demurs to each of the defenses in the answer of** _ _[*defendant/cross-defendant*]_ _, _ _[*name*]_ _**, on the following grounds:** _ _[*State each ground for objection in numbered paragraph*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion, see §§23.42-23.47.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§23.75 E. Form: Notice of Decision Sustaining or Overruling Demurrer to Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF DECISION**
vs	)	_ _[*SUSTAINING/ OVERRULING*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*NAME*]_ _**'S DEMURRER TO** _ _[*NAME*]_ _**'S COMPLAINT**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, the Court** _ _[*sustained/overruled*]_ _ **the demurrer of** _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, to** _ _[*e.g., the complaint, the first and third causes of action in the complaint*]_ _ **and gave** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, _ _ **days from the date of service of this notice to** _ _[*amend/answer*]_ _ **that complaint.**

[*Add if demurrer is sustained*]

The Court sustained the demurrer _ _[*on the following grounds and terms/on the grounds and terms shown in the attached copy of the Court's* _ _[*decision/order*]_ _]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion, see §23.57.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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24

Motions to Strike

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I. INTRODUCTION

§24.1 A. Scope of Chapter

This chapter covers motions to strike in civil actions under CCP §§435-437. It discusses description and use (see §§24.3-24.6), the moving party's procedures (see §§24.7-24.16), the opposition (see §24.17), hearing and ruling (see §§24.18-24.19), and procedures after ruling (see §§24.20-24.23). It also contains diagnostic questions (see §24.24), a procedural checklist (see §24.25), forms of notice of motion to strike (see §24.26), and an order granting the motion to strike (see §24.27).

A party may file both a motion to strike and a demurrer at the same time. See §24.11. On demurrers generally, see chap 23.

NOTE: Except to the extent that general motion to strike rules apply, this chapter does not cover the special motion to strike under CCP §425.16 that may be addressed to a cause of action brought primarily to chill a person's constitutional right of petition or free speech in connection with a public issue (*i.e.,* a SLAPP, or Strategic Lawsuit Against Public Participation). On SLAPP lawsuits, see Bader & Goldowitz, *California's Powerful Anti-SLAPP Statute: Litigating After* Briggs v Eden Council for Hope & Opportunity, 21 CEB Civ Litigation Rep 82 (May 1999).

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§24.2 B. Governing Law

Motions to strike in civil actions are governed by CCP §§435-437. A motion to strike is a general appearance in a civil action. See CCP §1014.

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II. DESCRIPTION AND USE

§24.3 A. Function; Motion to Strike Compared With Demurrer

A motion to strike is used to challenge pleading defects not vulnerable to challenge by demurrer. For example, a motion to strike can be used to reach procedural defects (see §24.4) or to eliminate part of a cause of action or count (*e.g.,* a claim for punitive damages) even though the rest of the cause of action would stand against a general demurrer. Unlike a demurrer, a motion to strike can also be used to sanction a party for misuse of the discovery process (CCP §2023.030(d)(1)) or a party who fails to comply with local court rules, unless the failure to comply is the fault of counsel and not of the party. CCP §575.2 (court on its own motion or motion of party may strike all or any part of pleading).

A motion to strike may be directed against a whole pleading or any part of it. CCP §435(b)(1). Even an objectionable word or phrase may be stricken. A "pleading" is defined in the code as a demurrer, answer, complaint, or cross-complaint. See CCP §435(a)(2).

A motion to strike can eliminate:

- Irrelevant and redundant matter (see *American Aeronautics Corp. v Grand Central Aircraft Co.* (1957) 155 CA2d 69, 84, 317 P2d 694);
- Statements that are conclusions of law (*Simpson v Richmond* (1957) 154 CA2d 27, 315 P2d 435) or evidentiary matter (*Fisher v Larsen* (1982) 138 CA3d 627, 646, 188 CR 216); and
- Such inflammatory terms as "illegally" and "maliciously" (unless supported by punitive damages claim) (see *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 961, 970, 229 CR 360).

Like a demurrer, a motion to strike:

- Attacks matters that appear on the face of the pleading or that can be judicially noticed;
- Constitutes a general appearance in the action (CCP §1014);
- Precludes entry of default (CCP §§435(c), 585-586); and
- Extends the time to answer the complaint or cross-complaint but not the time within which a demurrer must be filed (CCP §435(c)-(d)).

In contrast to a demurrer, a motion to strike is usually the appropriate procedure for eliminating improper punitive damages allegations. *Grieves v Superior Court* (1984) 157 CA3d 159, 164, 203 CR 556. The objections raised by a motion to strike cannot be raised by demurrer under CCP §§430.10-430.20. Conversely, an objection that is grounds for a demurrer is usually not a proper ground for a motion to strike. *Warren v Atchison, Topeka & Santa Fe Ry.* (1971) 19 CA3d 24, 41, 96 CR 317; *Allerton v King* (1929) 96 CA 230, 233, 274 P 90. See generally 5 Witkin, California Procedure, *Pleading* §§1008-1043 (5th ed 2008).

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B. Grounds

§24.4 1. In Unlimited Civil Cases

Under CCP §437(a), grounds for a motion to strike must be based on:

- Matters appearing on the face of the challenged pleading; or
- Matters of which the court is required to take judicial notice.

Grounds for a motion to strike are that (CCP §436):

- The challenged pleading contains irrelevant, false, or improper matter); or
- All or part of the pleading is not drafted or filed in conformity with state law, a local rule, or a court order.

The court may also entertain a motion to strike a pleading filed in disregard of established procedural requirements or that otherwise would violate orderly judicial administration. *Neal v Bank of America* (1949) 93 CA2d 678, 682, 209 P2d 825. See examples in §24.6.

The court can deny a motion to strike on the ground that the defect should have been raised by demurrer. See *Warren v Atchison, Topeka & Santa Fe Ry.* (1971) 19 CA3d 24, 41, 96 CR 317 (ground asserted in motion merely another way of saying that count did not state facts sufficient to constitute cause of action); *Allerton v King* (1929) 96 CA 230, 233, 274 P 90 (uncertainty should have been asserted by special demurrer, not motion to strike). But see *Neal v Bank of America, supra.* For comparison of motions to strike with demurrers, see §24.3.

PRACTICE TIP: When the grounds for objection to a pleading do not appear on its face or from matter that must or may be judicially noticed, the appropriate way to object is by a motion for summary judgment (in which evidentiary matters may be raised) rather than by a motion to strike. *Deyo v Kilbourne* (1978) 84 CA3d 771, 779 n2, 149 CR 499. On summary judgment, see chap 36.

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§24.5 2. In Limited Civil Cases

In actions subject to CCP §§90-100 (economic litigation procedures for limited civil cases) (see chap 6), motions to strike are allowed only on the ground that the damages or relief sought are not supported by the allegations of the complaint. CCP §92(d).

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Source: Civil Litigation/California Civil Procedure Before Trial/24 Motions to Strike/§24.6 3. Examples of Grounds for Motion to Strike

§24.6 3. Examples of Grounds for Motion to Strike

Grounds for a motion to strike include the following:

- **The pleading is false, *i.e.,* untrue.** The word "sham," deleted when former CCP §453 was repealed in 1982, was replaced by the word "false" in the current CCP §436(a). A legislative intent to change the law is presumed when one statute is repealed and another statute with different wording is enacted on the same subject. *Garcia v Sterling* (1985) 176 CA3d 17, 21, 221 CR 349. Thus, cases decided under former CCP §453, in which "sham" was defined as "untrue," are still good law on this point (see *Allen v Stellar* (1930) 106 CA 67, 288 P 855), but there is some question about the applicability of cases in which "sham" was defined as "not filed in good faith." Many of the latter cases, however, probably fall within the scope of CCP §436(b), which allows a court to strike any pleading "not drawn or filed in conformity with the laws of this state." See, *e.g., Tostevin v Douglas* (1958) 160 CA2d 321, 330, 325 P2d 130 (amended complaint contained numerous unexplained inconsistencies, mistaken statements, contradictions, ambiguities, conflicts, and uncertainties when compared with previous pleadings; court has right to strike this kind of pleading from its files to preserve orderly judicial administration); *Neal v Bank of America* (1949) 93 CA2d 678, 209 P2d 825 (amended complaint no better than original demurrable complaint; court may strike pleading filed in disregard of established procedural requirements or otherwise violative of orderly judicial administration).
- **The pleading is filed without the required leave of court.** See *Stafford v Ballinger* (1962) 199 CA2d 289, 297, 18 CR 568 (amended complaint); *Gilbert v Sherrod* (1925) 75 CA 437, 243 P 30 (cross-complaint).
- **The form of pleading is in violation of a court order.** See *Morales v Camello* (1970) 12 CA3d 370, 90 CR 718 (amended complaint incorporated prior allegations by reference from three prior pleadings despite court's request for complete pleading).
- **The pleading is filed late.** See *Buck v Morrossis* (1952) 114 CA2d 461, 464, 250 P2d 270 (demurrer filed 11 days late); *Lincoln Holding Corp. v Union Indem. Co.* (1933) 129 CA 399, 18 P2d 744 (amended complaint filed after time granted by court); *Collins v Bicknell* (1919) 41 CA 291, 182 P 763 (answer and cross-complaint filed after time granted by court). But see *Tuck v Thuesen* (1970) 10 CA3d 193, 196, 88 CR 759 (no abuse of discretion in denying motion to strike late demurrer when late filing was mere irregularity and moving party not prejudiced by delay), overruled on other grounds in *Neel v Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C3d 176, 98 CR 837.
- **The pleading is barred by the statute of limitations.** This ground occurs when an amended complaint or cross-complaint, filed after a limitations statute has run, pleads an entirely different set of facts from those originally pleaded. See *Pagett v Indemnity Ins. Co.* (1942) 54 CA2d 646, 649, 129 P2d 700; 5 Witkin, California Procedure, *Pleading* §§1217, 1234-1235 (5th ed 2008).
- **The pleading must be verified.** This ground occurs when a pleading is either not verified or improperly verified. See *Perlman v Municipal Court* (1979) 99 CA3d 568, 574, 160 CR 567 (petition for writ of prohibition); *Johnson v Dixon Farms Co.* (1915) 29 CA 52, 55, 155 P 134 (answer).
- **The pleading or matter is irrelevant.** It does not present or raise a material issue. See *Green v Palmer* (1860) 15 C 411 (narrative portion of complaint stricken). See also *Title Guar. & Trust Co. v Fraternal Fin. Co.* (1934) 220 C 362, 30 P2d 515 (answer that pleaded extension of time to pay principal no defense to foreclosure based on failure to pay interest). But see *Allerton v King* (1929) 96 CA 230, 274 P 90 (error to strike allegations as irrelevant if pleading left defective).
- **The matter is redundant.** The matter to be stricken restates matter alleged elsewhere in the pleading. See *Wilson v Shea* (1924) 194 C 653, 229 P 945 (amended complaint constituted repetition of preceding amended complaint in all essential elements).
- **The pleading is filed by someone who is not a proper party to the action.** *Dabney v Shippey* (1974) 40 CA3d 990, 115 CR 526 (cross-complainants were not indispensable parties who were entitled to appear by cross-complaint). But see *CLD Constr. v City of San Ramon* (2004) 120 CA4th 1141, 1149, 16 CR3d 555 (even

though corporation cannot represent itself in court, filing of complaint by corporation in propria persona is curable defect and dismissal without leave to amend is not mandated).

NOTE: A motion to strike may also be used to attack the sufficiency of similar documents (*e.g.,* a petition for a writ of prohibition) not filed in conformity with the law. See *Perlman v Municipal Court, supra*.

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III. MOVING PARTY'S PROCEDURES

A. Timing

§24.7 1. When to File Against Complaint or Cross-Complaint

A defendant's or cross-defendant's notice of motion to strike must be served and filed within the time allowed to respond to a complaint or cross-complaint. CCP §435(b)(1). That time is normally 30 days after the date of service of the summons and complaint (CCP §412.20(a)(3)), cross-complaint (CCP §432.10), amended complaint (CCP §471.5(a)), or amended cross-complaint (CCP §586). This time requirement does not apply to a motion to strike made as part of a motion under CCP §438(i)(1)(A) after the granting of a motion for judgment on the pleadings. CCP §435(b)(1), (e). For time to respond following remand from federal court, see §22.96.

After an answer has been filed, a motion to strike the answered pleading will not ordinarily be heard. See *Adohr Milk Farms, Inc. v Love* (1967) 255 CA2d 366, 371, 63 CR 123.

PRACTICE TIP: Filing a motion to strike can gain an early ruling on the relevance of questionable allegations. A successful motion to strike eliminates all or part of the other party's claims or defenses and narrows the issues or theories that must be proved. However, striking irrelevant or redundant matter is not normally a sufficient objective to justify the time and expense of a motion to strike unless the matter will materially affect the outcome of the litigation. Even in these instances, it is often better to ignore surplusage in a pleading. If, however, the opponent requests that the pleading be read to the jury during trial of the action, an objection can be raised at that time. See Evid C §§350, 352. When the motion can strike a significant claim (*e.g.,* punitive damages barred by statute of limitations), reduce discovery or other pretrial costs, or lead to a more favorable settlement, the motion should be made. When a demurrer will be filed, a motion to strike should be made at the same time. CCP §§435-436; Cal Rules of Ct 3.1322.

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Source: Civil Litigation/California Civil Procedure Before Trial/24 Motions to Strike/§24.8 2. When to File Against Answer

§24.8 2. When to File Against Answer

Although the Code of Civil Procedure does not set the time within which a motion to strike an answer must be served and filed, it appears that a motion to strike all or part of an answer must be filed within 10 days after service of the answer because:

- A notice of motion to strike must be given within the time allowed to plead (Cal Rules of Ct 3.1322);
- The term "pleading" means a demurrer, answer, complaint, or cross-complaint (CCP §435(a)(2)); and
- The only pleading that is appropriately filed to an answer is a demurrer, and demurrers to answers must normally be filed within 10 days after service of the answer (CCP §430.40(b)).

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§24.9 3. Extensions by Stipulation or Court Order

A stipulation or an order extending the time to answer or otherwise respond may be obtained from the opposing party or from the court, and it can specify whether the time to move to strike is extended or not. See Cal Rules of Ct 2.20, 1.10(c); CCP §473.

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§24.10 4. Effect of Trial Court Delay Reduction Act

The ability to stipulate to extend deadlines for filing responsive pleadings to a complaint may be curtailed by local rules adopted under to the Trial Court Delay Reduction Act (Govt C §§68600-68620).

NOTE: Counsel should examine local rules before seeking or agreeing to extensions of time within which the parties can file pleadings. For further discussion, see chap 40.

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Source: Civil Litigation/California Civil Procedure Before Trial/24 Motions to Strike/§24.11 5. Motion to Strike Must Be Filed and Heard at Same Time as Demurrer

§24.11 5. Motion to Strike Must Be Filed and Heard at Same Time as Demurrer

A party may both move to strike and demur to a pleading. If both a motion to strike and a demurrer are filed, they must be filed and heard concurrently. Cal Rules of Ct 3.1322. The court, however, rarely rules on both a motion to strike and a demurrer. See *B.F.G. Builders v Weisner & Coover Co.* (1962) 206 CA2d 752, 757, 23 CR 815.

NOTE: If the demurrer is sustained with leave to amend, the amended pleading may make the motion to strike superfluous; conversely, if the motion to strike is granted and the pleading is stricken, there is no reason to object by demurrer.

For comparison of demurrers and motions to strike, see §24.3. On demurrers generally, see chap 23.

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§24.12 6. Setting Time of Hearing; Service

A notice of motion to strike, like other law and motion matters, must specify a hearing date at least 16 court days after the notice is served and filed, in addition to the time required for service by mail, unless the judge orders a shorter time. CCP §1005(b); Cal Rules of Ct 3.1300(b). Proof of service of any moving papers must be filed no later than 5 calendar days before the hearing. Cal Rules of Ct 3.1300(c). For further discussion, see chap 12 (noticed motions).

Counsel should become familiar with local rules and practices for the times and places of hearings on law and motion matters. See, *e.g.,* Los Angeles Ct R 9.0(c). In many counties, counsel may consult the court clerk or a judge for instructions on setting the hearing date.

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§24.13 B. Drafting Motion

In preparing the moving papers, counsel should draft a notice of motion (see §24.14) and if appropriate a request for judicial notice (see §24.15). A memorandum in support of the motion must accompany the notice of motion. Cal Rules of Ct 3.1112(a), 3.1113. On format of court papers generally, see chap 11. On motions generally, see chap 12.

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§24.14 1. Notice of Motion

If the motion is to strike an entire paragraph, cause of action, count, or defense of the pleading, the notice may refer to the part to be stricken by its number. Otherwise, the notice of motion must quote the portions to be stricken in full. Each item to be stricken must be numbered consecutively in the notice. Cal Rules of Ct 3.1322. It is good practice to include the page and line numbers of each portion of the pleading that the motion challenges.

The motion may be denied in its entirety if the matter to be stricken is so broad that it includes matters properly pleaded. See *Hill v Wrather* (1958) 158 CA2d 818, 823, 323 P2d 567. A motion that is not directed to particular allegations may be considered a motion to strike the entire pleading or an entire count and may be denied if any part of the pleading is sufficient. See *Triodyne, Inc. v Superior Court* (1966) 240 CA2d 536, 542, 49 CR 717.

Procedural requirements for noticed motions are discussed in chap 12. On format of court papers generally (including supporting memorandum), see chap 11. See form of notice of motion to strike in §24.26.

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§24.15 2. Judicial Notice

The grounds for a motion to strike must appear on the face of the challenged pleading or be based on any matter of which the court (see CCP §437(a)):

- Is required to take judicial notice (see Evid C §451 (mandatory judicial notice)); or
- May take judicial notice (see Evid C §§452-453 (permissive judicial notice)).

When the motion is based on a matter of which the court may, but is not required to, take judicial notice, that matter must be specified in the notice of motion or in the supporting memorandum unless the court permits otherwise. CCP §437(b).

A party requesting judicial notice in the permissive category must provide the court and each party with a copy of the material to be noticed. If the material is part of a court file, the party must specify the part of the file to be judicially noticed and make arrangements with the clerk to have the file in the courtroom at the hearing. Cal Rules of Ct 3.1306(c). For further discussion, see California Trial Practice: Civil Procedure During Trial, chap 14 (3d ed Cal CEB 1995); Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009).

NOTE: Although a court can take judicial notice of the existence of documents in a court file (Evid C §452(d)), it may take judicial notice only of the truth of facts asserted in those documents that evidence the court's findings, *e.g.,* orders, statements of decision, judgments. *Garcia v Sterling* (1985) 176 CA3d 17, 21, 221 CR 349; *Day v Sharp* (1975) 50 CA3d 904, 914, 123 CR 918.

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§24.16 C. Moving Party's Reply to Opposition Papers; Timing

After being served with opposition papers (see §24.17), the moving party may respond by drafting a memorandum. The reply must be served and filed at least 5 court days before the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). If there is not enough time to allow for service by mail, the reply should be personally served on the other parties in the action.

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§24.17 IV. OPPOSING THE MOTION

A party opposing a motion to strike should file a supporting memorandum in opposition to the motion. See Cal Rules of Ct 3.1113(a). Like a supporting memorandum, this document should contain a statement of facts drafted by the opposing party's counsel; a concise statement of the law and the arguments relied on; and a discussion of the statutes, cases, and textbooks cited to support the position advanced. See Cal Rules of Ct 3.1113(b). For discussion of procedures for opposing motions generally, see chap 12.

All opposition papers must be served and filed at least 9 court days before the hearing date. CCP §1005(b); Cal Rules of Ct 3.1300(a). If there is not enough time to allow for service by mail, the opposing papers should be personally served on the other parties in the action. On service generally, see chap 18.

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V. HEARING AND COURT RULING

§24.18 A. Hearing; Judge's Ruling on Motion to Strike

Counsel for the parties are entitled to appear at a hearing on any motion. CCP §1005.5. The right to argue orally on the motion is subject to the court's discretion, however, and the judge may decide a matter solely on the basis of the supporting papers. *Muller v Muller* (1956) 141 CA2d 722, 731, 297 P2d 789 (motion under consideration obviously frivolous; court acted within its power to summarily deny it without oral argument). For discussion of court hearing procedures generally, see chap 12.

A motion to strike raises an issue of law. CCP §589(b). The court should not strike relevant matter essential to a cause of action or defense. If a motion to strike is so broad that it includes relevant and irrelevant matter, the motion should be denied. See *Triodyne, Inc. v Superior Court* (1966) 240 CA2d 536, 542, 49 CR 717.

The court's granting of a motion to strike will be overturned only if the court abused its discretion and prejudice can be shown. See §24.21 (review on appeal).

Unlike for a demurrer, a court may act on its own motion to strike all or part of a pleading. CCP §436. However, a court that strikes all or part of a pleading on its own motion may do so on grounds that would also be the basis for a demurrer, because the court has authority to strike "all or any part of any pleading not drawn or filed in conformity with the laws of this state." CCP §436(b). See *In re Easterbrook* (1988) 200 CA3d 1541, 1544, 244 CR 652; *Lodi v Lodi* (1985) 173 CA3d 628, 630, 219 CR 116.

PRACTICE TIP: When a demurrer and a motion to strike are heard at the same time, counsel should make sure that the court's ruling clearly designates which parts of the pleading are stricken, which of the remaining parts are defective, and whether the pleader is given leave to amend the pleading. See *B.F.G. Builders v Weisner & Coover Co.* (1962) 206 CA2d 752, 758, 23 CR 815 (court should have sustained demurrer or granted motion to strike, but not both).

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§24.19 B. Notice of Ruling

The court clerk must notify the parties "forthwith" of the court's ruling on a motion to strike. See Cal Rules of Ct 3.1109(a)-(c). If given by mail, the clerk's notification does not constitute service of notice, and the clerk's failure to advise the parties of the court's ruling does not extend a party's time for performing any act after the court's ruling except as provided in rules of court relating to the time for filing a notice of appeal. Cal Rules of Ct 3.1109(a)-(c).

Unless notice was waived at the hearing, counsel can effect service of notice by serving a conformed copy of the order. On service generally, see chap 18.

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VI. PROCEDURES AFTER RULING

A. Motion Granted

§24.20 1. Time to Amend

If an order to strike all of a complaint is granted without leave to amend, the court may dismiss the complaint as to the moving defendant. CCP §581(f)(3). The court may also dismiss the complaint if the order is granted with leave to amend and the plaintiff fails to amend within the time allowed by the court. CCP §581(f)(4).

If a demurrer is stricken (*e.g.,* the plaintiff moves to strike the defendant's demurrer to the complaint), and there is no answer on file, the court must allow an answer to be filed on terms that are just. CCP §472a(c).

When a motion to strike is granted, the court may order that an amendment or amended pleading be filed on whatever terms it considers proper. If a motion to strike all or part of a complaint or cross-complaint is denied, the court must allow the moving party to file an answer. CCP §472a(d).

If the court's ruling fails to specify the time period within which to amend after the motion to strike is granted, and counsel intends to amend, it is good practice to amend the pleading within 10 days after the ruling. See, by analogy, Cal Rules of Ct 3.1320(g) (unless otherwise ordered, party has 10 days to answer or amend after ruling on demurrer).

NOTE: If an amendment is not filed within the time specified by the court, counsel may move for leave to amend under CCP §473.

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§24.21 2. Appellate Review

An order granting a motion to strike is not appealable unless it removes from the case the only cause of action alleged and leaves no issues to be determined in the action as to the moving party. *Wilson v Sharp* (1954) 42 C2d 675, 677, 268 P2d 1062 (motion to strike second cause of action in complaint was only cause of action applicable to moving defendant; order granting motion was appealable as to this defendant); *Garza v Kantor* (1976) 54 CA3d 1025, 127 CR 164 (granting motion to strike removed child's loss of consortium cause of action in complaint; appealable because this terminated child's participation in lawsuit).

An order striking only part of a pleading is considered excepted to (CCP §647) and is made part of the judgment roll (CCP §670), but the order itself is normally considered interlocutory and not appealable except on appeal from a final judgment. See *Oeth v Mason* (1967) 247 CA2d 805, 808, 56 CR 69.

An order granting a motion to strike that exceeds the court's jurisdiction can be reviewed by writ of mandate or prohibition. See CCP §§1085, 1102. See generally 9 Witkin, California Procedure, *Appeal* §155 (5th ed 2008).

EXAMPLE: Even though an answer may still raise issues, if a substantial defense is stricken, the defendant may apply to a court of appeal for a writ of mandate to compel the trial court to set aside the order and reinstate the defense. See *Carter v Superior Court* (1956) 142 CA2d 350, 359, 298 P2d 598 (granting of motion to strike affirmative defense of res judicata entitled defendant to writ of mandate compelling trial court to reinstate defense), overruled on other grounds in *Unruh v Truck Ins. Exch.* (1972) 7 C3d 616, 102 CR 815. See generally 5 Witkin, Procedure, *Pleading* §1016; California Civil Writ Practice §§8.45-8.49 (4th ed Cal CEB 2008).

If the entire answer is stricken, no issues remain to be tried and, if the defendant does not amend and the plaintiff takes judgment by default, that judgment is appealable. On default generally, see chap 38.

The issue on appeal is whether the court abused its discretion in granting the motion to strike. See *Tostevin v Douglas* (1958) 160 CA2d 321, 331, 325 P2d 130. Further, the appellant must demonstrate prejudice from the improper ruling, *i.e.,* that the outcome of the action would have been different but for the ruling on the motion to strike. See *Ross v Sweeters* (1932) 119 CA 716, 720, 7 P2d 334 (although plaintiff's motion to strike portion of defendant's answer should have been granted, no prejudice shown). If the ruling on the motion was correct under any theory of law applicable to the action, the appellate court will sustain it. *Zak v State Farm Mut. Liab. Ins. Co.* (1965) 232 CA2d 500, 506, 42 CR 908.

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§24.22 B. Motion Denied

A trial judge who denies a motion to strike all or part of a complaint or cross-complaint should specify the time within which an answer may be filed. See CCP §§472a(d), 586(a)(2). If the ruling fails to specify the allowable time period, it is good practice to answer within 10 days after the service of notice of denial of the motion. See, by analogy, CCP §472b; Cal Rules of Ct 3.1320(g), pertaining to demurrers.

If the defendant or cross-defendant answers within the time specified, default judgment will not be entered and any abuse of discretion in denial of the motion can be raised on appeal only after final judgment. See *Oeth v Mason* (1967) 247 CA2d 805, 808, 56 CR 69. See generally 9 Witkin, California Procedure, *Appeal* §155 (5th ed 2008).

If the law clearly establishes the right to an order, a denial can be reviewed by writ of mandate. See *Whitney's at the Beach v Superior Court* (1970) 3 CA3d 258, 83 CR 237 (summary judgment case; court's ruling denying motion when no triable issue existed was abuse of discretion, making use of extraordinary writ proper).

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§24.23 C. Prevailing Party's Response to Amended Pleading

A defendant whose motion to strike has been granted should not waive the right to require that the complaint be amended before filing a responsive pleading. After an amended complaint or cross-complaint is filed, the defendant has 30 days, unless the court directs otherwise, in which to answer, demur to, or move to strike that complaint or cross-complaint. CCP §471.5(a). If a plaintiff's motion to strike an answer is granted, the plaintiff has 10 days in which to demur to the amended answer unless the court sets another time period. CCP §471.5(b).

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§24.24 VII. DIAGNOSTIC QUESTIONS

Answers to the following questions may assist counsel in evaluating whether to use a motion to strike in a particular case:

1. Do any of the following grounds for a motion to strike appear on the face of the offending pleading or from matters that must or may be judicially noticed (see CCP §§436-437)?

- The pleading contains irrelevant, false, or improper matter.
- A cause of action is time barred.
- The pleading is not filed in conformity with statutes, court rules, or a court order.

2. If the motion is granted, will it materially affect the outcome of the litigation?

3. Will the motion result in dismissal of the challenged pleading, or all or part of a cause of action or defense?

4. Will the motion result in the exclusion of prejudicial evidence at trial?

5. Will the motion encourage a favorable settlement by the opposing party?

6. Are there any reasons why a motion to strike should not be made?

7. Can the truth of statements in supporting documents be judicially noticed?

8. Will the opposing party be able to correct the defect by amending the pleading?

9. Will the expense of the motion outweigh any potential benefits?

10. Will another procedure accomplish the same objective?

- Objection in answer (defendants)
- Demurrer
- Motion for judgment on the pleadings
- Motion for summary judgment
- Motion for dismissal
- Motion in limine before trial
- Objection at trial

On motions to strike extraneous matter from the petition or response in a family law proceeding authorized by Cal Rules of Ct 5.120(a)(2), see CCP §435; 5 Witkin, California Procedure, *Pleading* §849(f) (5th ed 2008).

On motions to strike to exclude evidence at trial, see Evid C §§353, 766; California Trial Objections, chap 52 (Cal CEB Annual).

On a motion for an order striking all or part of a pleading as a sanction for failure to obey a discovery order, see CCP §2023.030(d)(1); California Civil Discovery Practice §§15.92-15.102, 7.120-7.121 (4th ed Cal CEB 2006).

On motions under Fed R Civ P 12(f) to strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter, see 2 Moore & Coquillette, Moore's Federal Practice §12.37[3] (3d ed 1997); 5A Wright & Miller, Federal Practice and Procedure §§1380-1383 (3d ed 1998).

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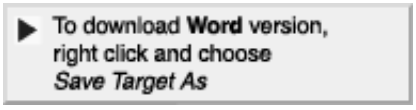
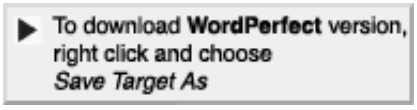
Source: Civil Litigation/California Civil Procedure Before Trial/24 Motions to Strike/§24.25 VIII. CHECKLIST: PROCEDURE FOR MOTION TO STRIKE

§24.25 VIII. CHECKLIST: PROCEDURE FOR MOTION TO STRIKE





Prehearing Procedures

Moving Party

- Decide whether to demur at same time
- Prepare moving papers:
- Notice of motion and motion (see §24.14);
- Memorandum in support of motion; and
- Any matters to be judicially noticed (see §24.15):
- Copy for court and each party; or
- Statement in writing of relevant part of court file and arrangements made for file to be in courtroom at hearing
- Serve moving papers:
- 30 days after service of complaint or cross-complaint, or within time to file a responsive pleading under an extension granted by the court or by stipulation of the parties (CCP §435(b)); or
- 10 days after service of answer, if moving to strike answer (see §24.8); and
- At least 16 court days before hearing (extend time for service by mail) (CCP §1005)

Opposing Party

- Prepare opposing papers (see §24.17):
- Memorandum of in opposition to motion; and
- Any matters to be judicially noticed as above
- Serve opposing papers at least 9 court days before hearing (extend time for service by mail) (CCP §1005)

Moving Party

- Prepare reply
- Serve reply at least 5 court days before hearing (extend time for service by mail) (CCP §1005)

Posthearing Procedures

If motion granted as to complaint or cross-complaint

- Proceed with suit on remaining causes of action
- Amend pleading under CCP §472a(d) or §473 if court grants leave (see §24.20)
- Consider applying for writ of mandate (see §24.21)
- Appeal if order strikes all causes of action, leaving no issues to be determined and judgment for defendant is entered (see §24.21)

If motion granted as to answer (see §24.21)

- Proceed with suit on remaining denial and defenses
- Amend pleading under CCP §472a(d) or §473 if court grants leave

- Consider applying for writ of mandate
- Appeal if order strikes all defenses, leaving no issues to be determined, and plaintiff takes judgment by default

If motion denied as to complaint or cross-complaint (see §24.22)

- Answer within time specified in order denying motion (court must allow moving party to file answer; see CCP §472a(d))
- Consider applying for writ of mandate

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Source: Civil Litigation/California Civil Procedure Before Trial/24 Motions to Strike/ IX. FORMS/§24.26 A. Form: Notice of Motion to Strike

IX. FORMS

§24.26 A. Form: Notice of Motion to Strike

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION TO STRIKE** _ _[*E.G., COMPLAINT*]_ _; _ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, **moves the Court under Code of Civil Procedure §§435-436 for an order to strike**

[*Option 1: Entire pleading*]

the _ _[*e.g., complaint*]_ _ **filed by** _ _[*name*]_ _**.**

[*Option 2: Cause of action, count, defense, or paragraph*]

the _ _[*e.g., first*]_ _ _ _[*cause of action/count/defense/paragraph*]_ _ **in the** _ _[*complaint/answer to the cross-complaint*]_ _ **filed by** _ _[*name*]_ _**, beginning at page** _ _**, line** _ _**, and ending at page** _ _**, line** _ _**.**

[*Option 3: Particular sentences, clauses, or words*]

the following from the _ _[*e.g., complaint*]_ _**:**

1. From page _ _**, line** _ _**, through page** _ _**, line** _ _**, the words "**_ _[*quote words to be stricken*]_ _**."**

2. _ _[*Identify page and line numbers of additional words to be stricken*]_ _**.**

[*Continue*]

The grounds for issuance of this order are that the _ _[*e.g., complaint, answer to the cross-complaint, matter specified above, first cause of action, second defense*]**_ _ _ _**[*state ground; see §§24.4-24.6*]**_ _.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of _ _*[*name*]**_ _**, *dated _ _ _ _ _ _*]**_ _, _ _**[*and*]**_ _ on all papers filed and records in this action _ _**[*, and on any evidence received at the hearing*]**_ _.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§24.13-24.14 (motions to strike), chap 12 (notices of motion generally).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/24 Motions to Strike/§24.27 B. Form: Order Granting Motion to Strike

§24.27 B. Form: Order Granting Motion to Strike

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER GRANTING MOTION TO STRIKE**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, to strike was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*Specify pleading or matter*]_ _ be stricken.

2. _ _[*E.g., Plaintiff*]_ _, _ _[*name*]_ _, has _ _[*until _ _[date]_ _,/_ _ days after notice of this order*]_ _ to amend the _ _[*e.g., complaint*]_ _.

3. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§12.104-12.112 on formal requirements for court orders.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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25

Answers

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I. INTRODUCTION

§25.1 A. Scope of Chapter

This chapter discusses answers, the pleadings filed by defendants and cross-defendants in response to complaints. It explains description and use (see §§25.3-25.9); format rules, including the use of Judicial Council forms, denials and affirmative defenses (see §§25.10-25.22); denials (see §§25.23-25.29); defenses (see §§25.30-25.64); service and filing and service requirements (see §§25.65-25.69); and the procedures for amending and supplementing answers (see §§25.70-25.79). A diagnostic checklist (see §25.80) and sample pleadings appear at the end of the chapter (see §§25.81-25.93).

The strategies of filing alternative papers (*e.g.,* demurrer, motion to strike, cross-complaint, petition to remove action to federal court, motion for change of venue, motion to dismiss for inconvenient forum, motion to change jurisdictional classification to limited or unlimited civil case (see chap 6)) are also treated, as are the steps defense counsel may take to obtain extensions of time to respond to complaints. For related discussion, see generally the chapters on the drafting and filing of the alternative documents listed above (*e.g.,* demurrers are covered in chap 23).

NOTE: Unless otherwise stated, the discussion in this chapter applies both to answers to complaints and to answers to cross-complaints in the California superior courts. Other papers filed in response to applications for peremptory writs and in other special proceedings may also be called "answers." See, *e.g.,* CCP §§1069.1 (certiorari), 1089 (mandate), and 1105 (prohibition). This chapter does not cover responsive pleadings or papers under the Family Code or other special proceedings.

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§25.2 B. Governing Law

An answer, *i.e.,* a pleading filed in a civil action by a defendant or cross-defendant to reply to the allegations of a complaint or cross-complaint, is governed by CCP §§420, 430.30, 431.30.

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II. DESCRIPTION AND USE

§25.3 A. Purpose and Function

An answer may fulfill various purposes:

- To make general appearance in the action (CCP §1014);
- To prevent a plaintiff from taking judgment against the answering defendant by default (CCP §585);
- To state the same formal objections to the complaint and its allegations that may be stated by demurrer (see chap 23) when the reasons for objecting do not appear on the face of the complaint (CCP §§430.10, 430.30);
- To require plaintiff to prove all material allegations of fact denied in the answer (CCP §590); or
- To state new matters, particularly defenses, that may prevent plaintiff from obtaining a judgment (CCP §§420, 431.30(b), 590).

Filing a timely answer raises the issues that are to be tried in the lawsuit. At issue between the plaintiff and the defendant are material allegations of the complaint that are denied or controverted in the answer, and new matter stated in the answer in avoidance or constituting a defense. CCP §§431.20(b), 588, 590. The right to answer a pending complaint is a fundamental element of due process; a court that arbitrarily abridges that right may have unconstitutionally exceeded its jurisdiction. See *McClatchy v Superior Court* (1897) 119 C 413, 420, 51 P 696.

Two additional issues occasionally arise for corporate defendants:

- Corporations not in good standing (*e.g.,* because of nonpayment of taxes) may not defend suits (Corp C §2203).
- As to corporations torn by a contest for control, a trial judge may select among competing claimants the one who may answer on behalf of the corporation. *Kellar v Hendey* (1961) 189 CA2d 86, 10 CR 748.

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§25.4 B. Effect of Failure to File

Plaintiff may obtain a default judgment against a defendant who fails to file a timely and sufficient answer to a complaint or a cross-complaint. CCP §§585-587. On default, see chap 38. A defendant who does not answer or otherwise appear is not entitled to be served with subsequently filed papers in the action. CCP §1014.

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C. Effect of Defects

§25.5 1. Failure to Deny Material Allegation

Defendant must deny every material allegation of the complaint, or allege facts that controvert all material allegations. CCP §431.20(a). See *Hennefer v Butcher* (1986) 182 CA3d 492, 227 CR 318.

A material allegation is essential to a claim, and if stricken, leaves the complaint insufficient as a matter of law. CCP §431.10(a). An immaterial allegation is any other allegation, prayer for judgment, or irrelevant matter as defined by CCP §§436 and 431.10(b)-(c). CCP §431.20. See *Hibernia Sav. & Loan Soc'y v Dickinson* (1914) 167 C 616, 619, 140 P 265; *Weinberger v Weidman* (1901) 134 C 599, 66 P 869.

A defendant's failure to deny a material allegation operates as a binding admission of its truth and relieves a plaintiff from having to prove the admitted matter at trial. *Rembold v City & County of San Francisco* (1952) 113 CA2d 795, 249 P2d 58; *Silvey v Neary* (1881) 59 C 97. Unless the defendant is later able to amend the answer (see §§25.70-25.78), a binding admission precludes the defendant from later challenging the admission by offering contrary evidence. See *Fuentes v Tucker* (1947) 31 C2d 1, 4, 187 P2d 752. See generally 5 Witkin, California Procedure, *Pleading* §§1050-1054 (5th ed 2008).

PRACTICE TIP: In practice, it is usually unwise to decide whether a given allegation is "material" or not. The better approach is to treat all allegations as material and to deny every allegation the defendant does not intend to admit.

Subject matter jurisdiction, unlike personal jurisdiction, cannot be conferred on a court by consent of the parties; thus, even if they are not denied, allegations in a complaint of subject matter jurisdiction are not deemed admitted. *Taylor v Taylor* (1923) 192 C 71, 78, 218 P 756. See discussion in chap 6 (jurisdiction).

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§25.6 2. Failure to Assert Defense

Failure to plead specific facts constituting a defense is a waiver by the defendant of that defense. See *Jetty v Craco* (1954) 123 CA2d 876, 880, 267 P2d 1055. However, the defense may later become an issue if:

- Defendant is subsequently permitted by the court to amend the answer to plead facts on which defense is based;
- Plaintiff, as well as defendant, proceeds as if that defense had been explicitly raised; or
- Plaintiff introduces evidence on which that defense can be based.

See *Hollypark Realty Co. v MacLoane* (1958) 163 CA2d 549, 552, 329 P2d 532.

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§25.7 3. Defective Denial

It is a state policy that allegations in a pleading must be liberally construed to afford substantial justice among the parties. CCP §452. See generally 4 Witkin, California Procedure, *Pleading* §§442-451 (5th ed 2008). However, deliberate evasiveness (see *Hutson v Gerson* (1933) 132 CA 665, 23 P2d 816) or gross defects in the form of a denial (*e.g.,* on information and belief when not authorized) amount to no denial at all and are treated as an admission. But see *Stroud v Tunzi* (2008) 160 CA4th 377, 72 CR3d 756 (noting that *Hutson* was decided under former CCP §437, which was reenacted with substantial modifications as CCP §431.30).

This can have severe consequences, but the rule has long been established and is regularly enforced. Compare *California Corrugated Culvert Co. v Stewart* (1932) 215 C 120, 123, 8 P2d 1013, with *Cockerell v Title Ins. & Trust Co.* (1954) 42 C2d 284, 288, 267 P2d 16. For discussion of proper form of denials, see §§25.23-25.29. On amending an answer, see §§25.70-25.79.

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§25.8 4. Affirmative Admission

Occasionally, an inadvertent but express and unequivocal admission of fact is included in an answer. The penalty is undeniably severe: a binding admission. See *Fuentes v Tucker* (1947) 31 C2d 1, 5, 187 P2d 752; *Peyton v Cly* (1960) 184 CA2d 193, 195, 7 CR 504. But see *Chase v Van Camp Sea Food Co.* (1930) 109 CA 38, 44, 292 P 179 (dictum; no unequivocal admission found).

PRACTICE TIP: A defense attorney, particularly if pleadings are drafted by other lawyers in the office, should rigorously review an answer before filing to avoid inadvertent admission of a material allegation of the complaint. This will avoid the embarrassment of later having to inform the client of the necessity of having to amend the pleading to cure a drafting defect.

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§25.9 5. Failure to Verify Answer When Required

Generally, a defendant must verify an answer when the complaint is verified. CCP §446. See discussion in §25.17.

Failure to verify an answer when required by CCP §446 permits a plaintiff to seek an order striking the answer or moving for judgment on the pleadings. See 4 Witkin, California Procedure, *Pleading* §§467-468 (5th ed 2008).

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III. FORMAT

A. Drafting: Formal Aspects

§25.10 1. Caption; Opening Paragraph

Like other pleadings and papers, answers must conform in size and format to the specifications of Cal Rules of Ct 2.100-2.119. See chap 11. See form of answer in §25.83.

Defense counsel should be careful to state the name of the defendant (or of each multiple defendant) on whose behalf an answer is being filed.

EXAMPLE: The first page of the answer may list under defense attorneys' address and telephone number that they are "Attorneys for Defendant John Smith, Individually and as President of Smith & Sons, Inc." If separate answers are filed, one pleading might be titled "Answer of Defendant Tom Smith to Complaint of John Doe" and the caption of another pleading might be "Answer of Defendant Smith & Sons, Inc. to Complaint of John Doe."

In multiple party litigation, it is convenient although not required for the first paragraph to contain introductory language identifying the answering defendant, such as the following:

Defendant Tom Smith ("Smith"), for himself alone and severing himself from all other defendants, answers the complaint of John Doe as follows:

Each defendant must answer the allegations of a complaint; in the instance of multiple defendants, several may elect to file a joint answer, even if represented by different attorneys. See *Western Lumber Co. v Phillips* (1892) 94 C 54, 29 P 328. However, unless the responses will be identical, each defendant should answer separately. In making separate answers, no defendant is bound by the admissions of another defendant's answer. See *Miller v Keegan* (1949) 92 CA2d 846, 852, 207 P2d 1073. A defendant need not answer allegations that on their face relate solely to another defendant. *Hibernia Sav. & Loan Soc'y v Dickinson* (1914) 167 C 616, 619, 140 P 265. Care must be taken to frame a complete answer because a defendant cannot rely on defenses raised in the answer of a codefendant but ignored in one's own answer. *Kirk v Santa Barbara Ice Co.* (1910) 157 C 591, 594, 108 P 509. However, portions of another party's answer might be incorporated by reference if attached. See §25.16.

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§25.11 2. Body of Answer

The answer must contain (a) general or specific denials of the material allegations of the complaint that the defendant wishes to controvert and (b) a statement of any new matter constituting a defense. CCP §431.20(b). On effect of failure to deny a material allegation, see §25.5.

The answer may not demand affirmative relief (CCP §431.30(c)), and a defendant who seeks such relief should file a cross-complaint as well as an answer. See chap 26 (cross-complaints). On using a verified general written denial rather than an answer when the complaint demands less than $1000, see §25.23.

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Source: Civil Litigation/California Civil Procedure Before Trial/25 Answers/§25.12 a. Denials

§25.12 a. Denials

Specific denials should be set out in separate, numbered paragraphs. See §§25.23-25.29. A paragraph stating a general denial (see §25.23) should also be numbered if additional paragraphs stating defenses or other matter will follow.

For discussion of when to use general denials and when to use specific denials, see §§25.23-25.29.

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§25.13 b. Defenses

Any new matter constituting a defense (see §§25.30-25.64) must be stated in the answer. CCP §431.30(b)(2). Each defense must be separately pleaded and numbered. CCP §431.30(g); Cal Rules of Ct 2.112.

Defenses and objections to a complaint as a whole should follow the general denial or specific denials. If defenses apply to a particular cause of action, they should be so headed, *e.g.,* "FIRST AFFIRMATIVE DEFENSE TO SECOND CAUSE OF ACTION." See CCP §431.30(g). Otherwise, a defense may be headed, *e.g.,* "FOURTH AFFIRMATIVE DEFENSE TO ENTIRE COMPLAINT: ANOTHER ACTION PENDING."

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§25.14 c. Prayer

No statute or rule requires that an answer contain a prayer or demand for relief. However, many attorneys customarily conclude the answer with a prayer. For example:

WHEREFORE, defendant _ _[*name*]_ _ prays that plaintiff _ _[*name*]_ _ take nothing by this action and that defendant be awarded costs and all other just relief.

A request for attorney fees, when permitted to a prevailing defendant, may also be made in the prayer to bring the matter to the court's attention; no separate cross-complaint is generally required. See, *e.g.* CC §1717, providing that, when a contract authorizes attorney fees to one party, any contracting party prevailing in an action on that contract is entitled to recover reasonable attorney fees; *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614 (§1717 requires that any contractual provision for attorney fees to "prevailing party" must be applied mutually, even if contract specifies that only one party may recover fees). See also *T.E.D. Bearing Co. v Walter E. Heller & Co.* (1974) 38 CA3d 59, 112 CR 910 (attorney's fees permitted by statute are taxed as costs; no separate cross-complaint required). In *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1088, 95 CR2d 198, the California Supreme Court ruled that §1717 gives the trial court broad discretion to award attorney fees to a prevailing party, even when that party is represented by in-house counsel.

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§25.15 d. Date; Subscription

It is not essential to date the answer, although it is considered a good office practice for the signature on the answer to be dated. If the answer is verified, the verification will carry a date. The court clerk will stamp a date on an answer to show when it was filed, and the attached proof of service form will show the date of service. See §25.65 on time to file.

The answer must be signed by the attorney in the attorney's individual name or by the party, if the party is unrepresented. CCP §128.7(a). By presenting the answer to the court, the attorney is certifying to the best of his or her knowledge, after reasonable inquiry, that the denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief. CCP §128.7(b). See §1.6 for discussion of sanctions.

NOTE: Code of Civil Procedure §128.7 is based on Fed R Civ P 11 and replaces the part of CCP §446 that required each pleading to be subscribed by the party or the party's attorney. Section 128.7 applies to complaints or petitions filed after December 31, 1994. See CCP 128.7(i). For discussion of CCP §128.7, see §1.6.

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§25.16 3. Incorporation by Reference

Incorporation by reference is useful for (1) minimizing repetitions in the answer when responses to various causes of action are the same and (2) including documents in the body of the answer without the need for extensive quotations. Lawyers customarily answer allegations appearing later in a complaint by incorporating by reference earlier responses, denials, or defenses directed to other causes of action. For example:

Answering paragraph 14 of plaintiff's complaint, defendant incorporates by this reference each answer, admission, and denial contained in paragraphs 1, 3, 5, and 7 of this answer, as if repeated here fully.

When a defense is based on a particular document (*e.g.,* a letter or written contract), the attorney should attach the document to the answer and specifically incorporate it by reference in the same manner as documents are incorporated by reference in a complaint. Incorporating a document by reference also allows the court and the other parties to view the full text of a document in dispute. On complaints, see chap 15.

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§25.17 4. Verification

When a complaint is verified, the answer must also be verified. CCP §446. On effect of failure to verify when required, see §25.9.

An individual defendant cannot refuse to verify an answer, even on the grounds of self-incrimination, but the information contained in the verified answer cannot be used in any criminal prosecution later. The rationale is that verification of an answer is mandated by statute; thus a defendant who has verified an answer has not chosen to waive the privilege against self-incrimination and may still claim the privilege in a criminal trial. *Alvarez v Sanchez* (1984) 158 CA3d 709, 715, 204 CR 864.

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§25.18 a. Corporate Defendant

A corporate defendant has no comparable privilege against self-incrimination and is obliged to appoint an agent to make the required verification of its answer. *DeCamp v First Kensington Corp.* (1978) 83 CA3d 268, 147 CR 869. The selection of the agent for a corporate verification is important in certain circumstances because the verification of an agent who is not a party may be a waiver of the agent's personal privilege against self-incrimination; thus a person may decline to serve as agent and a corporation may be obliged to appoint another person as agent, one who can, without fear of self-incrimination, make the necessary verification.

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§25.19 b. Public Entity

A special rule applies to public entities, which need not verify their answers to verified complaints; however, the unverified complaint of a public entity or a public officer acting in an official capacity requires a verified answer unless the answering defendant is also a public entity or officer or unless an admission of truth in the complaint might subject the defendant to criminal prosecution. CCP §446. For further discussion, see §25.64.

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§25.20 c. Form

A verification may be either (1) positive or (2) on information and belief. The form of verification depends on the degree of personal knowledge the verifier has of the matters set forth in the answer. The verification may be placed below the signature on the same page, or on a separate page. See form of answer at §25.83.

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§25.21 d. Who Verifies

An answer may be verified by the party or the attorney. CCP §446. However, verification by attorneys is discouraged. See *DeCamp v First Kensington Corp.* (1978) 83 CA3d 268, 147 CR 869. The person who verifies a pleading in effect becomes a witness to every fact verified, and may later be asked to testify at a deposition or trial. Under certain circumstances verification of an answer by counsel could require the attorney's withdrawal from the case. See chap 4 (changes in representation during suit).

PRACTICE TIP: The attorney should review an answer to be verified by the client to ensure that there is no basis for the plaintiff claiming a waiver of the attorney-client privilege through disclosure of any confidential communications. See Evid C §912. Verifications made "on information and belief" have been held not to waive the defendant's attorney-client privilege. *Alpha Beta Co. v Superior Court* (1984) 157 CA3d 818, 831, 203 CR 752 (allegations responded to also were vague, conclusional, and lacked "factual depth"). Thus, the attorney should be particularly cautious if the client's verification is positive in form, rather than made on information and belief.

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§25.22 B. Using Official Forms

The Judicial Council has developed and approved forms for answers in California trial courts in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. CCP §425.12; Cal Rules of Ct 1.45.

While use of the approved forms is optional, it is often advantageous in a simple case because they contain denials stated in effective language and assert the most common defenses, supplying space for additional defenses and objections. The forms also provide an opportunity for specification of particular denials or defenses by way of supplement. See, *e.g.*, reproduction of Answer—Contract (Judicial Council Form PLD-C-010) in §25.92.

PRACTICE TIP: Counsel should be cautious about using official forms, particularly in complicated cases. Although the forms have been judicially approved, and are easy and economical to use, the attorney must make sure that a form provides an opportunity for accurate and complete response to every allegation in the complaint. Counsel should also make sure that the form permits all appropriate defenses to be asserted. Otherwise, the client is best served by drafting a tailored answer.

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IV. DENIALS

§25.23 A. General Denial

A general denial is a brief statement that denies the truth of all allegations in a complaint, *e.g.*:

Defendant denies each and every allegation in plaintiff's complaint.

A general denial is sufficient to put in issue all the material allegations of an unverified complaint. CCP §431.30(d). See *Advantec Group, Inc. v Edwin's Plumbing Co.* (2007) 153 CA4th 621, 626, 63 CR3d 195 (general denial controverted issue of contractor's license).

A Judicial Council general denial form is available for filing in lieu of an answer. A brief statement of any new matter constituting a defense may be included on or attached to the form. CCP §431.40(a), (c). See General Form Denial (Judicial Council Form PLD-050) (§25.90) and California Judicial Council Forms Manual, Form No. 982(a)(13) (Cal CEB 1981).

Not Permitted If Complaint Verified. If the complaint is verified, a defendant's general denial may be disregarded and all material allegations in the complaint taken as true. CCP §431.20(a). *Pico v Colimas* (1867) 32 C 578, 580. Even if the answer is verified, a general denial does not put in issue the facts alleged in a verified complaint. *Dewey v Bowman* (1857) 8 C 145, overruled on other grounds by *Gagliardo v Hoberlon* (1861) 18 C 394.

Matters Not Exceeding $1000. When the amount in dispute under a complaint is less than $1000, exclusive of interest, use of the official general denial form (see §25.90) is mandatory, whether the complaint is verified or not. See Cal Rules of Ct Appendix A, Form 982(a)(13). See CCP §431.40(a), which by its language ("[a]ny provision of law to the contrary notwithstanding") supersedes CCP §431.30(d), which calls for specific denials to verified complaints).

Economic Litigation Programs. Instead of filing a formal answer or demurrer in civil matters subject to CCP §§90-100 (governing economic litigation in limited civil cases (see chap 6)), a general denial is sufficient and an answer need not deny specific allegations of a complaint even if verified. CCP §§92, 431.30(d), 431.40. However, in a collection case subject to economic litigation (*i.e.,* a claim assigned to a third party for collection of funds), a general denial is insufficient if the complaint is verified.

The official general denial form is widely used because defendants frequently desire not to tie themselves to admissions or denials of particular facts alleged in the complaint, particularly before discovery has taken place. However, generally there is some matter within a complaint that is unquestionably true and as to which a defendant may find tactical advantage in admitting. The defendant who wishes to limit a general denial to particular paragraphs may use language, *e.g.*:

Defendant denies each and every allegation of paragraphs 1, 3, 5, and 7 of the complaint.

Some defense attorneys feel that specific denials carry greater psychological weight if later heard or seen by the plaintiff or the trier of fact.

Courts appreciate the confinement of disputes to those matters that clearly divide parties, removing from the litigation matters that are unquestionably true. For this reason, the general denial has occasionally been condemned. See, *e.g., Burke v Superior Court* (1969) 71 C2d 276, 282, 78 CR 481; *Edger v Foster* (1941) 48 CA2d 580, 120 P2d 134.

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B. Specific Denials

§25.24 1. Must Use to Answer Verified Complaint

Any form of denial that is sufficient to contest particular allegations in a verified complaint is termed a specific denial. Although not defined in CCP §431.30, that section provides that denials may refer to specific paragraphs of a complaint or may couple express admission of particular allegations with a general denial of all other allegations. Thus, under CCP §431.30(d) and (f), allegations in a verified complaint may be put in issue by a denial that refers to specific lines or paragraphs, *e.g.*:

1. Defendant denies each and every allegation of paragraphs 3, 4, 7, 8, and 9 of the complaint.

However, many attorneys using specific denials consider it better form to answer the complaint paragraph-by-paragraph, denying each paragraph they wish to controvert. For example:

1. Defendant denies each and every allegation of paragraph 3 of the complaint.

2. Defendant denies each and every allegation of paragraph 4 of the complaint.

A specific denial should respond to each and every paragraph of the complaint. A defendant who wishes for tactical reasons to ensure that a particular allegation in the complaint will be taken as true while denying other allegations in the same paragraph may specifically admit it and deny the other matter, *e.g.*:

2. Defendant admits that he is a resident of Los Angeles, California, but denies each and every other allegation of paragraph 2 of the complaint.

PRACTICE TIP: An effective specific denial is one that is clear in its scope and intent. In an admission of a particular portion of an allegation and a denial of the remainder, many defense attorneys avoid repetition of facts and instead plead with reference to paragraph or line numbers, carefully limiting their admissions, and stating for each paragraph whether it, or parts of it, are admitted or denied.

Historically, a specific denial required an exact restatement and denial of every phrase in each sentence of a particular allegation to be adequate. For example, a specific denial of an allegation that a defendant had notice of the plaintiff's prior mortgage, might read:

Defendant denies that at the time he purchased the property, or at any time before the purchase, he had actual or constructive notice, or any notice whatever, of the existence of plaintiff's mortgage on the property.

See, *e.g., Racouillat v Rene* (1867) 32 C 450, 453. Over time, greater flexibility has been approved in order to avoid the disadvantages of a verbatim restatement of particular allegations. For discussion of historical changes in pleading rules, see 5 Witkin, California Procedure, *Pleading* §§1061, 1063 (5th ed 2008).

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§25.25 2. Denial by Affirmative Statement

The denial of an allegation in a complaint need not be negative in form: An affirmative statement that directly contradicts an allegation in the complaint, or is inconsistent with it, is equivalent to a specific denial. *Burris v People's Ditch Co.* (1894) 104 C 248, 253, 37 P 922, 923; *Cahill Bros. v Clementina Co.* (1962) 208 CA2d 367, 385, 25 CR 301.

For example, in a complaint in which the plaintiff alleged he owned a property interest, an affirmative allegation by the defendant that he owned the same property interest is sufficient to controvert and deny the plaintiff's allegation. See *Elliott v Bertsch* (1943) 59 CA2d 543, 139 P2d 332. Similarly, an assertion that the defendant was sober sufficiently contradicts an allegation in a complaint that he or she was intoxicated.

PRACTICE TIP: Although liberal pleading rules no longer hold affirmative statements to be ineffectual, it is more difficult and more time consuming to draft such an answer. Most defense attorneys consider it better practice to specifically deny paragraphs of a complaint, admitting only those allegations that are true, and not relying on affirmative statements that only by implication may show certain allegations to be at issue. On the danger of drafting negatives pregnant or conjunctive denials, see §§25.24-25.25.

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3. Avoiding Ambiguous Denials

§25.26 a. Negative Pregnant

A precise step-by-step denial of an allegation frequently results in a "negative pregnant," *i.e.,* a denial pregnant with an implied admission and insufficient to raise an issue. For example, if a plaintiff alleges damages of $1000 and the defendant "denies that the plaintiff was damaged in the amount of $1000," the denial contains the possibility that the plaintiff was damaged in some other amount. See, *e.g., Armer v Dorton* (1942) 50 CA2d 413, 123 P2d 94. See also *United Air Servs. v Sampson* (1938) 30 CA2d 135, 146, 86 P2d 366.

Negatives pregnant are not limited to dollar amounts. For example, denying that the "plaintiff's vehicle struck defendant at the corner of Main and Elm on October 1" may be an admission that a tort occurred but in some other manner, at some other place, or on some other date. See generally *Janeway & Carpender v Long Beach Paper & Paint Co.* (1922) 190 C 150, 211 P 6.

PRACTICE TIP: A negative pregnant may be avoided by following a specific denial with a more general denial. For example, a denial may state that "plaintiff was not damaged in the amount of $1000 or in any amount whatsoever." The most effective way to avoid negatives pregnant, however, is to avoid factual denials altogether. Under modern pleading rules, it is sufficient to deny or admit the allegations of the complaint paragraph by paragraph or even by references to line numbers. See Practice Tip in §25.24. A separate denial or other response applicable, *e.g.,* to each paragraph, will also preclude a court from declaring the answer to be a general denial.

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§25.27 b. Conjunctive Denial

A conjunctive denial is a form of negative pregnant that occurs when several matters alleged in the complaint are denied in the answer conjunctively (*i.e.,* using the conjunctive "and") instead of separately (*i.e.,* using the disjunctive "or"). The defect usually occurs when a plaintiff has strung together several allegations connected by the word "and" and the defendant has denied these allegations verbatim.

For example, "Defendant denies that plaintiff is now and at all times herein mentioned was the owner of certain real property" may imply that the plaintiff was the owner, but is not presently the owner, or vice versa. See *California Trust Co. v Gustafson* (1940) 15 C2d 268, 101 P2d 74; *Janeway & Carpender v Long Beach Paper & Paint Co.* (1922) 190 C 150, 211 P 6.

PRACTICE TIP: It is easy to remedy the defect by using "or" in place of "and"; thus, if a plaintiff alleges that a fact "is and was" true, the defendant might deny that the fact "is or was" true. In the above example, the defect would be corrected if the denial were to read "is now, or at the times mentioned was" the owner. See generally 5 Witkin, California Procedure, *Pleading* §1071 (5th ed 2008).

When both allegations connected by "and" are synonymous, a conjunctive denial has been held not to create a negative pregnant. *Jones v Eddy* (1891) 90 C 147, 27 P 190. See also *Southside Spiritualist Church v National Fed'n of Spiritual & Psychic Science Church* (1931) 119 CA 11, 13, 5 P2d 657. However, rather than to guess whether two propositions are synonymous, a safer practice is to separate denials by "or."

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C. Denials on Information and Belief or Lack of Information or Belief

§25.28 1. When to Use

An allegation in a complaint may be denied "upon information and belief, or for lack of sufficient information or belief." CCP §431.30(f). However, such denials are limited to situations in which the defendant is unable to admit or deny an allegation positively. *Dobbins v Hardister* (1966) 242 CA2d 787, 51 CR 866.

If the defendant has actual knowledge, or can be reasonably presumed to have knowledge, the denial on information and belief may be stricken or disregarded as an evasion and sham. See *Boscus v Bohlig* (1916) 173 C 687, 162 P 100 (denial that mechanic performed work on defendant's building at defendant's request); *Oliver v Swiss Club Tell* (1963) 222 CA2d 528, 35 CR 324 (denial on information and belief of allegation that defendant was an unincorporated association). For example, a defendant is presumed to have knowledge of, and must answer positively, an allegation that he or she entered into a contract with the plaintiff, who performed obligations under it; a denial for lack of information or belief would appear evasive. See *Zany v Rawhide Gold Mining Co.* (1911) 15 CA 373, 114 P 1026. For further illustrations, see 5 Witkin, California Procedure, *Pleading* §1066 (5th ed 2008).

Sometimes, however, a defendant may not know something that he or she might ordinarily be presumed to know. A denial can properly be made on information and belief in such circumstances, but the defendant should allege the circumstances that explain why he or she lacks positive knowledge. See, *e.g., Warring v Couch* (1913) 165 C 383, 132 P 587 (owner denied personal knowledge of depth of oil wells drilled on his property, alleging he heard reports of it from third persons).

Positive denials (rather than on information and belief) are required when the plaintiff alleges facts that are a matter of public record because the defendant has the means to learn the truth of the allegation. See, *e.g., Mulcahy v Buckley* (1893) 100 C 484, 35 P 144 (allegation that plaintiff recorded mechanic's lien claim in same county suit was brought); *Smith v Fidelity & Deposit Co.* (1933) 130 CA 45, 57, 19 P2d 1018 (allegation that probate court entered decree settling account of guardian and fixing his liability); *Curtin v Salomon* (1926) 80 CA 470, 251 P 237 (allegation that plaintiff, doing business under fictitious name, complied with statute governing such businesses).

PRACTICE TIP: It common for a defendant to use a positive denial to allegations of a complaint. Defense counsel should be mindful that the plaintiff has the right during discovery to require a defendant to state facts on which a denial is based, and that a defendant who has no basis for a positive denial may be impeached at trial. The defense attorney should review the answer carefully to ensure that positive denials are based on personal knowledge and, when appropriate, that other denials are made on information and belief or on lack of information or belief.

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§25.29 2. Sample Language

Information and belief. When basing a denial on information and belief, the denial must specifically plead the defendant's "information," as well as the defendant's "belief." Omitting one or the other is a technical defect inconsistent with the statute and operates as an admission of the allegation. See, *e.g., Aronson & Co. v Pearson* (1926) 199 C 295, 249 P 191. A denial on information and belief may be stated:

Defendant, on information and belief, denies each and every allegation of paragraph 6 of the complaint.

Use of the more traditional "according to information and belief" is also acceptable because that language was used in former CCP §437, on which CCP §431.30(f) is based. See, *e.g., Roussin v Stewart* (1867) 33 C 208. However, despite its common usage by attorneys, the statement "defendant is informed and believes and therefore denies" has been held meaningless and does not raise an issue. See *Poe v Francis* (1933) 132 CA 330, 22 P2d 801. For technical language requirements, see Note below.

Lack of information or belief. A defendant who has no information or belief about facts alleged in the complaint, but does not wish to admit the allegations, is permitted to deny "for lack of information or belief." A denial for lack of information or belief may be stated:

Defendant lacks information or belief to answer the allegations of paragraph 6 of the complaint, and basing his denial on that ground, denies each and every allegation in it.

See *Jensen v Dorr* (1911) 159 C 742, 116 P 553. Defendant also may deny some but not all of the allegations within a paragraph for lack of information or belief by specifying, in the above example, "the allegations of paragraph 6, lines 14-21."

The pleader should not stop with the allegation that the defendant does not have information or belief sufficient to enable him or her to answer, but must go further and deny the allegations, *i.e.,* by adding the phrase, "and basing denial on that ground, denies...." See *Ziegler v Ohio Farmers Ins. Co.* (1937) 23 CA2d 138, 72 P2d 557.

NOTE: A few decisions based on technical grounds have held insufficient a denial limited to saying that "defendant has no knowledge or information sufficient to form a belief." See, *e.g., Davidson Inv. Co. v Dabney* (1930) 103 CA 392, 284 P 673. More often, however, such defenses are deemed as waived if not objected to in the trial court. See *Cockerell v Title Ins. & Trust Co.* (1954) 42 C2d 284, 267 P2d 16.

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V. DEFENSES

§25.30 A. Description and Use

A defense introduces new matter not put in issue by simple denial of the allegations of a complaint. Any new matter constituting a defense must be pleaded in the answer. CCP §431.30(b). Defenses, commonly called affirmative defenses, differ from denials in that denials are statements that some essential allegation in the complaint is untrue, whereas affirmative defenses claim that, despite the truth of the allegations, the plaintiff is not entitled to relief. See *Goddard v Fulton* (1863) 21 C 430; *Cahill Bros. v Clementina Co.* (1962) 208 CA2d 367, 25 CR 301.

Affirmative defenses have also been said to be matters on which the defendant has the burden of proof at trial, while the plaintiff has the burden of proving matters that the answer simply denies. See *Piercy v Sabin* (1858) 10 C 22. See generally 5 Witkin, California Procedure, *Pleading* §1081 (5th ed 2008).

Answer to Cross-Complaint. Generally, statutory rules for answering complaints apply equally to cross-complaints, but one distinction is relevant here. A third party defendant answering a cross-complaint is permitted to raise any defense that the third party plaintiff could have asserted against the original plaintiff, whether or not the third party plaintiff did so. CCP §428.70. See *Administrative Mgmt. Servs. v Fidelity & Deposit Co.* (1982) 129 CA3d 484, 181 CR 141. See generally 5 Witkin, Procedure, *Pleading* §§1081-1083.

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§25.31 1. Effect of Pleading Defense; No Reply by Plaintiff

Affirmative defenses pleaded in the answer are automatically deemed denied by the plaintiff and are at issue at trial. CCP §431.20(b). The plaintiff is not permitted to file a reply controverting new matter pleaded in an answer. CCP §§422.10-422.20.

Nonetheless, at the time of trial, the plaintiff will be free to introduce evidence opposing the defenses pleaded in the answer, despite lack of any prior pleading. See *Martin v Sugarman* (1933) 218 C 17, 21 P2d 428; *Aerojet Gen. Corp. v Superior Court* (1986) 177 CA3d 950, 953, 223 CR 249.

PRACTICE TIP: Because no reply pleading advises a defendant whether the plaintiff will controvert the affirmative defenses, and by what means, the defendant should propound discovery to address this point, for example, through contention interrogatories to the plaintiff. See generally California Civil Discovery Practice, chaps 1-2 (4th ed Cal CEB 2006). Thus, if the answer pleads as a defense a statute of limitations, the defendant should pose interrogatories to solicit the facts on which the plaintiff contends that this defense is inapplicable, identifying the witnesses and documents relevant to the plaintiff's position.

An exception exists in proceedings involving administrative mandamus or prohibition, in which instance plaintiff the may reply to new matters raised in the defendant's answer. In circumstances in which the plaintiff has the privilege of reply, he or she is expected to plead all grounds for avoiding defenses raised by defendants. See 8 Witkin, California Procedure, *Extraordinary Writs* §198 (5th ed 2008).

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§25.32 2. Effect of Not Pleading Defense: Waiver

Unless raised in an answer when appropriate, defenses are waived (CCP §430.80) and evidence with respect to any defense not pleaded will be inadmissible at trial. *California Academy of Sciences v County of Fresno* (1987) 192 CA3d 1436, 238 CR 154; *Carranza v Noroian* (1966) 240 CA2d 481, 49 CR 629. Therefore, counsel should ensure that each objection allowed under CCP §430.10 has been considered and specially pleaded in the answer, so as not to have been waived. On whether to raise defect in demurrer or answer, see §§25.36-25.37.

The failure of one defendant to assert a defense does not prohibit another defendant from claiming that defense; it will, however, bar the first defendant from subsequently raising the defense unless specially authorized by order of court.

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B. Pleading Inconsistent Defenses

§25.33 1. Right to Plead

Although no California statute expressly permits a defendant to plead inconsistent defenses in the answer, California courts have long recognized the right to do so (see, *e.g., Banta v Siller* (1898) 121 C 414, 53 P 935) as long as the defenses are kept separate from one another (see §25.34).

For example, a defendant who is sued for defamation may both deny making the defamatory statement and raise the affirmative defense that the statement is true. See *Edger v Foster* (1941) 48 CA2d 580, 120 P2d 134 (denial in answer of material allegations in complaint and affirmative defense in which same allegations were alleged to be true permissible in same manner as pleading inconsistent defenses). See also *Newark Trust Co. v Kriebel* (1920) 49 CA 614, 623, 193 P 962. For further illustrations, see 5 Witkin, California Procedure, *Pleading* §1086 (5th ed 2008).

NOTE: Inconsistent defenses cannot be removed by the plaintiff's motion to strike, and no binding admission results from pleading an inconsistency. Indeed, the defendant can present a defense based on one theory of facts in the answer and simultaneously file a separate cross-claim against third persons on an inconsistent separate theory. This circumstance occurred in *Shepard & Morgan v Lee & Daniel, Inc.* (1982) 31 C3d 256, 182 CR 351, in which the defendant denied the existence of hazardous conditions in its answer and cross-complained for indemnity against third persons, asserting a hazardous condition existed for which the third persons were appropriately responsible.

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§25.34 2. Separate Statements Required

In the answer, defendants may deny allegations of the complaint, plead affirmative defenses, or, as is usually the case, do both. See, *e.g., Hoffman v Southern Pac. Co.* (1927) 84 CA 337, 258 P 397 (denial of negligence and defense of contributory negligence). See sample form of answer in §25.83.

However, each defense must be separately stated and must refer to the causes of action that it is intended to answer; each defense should be separately numbered. CCP §431.30(g); Cal Rules of Ct 2.112.

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§25.35 3. Truthful Pleading Limitation

The pleading of defenses, and particularly of inconsistent defenses, is restricted by the fundamental judicial policy requiring truthfulness in the pleadings of litigants. See 4 Witkin, California Procedure, *Pleading* §397 (5th ed 2008). A defendant may not deliberately violate this policy by affirmatively asserting in an answer both the truth and untruth of a fact within the defendant's knowledge.

WARNING: Counsel should be particularly cautious in drafting verified answers. Not only may untruthful pleading amount to a criminal charge of perjury when the answer is verified (see 4 Witkin, Procedure, *Pleading* §397), but in the civil context the court may also treat the answer as failing to state a defense, and a general demurrer may thus be sustained. See, *e.g., County of Butte v Waters* (1942) 56 CA2d 185, 132 P2d 517.

A corollary to this rule, and to the rule that requires defenses to be separately stated (see §25.34), is that a court may treat as evasion or sham an answer that pleads inconsistent matter within a single defense. See *Poe v Francis* (1933) 132 CA 330, 22 P2d 801.

For the defendant's protection, counsel must separately state defenses, which will help prevent the sustaining of a special demurrer for failure to make a separate statement. In drafting the pleadings, it is permissible to deny the existence of a fact in an answer, putting the plaintiff to the burden of proof, while asserting an inconsistent fact known to the defendant in an affirmative defense. This is not the same as affirmatively pleading both the existence and absence of a particular fact or theory. For example, the defendant can deny that property was converted, while affirmatively claiming property was taken under claim and delivery proceedings. But careful attention must be given to safeguard the integrity of the client and the judicial process when drafting inconsistent pleadings.

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C. Defenses That Can Be Raised by Demurrer

§25.36 1. Current Rule Allows Answer to Raise

Code of Civil Procedure §430.30 provides that, when a defect or ground for objection (often called a ground for demurrer) appears on the face of a complaint, cross-complaint, answer, or from any matter that the court must take judicial notice of, the pleading may be objected to by demurrer rather than an answer. When such a defect does not appear on the face of the pleading, it may be raised by answer. CCP §430.30(b).

Some older court opinions seem to suggest that at least technical defenses appearing on the face of a complaint must be raised by demurrer and not by answer. See, *e.g., Gillam v Sigman* (1866) 29 C 637 (misjoinder of parties). Later decisions take the position that even dilatory defenses may be raised either by answer or demurrer whether or not they appear on the face of the complaint. See, *e.g., Danziger v Peebler* (1948) 88 CA2d 307, 198 P2d 719 (lack of capacity to sue); *Martin v Pacific Southwest Royalties, Inc.* (1940) 41 CA2d 161, 106 P2d 443 (another action pending).

NOTE: The modern trend permitting defendants to use answers to raise objections, even to matters appearing on the face of the complaint, tends to promote judicial economy, lowering the necessity for hearings on demurrers in already overcrowded judicial dockets.

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§25.37 2. Effect of Failure to Raise in Answer or Demurrer

Failure to object to a defective complaint by demurrer or answer waives the defect, unless it is an objection (1) to a lack of subject matter jurisdiction in the court, or (2) that the complaint fails to state facts sufficient to constitute a cause of action. CCP §430.80.

PRACTICE TIP: With the filing of an answer, a case is "at issue," with each side having presented each of the legal claims and defenses it will raise during the litigation. The statement of issues in the pleadings will control the breadth of discovery and the questions to be tried. It is for these important reasons that the attorney drafting an answer must be complete in specifying defenses, or the waiver doctrine may be applied for failure to set out all of the client's objections to the complaint. To correct or plead additional denials or defenses overlooked in the original answer, see §§25.70-25.78 (amendment of answer).

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D. Pleading Requirements

§25.38 1. Fact Pleading Required

The same rules for pleading "ultimate facts" rather than "legal conclusions" that apply to allegations in a complaint (on complaints, see chap 15) apply to pleading defenses in an answer. When particularity in pleading is necessary in a complaint, it is equally necessary to the statement of an affirmative defense on the same issue. *Bradbury v Higginson* (1914) 167 C 553, 557, 140 P 254; *Greiss v State Inv. & Ins. Co.* (1893) 98 C 241, 33 P 195.

A defendant who wishes to assert a particular defense must plead the essential facts that a defense in the answer. See CCP §431.30(b). Like common law affirmative defenses, the statutory objections contained in CCP §430.10 (*e.g.,* another action is pending; misjoinder of parties), like common law affirmative defenses, represent "new matter" to be specifically pleaded in an answer. Except for the objection of a lack of subject matter jurisdiction in the court, which is never waived, an answer or objection to a complaint is waived unless specifically pleaded. CCP §430.80. See §25.32.

When framing defenses, it is not sufficient to make a statement in affirmative form for it to constitute a defense. A positive statement that merely contradicts or is inconsistent with an essential allegation of the complaint is only a denial presented in argumentative form. *Rancho Santa Margarita v Vail* (1938) 11 C2d 501, 543, 81 P2d 533; *Frisch v Caler* (1862) 21 C 71. New facts are needed to establish each of the elements of a defense. See examples of particular defenses in §§25.42-25.64.

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§25.39 a. Pleading Defenses on Official Forms

The Judicial Council has issued various Official Form Answers. See, *e.g.,* Official Form Answer for Unlawful Detainer Actions (setting forth in detail defenses involving landlord's breach of rental agreement, breach of warranty to provide habitable premises, and retaliatory eviction). Particularly in tort and contract actions, the attorney should use care to add the particularized ultimate facts necessary to make the Official Form defenses complete.

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Source: Civil Litigation/California Civil Procedure Before Trial/25 Answers/§25.40 b. Format

§25.40 b. Format

Affirmative defenses are stated separately after general or specific denials or admissions of the allegations of the complaint.

PRACTICE TIP: When a critical portion of a defendant's case rests on the absence of an element of the plaintiff's pleading and proof of a cause of action, it is usually good practice both to plead this circumstance as an additional defense as well as to deny allegations in the body of an answer. This ensures that the matter is in issue and avoids a dispute over whether the circumstance was "new matter" to be raised on defense or waived.

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§25.41 2. When to Use; Identification of Defenses

Affirmative defenses should be pleaded whenever, in good faith and with the exercise of due care, counsel can identify facts on which to base them. Substantive law determines the issues on which the defendant has the burden of proof and thus the specific defenses available in response to an individual cause of action.

PRACTICE TIP: Two devices are commonly used by experienced counsel as checklists to identify various affirmative defenses. These can then be examined more closely against the facts available to determine the appropriateness of their pleading in a given answer. First, 4-5 Witkin, California Procedure, *Pleading* (5th ed 2008) prescribes the elements of various causes of action and defenses to them. Second, Judicial Council of California Civil Jury Instructions (CACI) or BAJI (Book of Approved Jury Instructions) state in each instruction the approved requirements for various causes of action and defenses. These jury instructions also indicate which party will have the burden of proof on issues at trial. Neither of these sources are updated as rapidly as the case law changes, however. For emerging and evolving defenses, the attorney should consult the latest cases in the particular area of substantive law that is the subject of the answer.

The most frequently asserted affirmative defenses in actions for breach of contract and torts cases appear below. Some of these and other common defenses are briefly discussed in §§25.42-25.64; it is beyond the scope of this chapter to address every possible defense. For consideration of additional defenses, see 5 Witkin, Procedure, *Pleading* §§1089-1128.

Breach of Contract Actions

- Statute of Frauds
- Statute of Limitations
- Contract Voidable Due to Fraud, Undue Influence, or Duress
- Payment and Release
- Accord and Satisfaction
- Waiver and Estoppel

Tort Actions

- Statute of Limitations
- Contributory or Comparative Fault of Plaintiff in Negligence Actions
- Assumption of the Risk (product liability actions)
- Release

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E. Particular Defenses

1. Statute of Limitations

§25.42 a. Pleading Requirements

A statute of limitations defense must be specifically pleaded; a denial is insufficient to raise the defense and it is waived. See *Minton v Cavaney* (1961) 56 C2d 576, 15 CR 641; *Warden v Bailey* (1933) 133 CA 383, 24 P2d 192. It may be raised by general demurrer if the defect appears on the face of the complaint, or by answer whether or not the defect appears on the face of the complaint. *California Safe Deposit & Trust Co. v Sierra Valley Ry.* (1910) 158 C 690, 698, 112 P 274.

Proper pleading of the defense includes a reference to the specific section (and subsection, if there is one) in the Code of Civil Procedure that specifies the applicable limitations period. It is not necessary to allege the specific facts establishing time bar. CCP §458. The defense is appropriately pleaded in the following language, *e.g.*:

Plaintiff's Third Cause of Action, for breach of a construction contract, is barred by statute of limitations set forth in CCP §337(1).

Pleading the wrong code section or failing to specify an applicable subsection are defects that are waived unless the plaintiff files a demurrer to the answer or formally objects at time of trial. See *Tofte v Tofte* (1936) 12 CA2d 111, 54 P2d 1137. The court has discretion to deny a request to amend an answer in order to plead the statute of limitations for the first time, but may not deny a request to amend to correct a nonprejudicial defect in the form of pleading (*e.g.,* to specify the subsection of a statute that both parties knew was being relied on). *Hopkins v Hopkins* (1953) 116 CA2d 174, 253 P2d 723.

PRACTICE TIP: Because proof of prejudice by the defendant is a basis for denying leave to amend an answer, the attorney should be careful in checking the exact subsection listed for this affirmative defense. Judges have treated the mistaken designation of an improper code section as prejudicial to the plaintiff and a waiver of the defense. If there is any question or doubt, a defendant should specify each separate statute of limitations that may reasonably apply to bar a cause of action.

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§25.43 b. As Defense to Cross-Complaint

In responding to a cross-complaint, a third party defendant may raise the affirmative defense of statute of limitations to the underlying principal complaint in the suit and is not confined to the statute of limitations applicable to the cross-complaint itself. Thus, in an action by the defendant for indemnity against a third party, the third party may assert that the original defendant has no liability, because the plaintiff's claim is barred by the statute of limitations. *Administrative Mgmt. Servs. v Fidelity & Deposit Co.* (1982) 129 CA3d 484, 181 CR 141. However, the original defendant has waived the defense by failing to assert it the against plaintiff. See 5 Witkin, California Procedure, *Pleading* §§1117-1121 (5th ed 2008).

NOTE: Historically, the statute of limitations is the one exception to fact pleading that has arisen. Code of Civil Procedure §458 permits a defendant to generally state that a cause of action is barred by a particular statute, without providing ultimate facts demonstrating the bar. For further discussion of the statute of limitations defense, see 5 Witkin, Procedure, *Pleading* §§1107-1121.

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§25.44 2. Plaintiff's Contributory Negligence or Comparative Negligence

Since *Li v Yellow Cab Co.* (1975) 13 C3d 804, 119 CR 858, some negligence, which in part caused a plaintiff's injury, no longer wholly bars the plaintiff's recovery in a tort action. The doctrine of "comparative negligence," assessing the respective contributions of the plaintiff's and defendant's negligence in causing the plaintiff's injury, is now in effect in California. Negligence by a plaintiff will reduce, but no longer bar, recovery; the phrase "contributory negligence" today refers to the current doctrine and not the former bar. See *Wittenbach v Ryan* (1976) 63 CA3d 712, 134 CR 47.

A defendant must plead the defense of contributory negligence in the answer. The defense may be raised without pleading it in the answer if the plaintiff has pleaded contributory negligence in the complaint. See *Gerfers v San Diego Transit Sys.* (1954) 126 CA2d 733, 272 P2d 930. It is not required that the plaintiff anticipate the defense and, thus, "comparative negligence" must be specifically pleaded as a new matter in the answer. *Kenny v Kennedy* (1908) 9 CA 350, 99 P 384.

To plead "comparative negligence," it is not necessary to use the words "contributory negligence" or, by inference, the current phrase "comparative negligence." *Hoffman v Southern Pac. Co.* (1927) 84 CA 337, 258 P 397. Although it does not appear to have specifically been so held, an answer using the phrase "contributory negligence" is likely to be understood to refer to "comparative negligence."

Proper pleading of this defense requires a specification of the ultimate facts identifying how the plaintiff was negligent and asserting that the plaintiff's particular negligence caused his or her own injury. The plaintiff's act that was negligent should be pleaded, though it is not necessary to detail the precise manner in which that act was negligent. *McMillan v Western Pac. R.R.* (1960) 54 C2d 841, 9 CR 361. A general allegation that "the plaintiff is negligent" would usually be held insufficient. See *Hoffman v Southern Pac. Co., supra*. See generally *Singer v Superior Court* (1960) 54 C2d 318, 5 CR 697; 5 Witkin, California Procedure, *Pleading* §1103 (5th ed 2008).

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§25.45 3. Assumption of Risk

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Historically, it has been appropriate to plead assumption of risk as a separate defense apart from the bar of contributory negligence, regardless of whether they spring from the same ultimate facts in the case. See *Inouye v PG&E* (1959) 53 C2d 361, 367, 1 CR 848. See generally 5 Witkin, California Procedure, *Pleading* §1104 (5th ed 2008).

An express assumption of risk may be pleaded as a separate defense, as may the form of assumption of risk that may be implied from a plaintiff's voluntary participation in certain sports and recreational activities. *Knight v Jewett* (1992) 3 C4th 296, 11 CR2d 2 (individual who voluntarily engages in potentially dangerous activity agrees to assume risks inherent in activity; participant in active sport breaches duty of care to other participants only if he or she intentionally injures another player or engages in conduct so reckless that it is totally outside range of ordinary activity involved in sport); *Yancey v Superior Court* (1994) 28 CA4th 558, 33 CR2d 777 (limited duty of care owed coparticipant in sports does not apply to discus). For discussion, see California Tort Guide §1.44 (3d ed Cal CEB 1996).

To plead the defense of assumption of risk, the better practice is to plead the ultimate facts on which the defense will be proved and to specify at least some of the particular risks that the plaintiff purportedly assumed, rather than to allege the defense in general terms, *e.g.*:

Plaintiff _ _[*name*]_ _, on or about _ _[*date*]_ _, knowingly and voluntarily agreed by executing a writing in favor of defendant to relieve defendant from any and all liability for the conduct, events, and injuries alleged by plaintiff in the complaint. A true and correct copy of plaintiff's written agreement is marked Exhibit "A," is attached to this answer, and is incorporated by reference herein. All damages and injuries alleged to have been sustained by plaintiff in the complaint were proximately caused by and are the proximate result of the risks so assumed. In particular, plaintiff's written agreement assumed the risk that he would injure himself as the proximate result of voluntarily ejecting himself from an airplane in mid-flight.

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§25.46 4. Mistake, Fraud, Duress, and Undue Influence

The defenses of fraud, mistake, duress, and undue influence are affirmative defenses, occasionally appearing in a breach of contract action. These defenses must be pleaded specifically, in the same fashion as they would be alleged in a complaint to rescind a contract, by showing the specific facts permitting the defense. See generally 4 Witkin, California Procedure, *Pleading* §§544-552 (5th ed 2008).

A general allegation in an answer that a contract or obligation was obtained "by fraud" is insufficient to raise the defense, as is a general denial of the plaintiff's allegations. See, *e.g., California Trust Co. v Gustafson* (1940) 15 C2d 268, 101 P2d 74; *Metropolis Trust & Sav. Bank v Monnier* (1915) 169 C 592, 147 P 265.

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§25.47 5. Estoppel, Waiver, Laches, and Unclean Hands

In equitable actions, the affirmative defenses of waiver, estoppel, and laches may be raised but must be pleaded specifically as new matter in an answer and will not be held to have been raised by denial of the plaintiff's allegations. See *California Academy of Sciences v County of Fresno* (1987) 192 CA3d 1436, 238 CR 154.

A statement of specific and ultimate facts is necessary, and a general allegation using the words "estoppel" or "waiver" will not be sufficient. See *Victor Oil Co. v Drum* (1920) 184 C 226, 193 P 243 (laches); *Wienke v Smith* (1918) 179 C 220, 176 P 42 (waiver); *Benson v Andrews* (1958) 166 CA2d 44, 332 P2d 698 (estoppel). It has formerly been held (see *Phoenix Mut. Life Ins. Co. v Birkelund* (1946) 29 C2d 352, 175 P2d 5) that, if the pertinent facts appear on the face of the complaint, the court on its own motion may deny relief to a plaintiff who is guilty of laches, regardless of the presence of this defense in the defendant's answer. It is extremely risky for a defendant to fail to raise this defense and merely rely on the court's perspicacity on this point.

The doctrine of unclean hands today appears both in legal and equitable actions as a defense; like the other defenses, it must be specifically pleaded and the pertinent ultimate facts demonstrating misconduct by the plaintiff must be shown. See *Fibreboard Paper Prods. Corp. v East Bay Union of Machinists* (1964) 227 CA2d 675, 39 CR 64. For further information on these defenses, see generally 5 Witkin, California Procedure, *Pleading* §§1122-1126 (5th ed 2008).

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§25.48 6. Statute of Frauds

Various contracts must be memorialized in writing under the common law statute of frauds embodied in CC §1624. A challenge that an oral agreement that falls within the statute of frauds was not memorialized, and therefore fails to state a cause of action, may be made by general demurrer or by a denial of plaintiff's allegation that a contract was made. See *Carrier & Braddock, Inc. v S.W. Straus & Co.* (1931) 213 C 508, 513, 2 P2d 811; *Aero Bolt & Screw Co. v Iaia* (1960) 180 CA2d 728, 742, 5 CR 53; *Ira Garson Realty Co. v Brown* (1960) 180 CA2d 615, 633, 4 CR 734; *Hanley v Murphy* (1924) 70 CA 157, 163, 232 P 767.

NOTE: Under CC §1624(b), a "qualified financial contract," as defined, is not invalid for failure to be memorialized in writing when there is sufficient evidence to indicate that a contract has been made or that the parties agreed to be bound.

It is appropriate to plead the statute of frauds as a separate defense, and it is helpful to the court when so pleaded as a basis for a motion at trial to strike evidence of an oral contract. See *Jamison v Hyde* (1903) 141 C 109, 74 P 695; *Hanley v Murphy, supra.*

It is important to remember that the statute of frauds is in part a doctrine of evidence. If one denies a contract but fails to object at trial to the plaintiff's evidence of an oral agreement, a defense under the statute of frauds will be held to have been waived. The defense requires not only pleading but also objection to the nonmemorialization of an oral agreement at time of trial. It is too late to raise the statute of frauds for the first time on appeal. *Coleman v Satterfield* (1950) 100 CA2d 81, 83, 223 P2d 61; *Ellis v Klaff* (1950) 96 CA2d 471, 474, 216 P2d 15, disapproved on other grounds in *Sterling v Taylor* (2007) 40 C4th 757, 769, 55 CR3d 116.

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§25.49 7. Purported Contract: Illegal or Otherwise Void

Like the statute of frauds, facts that invalidate a contract, *e.g.,* illegality in its object or terms, fraud in the inducement of the contract, or incompetency of a contracting party, may be raised by a denial of the plaintiff's allegation of an agreement. However, as discussed in §§25.50-25.51 it is often advisable to plead by specific affirmative defense the ultimate facts and overall circumstances that the contract cannot be enforced.

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§25.50 a. Contract Conditions Precedent or Subsequent

Because the plaintiff must plead and prove performance of a contract, failure of performance by reason of conditions precedent or subsequent need not be raised by affirmative defense; denial may be sufficient. *Eucalyptus Growers Ass'n v Orange County Nursery & Land Co.* (1917) 174 C 330, 334, 163 P 45. However, it is increasingly common for the failure of conditions to be pleaded as an affirmative defense, and some courts are coming to rely on the presence of such a pleading to alert them to this defense contention.

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§25.51 b. Illegality of Contract

A contention that a contract is illegal may appropriately be pleaded as an affirmative defense, even though the subject can later be raised by the court on its own motion in the absence of a pleading from either party. See *Santoro v Carbone* (1972) 22 CA3d 721, 732, 99 CR 488, disapproved on other grounds in *Tenzer v Superscope, Inc.* (1985) 39 C3d 18, 30, 216 CR 130.

For other examples of circumstances invalidating agreements, the facts of which may be pleaded as affirmative defenses, see 1 Witkin, Summary of California Law, *Contracts* §§45, 345, 365, 406 (10th ed 2005); *Lever v Garoogian* (1974) 41 CA3d 37, 39, 115 CR 856; *Leo F. Piazza Paving Co. v Bebek & Brkich* (1956) 141 CA2d 226, 232, 296 P2d 368. See also former UCC 3-307(1) (now see UCC 3-308) ("[u]nless specifically denied in the pleadings, each signature on an instrument is admitted").

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§25.52 8. Payment Under Contract

In most jurisdictions, a defendant's payment under a contract is an affirmative defense required to be specifically pleaded in the answer. California cases have required that the plaintiff plead nonpayment under a contract as an element of the cause of action. If the plaintiff pleads nonpayment, the defendant's payment may be raised by the defendant's denial of the pertinent allegations in the answer. *Bank of Shasta v Boyd* (1893) 99 C 604, 34 P 337; *Davanay v Eggenhoff* (1872) 43 C 395. However, inconsistency in the cases makes it by far the better practice to plead payment as an affirmative defense. See *Pastene v Pardini* (1902) 135 C 431, 67 P 681.

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§25.53 9. Mitigation of Damages (Wrongful Termination Actions)

In actions for wrongful employment termination, a frequent defense by the employer is an assertion that the former employee subsequently made earnings through new employment that should be applied in mitigation of damages, or that the former employee failed to seek new employment and mitigate the claim as obligated to do. In the former circumstance, when the plaintiff in fact earned income after termination, the defense of mitigation can be asserted without affirmative pleading, merely through denial of the plaintiff's allegations of damage. *Erler v Five Points Motors, Inc.* (1967) 249 CA2d 560, 562, 57 CR 516. The *Erler* court distinguished the situation in which the defendant wishes to claim that the plaintiff could have found other employment. This defense of mitigation must be pleaded specifically, or it is waived, *e.g.,* "Plaintiff failed and refused to seek new employment following termination and thereby has failed to mitigate his (or her) alleged damages."

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§25.54 10. Defenses to Common Counts

As an appropriate counterpoint to the uninformative and general nature of "common counts" seeking the recovery of money, courts have several times held that a general denial is sufficient for the raising of virtually any defense. See *Heaton-Hobson Assoc. Law Offices v Arper* (1904) 145 C 282, 78 P 721; *Aetna Carpet Co. v Penzner* (1951) 102 CA2d 859, 228 P2d 347; *De Santis v Miller Petroleum Co.* (1938) 29 CA2d 679, 683, 85 P2d 489.

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11. Defense of Setoff

§25.55 a. Pleading Requirements

If one seeks a setoff to a monetary obligation and the setoff arises from a separate transaction, it must be pleaded as new matter. *Carranza v Noroian* (1966) 240 CA2d 481, 484, 49 CR 629. Any issue as to "setoffs," *e.g.,* overpayments by the defendant in the past, represents new matter that must be pleaded as an affirmative defense. See *Title Ins. Co. v State Bd. of Equalization* (1992) 4 C4th 715, 731, 14 CR2d 822; *Interstate Group Adm'rs, Inc. v Cravens, Dargan & Co.* (1985) 174 CA3d 700, 220 CR 250. This is particularly important when the setoff relates to a separate debt or than the one pleaded by the plaintiff. See *Carranza v Noroian, supra* (plaintiff pleaded breach of labor contract for harvesting peach crop; defendant sought setoff related to labor provided by plaintiff in harvesting later fig crop; held to constitute "new matter" not placed in issue by general denial). When a plaintiff has pleaded a common count, a general denial will permit the defendant to prove setoff relating to the same debt or obligation asserted by the plaintiff. *Interstate Group Adm'rs, Inc. v Cravens, Dargan & Co., supra*. The better practice, however, would be to plead a specific affirmative defense for each asserted setoff.

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§25.56 b. Setoffs as Allegation of Cross-Complaint

A claim for affirmative relief, not merely for setoff, requires the pleading of a separate cross-complaint and may not be included in an answer. CCP §431.30(c). Some subject matter, *e.g.,* claim of fraud in the inducement of the signature of a contract or note, may require the defendant both to plead fraud as an affirmative defense in the answer and fraud as a cause of action for damages in a separate cross-complaint. This would be appropriate if the defendant asserts damages other than or exceeding setoff amounts.

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§25.57 12. Absence of Elements of a Claim for Negligence

The appropriate challenge to a plaintiff's failure to plead one or more of the elements of a claim (*i.e.,* in a claim for negligence, failure to plead illegal duty of care, a negligent act amounting to a breach of that duty, proximate cause of injury from the act, or injury) is appropriately raised by denial of the plaintiff's allegations. It is not necessary to plead absence of one of these elements as a specific affirmative defense, challenging, for example, the contention that an accident was unavoidable (*i.e.,* that there was no negligence on defendant's part or that defendant's acts did not proximately cause plaintiff's injury). Appellate courts have reminded trial courts of this when lower courts sometimes misapprehend the burden of proof on some affirmative defenses claiming the unavoidability of accidents. See, *e.g., Jolley v Clemens* (1938) 28 CA2d 55, 82 P2d 51, in which the court noted that it was reversible error to place the burden of proof on claim of "unavoidable accident" on the defendant; the burden to establish negligence correctly tested the plaintiff, and thus a denial adequately responded to the plaintiff's allegation. See also *Parker v Womack* (1951) 37 C2d 116, 121, 230 P2d 823, overruled on other grounds at 49 C2d at 660.

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§25.58 13. Absence of Elements of Particular Intentional Torts

As with the pleading of negligence (see §25.44), failure to plead one of the elements of an intentional tort need not be raised by affirmative defense, but is appropriately addressed through a denial of the plaintiff's allegations. See *Kritzer v Citron* (1950) 101 CA2d 33, 39, 224 P2d 808 (consent and participation in acts of assault and battery may be proved under general denial); *Churchill v Baumann* (1892) 95 C 541, 549, 30 P 770 (consent to injury and claim of intentional diversion of water rights).

In actions for malicious prosecution, malice and the defendant's lack of probable cause in instituting legal proceedings must be alleged. Typically, a defendant will assert a reliance on the advice of counsel to negate those elements; accordingly, it has been permitted for this position to be proved under a denial of the plaintiff's allegations, and not a separate affirmative defense. *Walker v Jensen* (1949) 95 CA2d 269, 275, 212 P2d 569.

However, defenses of privilege must be set forth as affirmative defenses and be specifically pleaded, including claims of self-defense in an action for battery, privilege in an action for defamation, truthfulness of statements in an action for defamation, or privilege in an action for interference with business advantage.

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§25.59 14. Defendant's Title as Defense in Ejectment and Quiet Title Property Actions

A necessary element of a claim for ejectment or quiet title is that the plaintiff owns the real property in question; denying the allegation of ownership or of the right to possession is sufficient to permit the defense to present any evidence of a defect in the plaintiff's chain of title. Only if the defendant wished to go further and demand affirmative equitable relief is additional pleading required (*i.e.,* by cross-complaint, with its basis also set forth as affirmative defense to plaintiff's claim). But merely claiming title, which defeats the plaintiff's claim, does not require setting forth an affirmative defense. See *Smart v Peek* (1931) 213 C 452, 454, 2 P2d 380; *Locke v Moulton* (1895) 108 C 49, 52, 41 P 28; *Swasey v Adair* (1891) 88 C 179, 25 P 1119; *Coons v Thompson* (1946) 75 CA2d 687, 171 P2d 443; *Wade v Howe* (1934) 2 CA2d 435, 440, 38 P2d 439.

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§25.60 15. Denying Plaintiff's Possession in Actions for Recovery of Personal Property

The same principle found in ejectment and quiet title actions for real property (see §25.59) also applies in actions to recover personal property. Defendant is permitted to present evidence of the right to possession and ownership of personal property merely by denying the plaintiff's assertion of ownership. See *Summerville v Stockton Milling Co.* (1904) 142 C 529, 548, 76 P 243.

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§25.61 16. Excuse for Nonperformance

In response to a claim of breach of contract, a defendant may assert some excuse for failing to perform that contract. To do so, the excuse must be pleaded specifically as an affirmative defense, and may include, *e.g.,* an assertion of the plaintiff's breach or anticipatory breach, the failure of consideration to the defendant, or the impossibility of performance or of tender of performance. See *Eucalyptus Growers Ass'n v Orange County Nursery & Land Co.* (1917) 174 C 330, 335, 163 P 45; *Alvernaz v H.P. Garin Co.* (1932) 127 CA 681, 688, 16 P2d 683; *Riegel v Wollenshlager* (1920) 49 CA 300, 193 P 160.

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§25.62 17. Discharge of Liability: Release, Novation, and Accord and Satisfaction

As with excuses for nonperformance, a defendant who wishes to present facts to show discharge from liability through the execution of a release, novation of original contract, or accord and satisfaction (*e.g.,* through bankruptcy, arbitration, or the occurrence of a condition subsequent) must plead the ultimate facts specifically as an affirmative defense. It is not sufficient to rely on a mere denial of the plaintiff's allegations. See, *e.g., Alexander v Angel* (1951) 37 C2d 856, 860, 236 P2d 561 (novation); *Landis v Morrissey* (1886) 69 C 83, 86, 10 P 258 (release); *Owens v Noble* (1946) 77 CA2d 209, 215, 175 P2d 241 (accord and satisfaction); *Stanton v Santa Ana Sugar Co.* (1927) 84 CA 206, 257 P 907 (mutual rescission). See also 2 Witkin, Summary of California Law, *Insurance* §§118, 119, 121 (10th ed 2005).

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§25.63 18. Exclusive Remedy in Alternative Forum

If a defendant objects that the plaintiff's exclusive remedy lies in another forum, this is an affirmative defense to be specially pleaded. See, *e.g.,* the claim that workers' compensation must be administratively determined. *Iverson v Atlas Pac. Eng'g* (1983) 143 CA3d 219, 224, 191 CR 696.

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§25.64 19. Public Entity and Employee Defenses

Public agencies and public employees are given particular immunities under the California Tort Claims Act; these must be pleaded as affirmative defenses, including sufficient ultimate facts so that it is apparent the case falls within the statute. See generally California Government Tort Liability Practice §§10.3-10.5 (4th ed Cal CEB 1999).

This affirmative defense may allege such facts as that employees were performing duties within their lawful responsibilities and were therefore immune from suit (*Davis v Cordova Recreation & Park Dist.* (1972) 24 CA3d 789, 794, 101 CR 358), or that compliance with an administrative claims-presentation procedure, a condition precedent to the action, has not been accomplished by the plaintiff. See Govt C §945.4; *Dujardin v Ventura County Gen. Hosp.* (1977) 69 CA3d 350, 355, 138 CR 20.

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VI. FILING AND SERVICE

§25.65 A. Time for Filing

Normally, a defendant must file an answer to a complaint within 30 days after service of summons, unless the defendant obtains an extension of time to answer or files an alternative responsive pleading or motion. See CCP §412.20, which provides that a summons in a civil action must contain a direction that the defendant file with the court a written pleading in response to the complaint within 30 days. The 30-day period begins on the date that service on the defendant becomes effective; the effective date depends on the method of service used. For example, personal service is effective on receipt by the defendant. For methods of service, see chap 17.

The same basic rules apply to the service of answers to amended complaints (CCP §§471.5, 586) and answers to cross-complaints (CCP §432.10), which also provide for a 30-day period to respond following service. When an amended complaint is served by mail, CCP §1013(a) extends the time within which to answer. *Baker v Anderson* (1981) 119 CA3d 1000, 174 CR 307. The *Baker* court also held that if service of an amended complaint precedes its filing, the effective date of service is the date of filing.

WARNING: The general rules may be superseded in particular circumstances by statute or case law. For example, specific statutes provide other times for the filing of answers in special proceedings. See, *e.g.,* CCP §1167 (5-day answering period in unlawful detainer actions).

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§25.66 1. Filing After Ruling on Demurrer

A demurrer and an answer may be filed concurrently (CCP §430.30(c)), or a demurrer may precede the answer. If a demurrer filed first is directed to fewer than every cause of action of the complaint, the defendant is relieved from the obligation to answer to the remaining causes of action, pending ruling on the demurrer. See §25.36.

When overruling a demurrer, the court usually specifies a time within which an answer must be filed. If the court does not so specify a time to answer, 10 days is deemed to have been granted. Cal Rules of Ct 3.1320(g). However, in unlawful or forcible detainer actions and forcible entry actions, only 5 days is deemed to have been granted after a decision on a demurrer. Cal Rules of Ct 3.1320(g). The period for answering after a demurrer has been decided runs from the date of the service of notice of the court's decision or order, unless that notice has been waived by the defendant in open court and the waiver has been entered by the clerk on the court's minutes. CCP §472b. If an order sustaining a demurrer without leave to amend is reversed or remanded by a reviewing court, any amended complaint must be filed within 30 days after the clerk of the reviewing court mails notice of the remittitur. CCP §472b. On demurrers generally, see chap 23.

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§25.67 2. Filing After Other Motions Challenging Action Heard

Other alternatives to the filing of a demurrer or answer in response to a complaint include the filing of a motion to quash summons (see chap 19), a motion to strike (see chap 24), a petition to remove the action to federal court (see chap 22), a motion to dismiss for failure to serve within three years (CCP §472a(e)) (see chap 39), a motion for change of venue, and a motion to have the case designated a limited (or unlimited) civil case (see chap 6). Some of these motions must be filed prior to the time for filing an answer, or the right to file them is waived. See, *e.g.,* CCP §418.10 (motion to quash service of summons or to dismiss action for inconvenient forum).

When a defendant has improperly removed a case to federal court without filing a response in the original court and the case is remanded, the defendant has 30 days from the date the original court receives the case on remand to respond. CCP §430.90. See §22.96 for discussion of time to respond after remand from federal court.

If a complaint is based on a contract providing for arbitration of disputes, the defendant may elect to file a petition to compel arbitration in lieu of an answer. CCP §1281.7. When the petition is granted, the action will be stayed and the dispute will proceed to arbitration. If the petition is denied, the defendant is automatically granted 15 days after the denial to respond to the complaint. CCP §1281.7. See chap 45 for discussion of alternative dispute resolution.

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§25.68 B. Extending Time by Stipulation or Order

The time to respond to a complaint may be extended by agreement of the parties or formal written stipulation or by court order. See form of stipulation in §25.81. Attorneys should note that many courts have adopted delay reduction rules implementing the Trial Court Delay Reduction Act (Govt C §§68600-68620) that limit the amount of time to which parties can stipulate. See, *e.g.,* Govt C §68616(b) (local rules can limit extensions by stipulation to no fewer than 15 days). See also CCP §1054. See generally 4 Witkin, California Procedure, *Pleading* §§10-12 (5th ed 2008). For discussion of fast-track rules, see chap 40.

The parties may stipulate without leave of court to one 15-day extension beyond the 30-day time period prescribed for the response after service of the initial complaint. Cal Rules of Ct 3.110(d) (not applicable to unlawful detainer, family law proceedings, or proceedings with different service requirements prescribed by law). The court, on its own motion or on the application of a party, may extend or otherwise modify the time provided in Cal Rules of Ct 3.110(b)-(d) (service of complaint, cross-complaint, or stipulation for extension of time for response). An application for a court order extending the time to serve a pleading must be filed before the time for service has elapsed. The application must be accompanied by a declaration showing why service has not been effected, documenting the efforts that have been made to effect service, and specifying the date by which service is proposed to be effected. Cal Rules of Ct 3.110(e).

A party may also apply for an extension of time to answer a complaint by means of a written ex parte application. If the opposing party does not consent to the extension, the court may grant an extension of no more than 30 days; with the opposing party's consent the court may grant a longer extension. CCP §1054. Note, however, that many courts have adopted local fast-track rules that limit the length or number of extensions available by any means. See form of ex parte application to extend time within which to respond to complaint in §25.82. On ex parte motions generally, see chap 13.

Failure to file a timely answer or other responsive pleading (*e.g.,* a demurrer) permits a plaintiff to apply for entry of judgment by default. CCP §§585-587. If a responsive pleading is not served within the time limits specified in this rule and no extension has been granted, the plaintiff, within 10 days after the time for service has elapsed, must file a request for entry of default. Failure to timely file the request for the entry of default may result in an Order to Show Cause being issued as to why sanctions should not be imposed. Cal Rules of Ct 3.110(g). When a default is entered, the party who requested the entry of default must obtain a default judgment against the defaulting party within 45 days after entry of default, unless the court has granted an extension of time. Failure to obtain entry of judgment against a defaulting party or to request an extension to apply for a default judgment may result in an OSC being issued as to why sanctions should not be imposed. Cal Rules of Ct 3.110(h). When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less that 5 calendar days before the hearing. Cal Rules of Ct 3.110(i).

A defendant against whom a default judgment is taken may apply to the court for relief from that default judgment if it was taken due to the defendant's mistake, inadvertence, surprise, or excusable neglect. CCP §473(b). An application for relief from default judgment must be made within a reasonable time, in no event more than 6 months after the judgment, and must be accompanied by a copy of the proposed answer the defendant will file if relieved from default. On default generally, see chap 38.

The defendant may also apply for a court order to file an answer after expiration of the time for filing a response stated in the summons. CCP §473. The court has power to grant a plaintiff's motion to strike a tardy answer, but usually will not do so without a showing of significant prejudice to the plaintiff due to the defendant's late filing. For further discussion, see 4 Witkin, Procedure, *Pleading* §§10-12.

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§25.69 C. Manner of Service

Under CCP §465, an answer is a pleading "subsequent to the complaint," and must be filed with the court in which the complaint was filed.

An answer is usually filed with an attached proof of service form. A copy of the answer must be served on the plaintiff or the plaintiff's attorney. CCP §465. An answer may be served personally or by mail on the plaintiff's attorney, or on a plaintiff who has no attorney. CCP §§1010-1013a. On procedures for service, see chap 18.

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VII. AMENDED AND SUPPLEMENTAL ANSWERS

§25.70 A. Amendment

An answer that has been filed can be amended to correct formal or substantive defects. For example, the defense attorney may notice that there is an incorrect or missing signature or verification, or that a valid defense was overlooked or defectively pleaded, or that the answer failed to deny allegations that should have been put in issue. Plaintiff's filing of an amended complaint, a demurrer to the answer or a motion for summary judgment may also provide an occasion for the defendant to amend. An answer may also be amended on the basis of facts that occurred before the answer was filed but were not known until afterwards. Barring a showing of prejudice, amendment of answers is liberally allowed so that a defendant may freely assert all available defenses. *Ramos v Santa Clara* (1973) 35 CA3d 93, 110 CR 485.

The methods of amending an answer include filing and serving an amended answer, or an amendment to the answer, with or without leave of court or notice to the parties. An answer may also be amended, expressly or in effect, by a pretrial order. See CCP §576. An answer is amended in effect when a trial judge grants summary judgment on the defendant's motion on the basis of defenses that were not stated in the answer. See *Ramos v Santa Clara, supra*. On filing a supplemental answer, see §25.79.

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§25.71 1. Amended Answer

An amended answer is a new pleading, complete in itself. When served and filed, it supersedes the original answer and any preceding amended answer. See *Cohen v Superior Court* (1966) 244 CA2d 650, 657, 53 CR 378.

The format for an amended answer is the same as for the original answer, except that the document is titled, *e.g.,* "Amended Answer, Second Amended Answer." The body of an amended answer should contain all the denials, objections, and defenses that the defendant wishes to plead. Denials and other matter in previous answers that are not repeated in an amended answer will normally be considered abandoned if not repeated in the amended answer. If the original answer was or should have been verified, the amended answer should carry its own verification. For further discussion applicable to amended pleadings, see chap 16 (amending complaints).

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§25.72 2. Amendment to Answer

An amendment to an answer is an addition to or change in an answer that is pending in the action. See *Cohen v Superior Court* (1966) 244 CA2d 650, 657, 53 CR 378. A paper titled "Amendment to Answer," listing the additions, deletions, and changes to be made, is not really a separate pleading, but must be read in conjunction with the answer it amends. See form in §25.85. See applicable discussion in chap 16 (amendment to complaint).

The amendment must be signed, and, if the answer was verified, the amendment should also be verified, preferably by the same persons who signed and verified the answer.

PRACTICE TIP: Amendment is particularly useful for correcting an admission made either expressly or inadvertently in the answer. To invalidate an admission, the defendant may file an amendment to the answer either "of course" (see §25.73) or by leave of court after a noticed motion (see §25.77); admissions that have been corrected by amendment are no longer binding. Note that no admission is found from the pleading of inconsistent defenses. See §25.33.

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B. Procedures for Amendment

§25.73 1. Amendment "Of Course"

An answer may be amended once by a party "of course" (*i.e.,* without court permission, notice to other parties, or costs) within the time for demurrer to an answer (*i.e.,* 10 days under CCP §430.40(b)), or after a demurrer has been filed but before the hearing on that demurrer. CCP §472. See *Tingley v Times Mirror Co.* (1907) 151 C 1, 10, 89 P 1097; 5 Witkin, California Procedure, *Pleading* §1193 (5th ed 2008).

Amendment of course is accomplished by filing either an amendment to the answer (see §25.72) or a complete amended answer (see §25.71) and serving a copy of that paper on the plaintiff's attorney or directly on an unrepresented plaintiff. CCP §472. Plaintiff has 10 days after service of an amendment or amended answer, or such other time as the court may direct, in which to demur to the answer as amended. CCP §471.5(b).

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§25.74 2. Correcting Mistakes

The court may allow a party, in furtherance of justice and on such terms as may be proper, to amend a pleading by correcting a mistake in the name of a party, or a mistake in any other respect. See CCP §§473, 576.

Such an order may be approved without a noticed hearing. For procedures and forms that can be adapted, see chap 16 (amending complaints). On procedures for ex parte motions generally, see chap 13. See also 5 Witkin, California Procedure, *Pleading* §§1242-1245 (5th ed 2008).

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§25.75 3. After Demurrer Sustained

After a demurrer to an answer has been sustained with leave to amend, the defendant may file an amended answer or amendment to the answer without further motion. See §§25.70-25.78. The time within which the amendment must be filed is usually specified in the order sustaining the demurrer. See CCP §472a. If no time has been given in the order, the defendant will be deemed to have been granted 10 days within which to amend (Cal Rules of Ct 3.1320(g)), beginning on the day notice of the ruling was served or waived (CCP §472b).

The amended answer, once filed, may be challenged by a further demurrer or motion. See *People v Clausen* (1967) 248 CA2d 770, 785, 57 CR 227.

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§25.76 4. Oral Motion to Amend

When all parties are before the court, even at trial, the court may order an answer amended at the defendant's oral request. See applicable discussion in chap 16 (amendment of complaint on oral motion). Amendment at trial is not "of course" (see §25.73), and leave of court is required. See *Bank of Am. Nat'l Trust & Sav. Ass'n v Goldstein* (1938) 25 CA2d 37, 45, 76 P2d 545.

WARNING: This manner of amending an answer is wholly at the court's discretion, and is therefore a somewhat risky procedure for the defendant to rely on unless the mistake is trivial or no party will object to the amendment.

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§25.77 5. On Noticed Motion With Leave of Court

When it has become too late to amend "of course" (see §25.73), a defendant can apply to the court on noticed motion for leave to amend the answer on such terms as may be just. See CCP §473. The original signed proposed amendment or amended answer should be attached to the moving papers, serially numbered to differentiate it from previous pleadings or amendments (Cal Rules of Ct 3.1324(a)). The required contents of the motion are in Cal Rules of Ct 3.1324. Also accompanying the noticed motion should be a memorandum in support of the motion, appropriate declarations (Cal Rules of Ct 3.1324(b)), and a proposed order for the judge to sign. Cal Rules of Ct 3.1112(a). The formal requirements are substantially the same for either an amendment to the answer or an amended answer. See forms in §§25.86-25.89. For discussion of similar procedures for amending a complaint on noticed motion, see chap 16.

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§25.78 6. By Stipulation of Parties

A written stipulation between the affected parties seeking leave of court for the filing of an amendment to the answer, an amended answer, or a supplemental answer may be filed in lieu of noticed motion. For applicable discussion, see chap 16 (granting leave to file amended complaint on written stipulation).

NOTE: In counties with delay reduction programs speeding up civil litigation at the trial court level, the court may be reluctant to grant leave to amend, even on the parties' written stipulation, and presumably will grant leave only for good cause. Counsel must therefore be quite careful in drafting the original answer. When an amendment to an answer is necessary, it should be sought as quickly as possible. For discussion of the Trial Court Delay Reduction Act (Govt C §§68600-68620) generally, see chap 40.

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§25.79 C. Supplemental Answer

A supplemental answer contains denials and defenses based on facts that occurred after the original answer was filed. CCP §464. A supplemental answer does not supersede the original answer but, like an amendment to an answer, adds new matter to be considered in conjunction with the original answer. See 5 Witkin, California Procedure, *Pleading* §1254 (5th ed 2008).

The accepted procedure is for the defendant to proceed by noticed motion to obtain the court's permission to file a supplemental answer. See CCP §464. See Note in §25.77 (noticed motion with leave of court. Forms of noticed motion seeking leave of court that can be adapted appear in §§25.86-25.89. On stipulation to file supplemental answer, see discussion in §25.78 (stipulation of parties).

A supplemental answer should be captioned as was the original answer (see form in §25.10), and the nature of the paper should be given as "Supplemental Answer of Defendant _ _[*name*]_ _ to Plaintiff's Complaint." It is advisable for the supplemental answer to include an opening paragraph such as the following:

Severing herself from all other defendants and for herself alone, defendant _ _[*name*]_ _ hereby files a supplement to her answer filed _ _[*date*]_ _ to plaintiff's complaint, based on facts that have occurred subsequent to the filing of the original answer:

If possible, the supplemental answer should be signed by the same person who signed the original answer, and it should be verified or not (see §25.17) as was the original answer, again by the same person if possible. A supplemental answer must be filed and served on all parties or their attorneys of record. CCP §465.

PRACTICE TIP: In preparing a supplemental answer, the attorney should pay particular attention to the impact of new facts on the former answer. A supplemental answer does not replace the original answer. That is the purpose of an amended answer. Under some circumstances, it may be appropriate to seek leave to file both an amendment to an answer, making certain corrections in the original answer, as well as a supplemental answer.

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§25.80 VIII. DIAGNOSTIC QUESTIONS

Before drafting an answer, counsel should carefully review the complaint (or cross-complaint) and any other available documents, arrange a meeting with the client or clients, and consider the following questions:

1. **How many and which defendants do you represent? If more than one defendant, review possible conflicts of interest.**
2. **Have appropriate fee arrangement and engagement letters been executed with each defendant?**
3. **When was the complaint served on each defendant?**
4. **Was service effective?**
5. **When is a responsive pleading due for each defendant?**
6. **Is an extension of time required?**
7. **Has a stipulation and order for extension of time to respond been executed and filed?**
8. **Does the complaint give rise to any alternative responses, such as any of the following?**
    - Motion to quash service for invalid service or lack of personal jurisdiction
    - Demurrer—for defects on the face of the complaint
    - Motion to strike
    - Cross-complaint for affirmative relief
9. **Is the complaint verified?**
10. **Is it appropriate to use a general denial?**
11. **Is it appropriate to use specific denials?**
12. **What denials must be made on information and belief or on lack of information and belief? Plan efforts to obtain constructive knowledge from public records and other documents known to defendants.**
13. **What affirmative defenses should be pleaded?**

On attorney-client representation agreements, including becoming attorney of record, see chap 3. For discussion of types of denials, see §§25.23-25.29. On affirmative defenses, see §§25.30-25.64.

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Source: Civil Litigation/California Civil Procedure Before Trial/25 Answers/ IX. FORMS/§25.81 A. Form: Stipulation Extending Time to Respond to Complaint; Order

IX. FORMS

§25.81 A. Form: Stipulation Extending Time to Respond to Complaint; Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	
	)	**STIPULATION EXTENDING**
vs	)	**TIME TO RESPOND; ORDER**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	

Plaintiff, _ _[*name*]_ _**, and defendant,** _ _[*name*]_ _**, acting through their counsel of record, stipulate that defendant will have until** _ _[*date*]_ _**, to answer** _ _[*or otherwise plead*]_ _ **in response to the complaint of plaintiff in this action.**

Court's approval of this extension of time is requested because _ _[*specify reasons*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of plaintiff's attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature of defendant's attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

ORDER

Good cause appearing,

IT IS ORDERED that defendant have until _ _[*date*]_ _**, to answer** _ _[*or otherwise plead*]_ _ **in response to the complaint of plaintiff in this action.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (after attorneys have signed, present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: Some courts have implemented local rules limiting counsel's ability to stipulate to extensions of time without court order. For discussion of judicial case management under the Trial Court Delay Reduction Act (Govt C §§68600-68620), see chap 40. For discussion of extending time to answer, see §25.68.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§25.82 B. Form: Ex Parte Application for Extension of Time to Respond to Complaint; Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**APPLICATION FOR**
vs	)	**EXTENSION OF TIME TO**
	)	**ANSWER; ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

Defendant, _ _[*name*]_ _**, applies under Code of Civil Procedure §1054 for an order extending time to answer** _ _[*or otherwise plead*]_ _ **in response to the complaint of plaintiff,** _ _[*name*]_ _**, in this action until** _ _[*date*]_ _**. This action is for** _ _[*briefly state nature of action*]_ _**.**

The following extensions have previously been granted by stipulation of counsel, _ _ **days; by the Court,** _ _ **days.**

The reasons for requesting this extension are: _ _[*State reasons*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of defendant's attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

ORDER

Good cause appearing,

IT IS ORDERED that defendant have until _ _[*date*]_ _**, to answer** _ _[*or otherwise plead*]_ _ **in response to the complaint of plaintiff in this action.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of extending time to answer, see §25.68.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134, and the discussion in §11.27.

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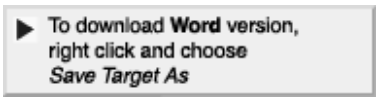
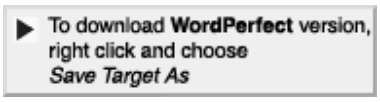
§25.83 C. Form: Unverified Answer





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ANSWER TO COMPLAINT**
vs	)	[*In limited civil case, add:*
	)	**Amount demanded**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*exceeds/does not exceed*]_ _ **$10,000**]
_____	)	

1. Defendant, _ _[*name*]_ _, answers the complaint of plaintiff, _ _[*name*]_ _, in this action as follows:

2. Defendant, _ _[*name*]_ _, generally denies each and every allegation in plaintiff's complaint.

3. Defendant, _ _[*name*]_ _, states the following as separate affirmative defenses to plaintiff's complaint:

FIRST AFFIRMATIVE DEFENSE
Other Action Pending

4. This action is barred in its entirety by a prior action pending before this Court which involves the same transactions, issues, parties, and property that are the subject of the complaint. The other action is presently pending in this _ _ _ _ _ _ branch, Case No. _ _ _ _ _ _, filed by plaintiff against defendant. Both parties to this complaint have appeared in the other action. Defendant requests that the Court take judicial notice of the other action under Evidence Code §452. A copy of the complaint in that action, filed _ _[*date*]_ _, is attached as Exhibit A.

SECOND AFFIRMATIVE DEFENSE
Lack of Standing

5. The entire complaint is barred by the fact that plaintiff lacks standing to bring an action. Plaintiff is not a party to the transaction and is not connected to the transaction. Defendant owes no duty to respond to plaintiff's allegations regarding the transaction.

THIRD AFFIRMATIVE DEFENSE
Failure To State Cause of Action

6. The entire complaint is barred by plaintiff's failure to state a cause of action against defendant.

FOURTH AFFIRMATIVE DEFENSE
Laches

7. The complaint is barred in whole or in part by laches.

FIFTH AFFIRMATIVE DEFENSE
Unclean Hands

8. The complaint is barred in whole or in part by plaintiff's unclean hands.

SIXTH AFFIRMATIVE DEFENSE
Equitable Estoppel

9. The entire complaint is barred by plaintiff's role in the transactions that are the subject of the other action pending, the complaint in which is attached as Exhibit A.

SEVENTH AFFIRMATIVE DEFENSE
Indemnity

10. If any liability exists on the part of defendant to plaintiff, such liability is to be completely indemnified by _ _[*name*]_ _.

EIGHTH AFFIRMATIVE DEFENSE
Setoff

11. Any amount sought to be recovered in this action is barred in whole or in part by the amount owing from plaintiff to defendant.

WHEREFORE, defendant requests judgment as follows:

1. That plaintiff take nothing by the complaint, which will be dismissed with prejudice.

2. That defendant recover from plaintiff costs in the amount of $_ _ _ _ _ _.

3. That the Court order further reasonable relief.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of affirmative defenses pleaded in answers to complaint, see §§25.30-25.64.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§25.83A D. Form: Verified Answer

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ANSWER TO VERIFIED**
vs	)	**COMPLAINT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	[*In limited civil case, add:* **Amount demanded**
	)	_ _[*exceeds/does not*
_____	)	*exceed*]_ _ **$10,000**]

Defendant, _ _[*name*]_ _, answers the complaint of plaintiff, _ _[*name*]_ _, in this action as follows:

RESPONSE TO PRELIMINARY ALLEGATIONS

1. Answering paragraph 1, defendant is without sufficient information or belief to admit or deny the allegations in this paragraph. Based on this lack of information or belief, defendant denies the allegations.

2. Answering paragraph 2, defendant admits that he is an individual residing in _ _ _ _ _ _ _ _ County, California. Defendant denies the remaining allegations in this paragraph.

3. Answering paragraph 3, defendant admits _ _[*specify*]_ _. Defendant denies the remaining allegations in this paragraph.

4. Answering paragraph 4, defendant admits that plaintiff is an individual. Defendant is without sufficient information or belief to admit or deny the remaining allegations in this paragraph. Based on this lack of information or belief, defendant denies the remaining allegations.

5. Answering paragraph 5, defendant denies the allegations in this paragraph.

RESPONSE TO FIRST CAUSE OF ACTION

6. Answering paragraph 6, defendant realleges and incorporates by reference the admissions, allegations, and denials in paragraphs 1 through 5 of this answer.

7. Answering paragraph 7, defendant denies the allegations in this paragraph.

8. Answering paragraph 8, defendant denies the allegations in this paragraph.

9. Answering paragraph 9, defendant admits _ _[*specify*]_ _. Defendant denies the remaining allegations in this paragraph.

RESPONSE TO SECOND CAUSE OF ACTION

10. Answering paragraph 10, defendant realleges and incorporates by reference the admissions, allegations, and denials in paragraphs 1 through 9 of this answer.

11. Answering paragraph 11, defendant is without sufficient information or belief to admit or deny the allegations in this paragraph. Based on this lack of information or belief, defendant denies the allegations.

12. Answering paragraph 12, defendant denies the allegations in this paragraph.

FIRST AFFIRMATIVE DEFENSE
Other Action Pending

13. This action is barred by a prior action pending before this Court which involves the same transactions, issues, parties, and property that are the subject of the complaint. The other action is presently pending in this _ _ _ _ _ _ branch, Case No. _ _ _ _ _ _, filed by plaintiff against defendant. Both parties to this complaint have appeared in the other action. Defendant requests that the Court take judicial notice of the other action under Evidence Code §452. A copy of the complaint in that action, filed _ _[*date*]_ _, is attached as Exhibit A.

SECOND AFFIRMATIVE DEFENSE
Lack of Standing

14. This complaint is barred by the fact that plaintiff lacks standing to bring an action. Plaintiff is not a party to the transaction and is not connected to the transaction. Defendant owes no duty to respond to plaintiff's allegations regarding the transaction.

THIRD AFFIRMATIVE DEFENSE
Fails To State Cause of Action

15. The complaint is barred by plaintiff's failure to state a cause of action against defendant.

FOURTH AFFIRMATIVE DEFENSE
Laches

16. The complaint is barred in whole or in part by laches.

FIFTH AFFIRMATIVE DEFENSE
Unclean Hands

17. The complaint is barred in whole or in part by plaintiff's unclean hands.

SIXTH AFFIRMATIVE DEFENSE
Equitable Estoppel

18. The complaint is totally barred by plaintiff's role in the transactions that are the subject of the other action pending, the complaint in which is attached as Exhibit A.

SEVENTH AFFIRMATIVE DEFENSE
Indemnity

19. If any liability exists on the part of defendant to plaintiff, such liability is to be completely indemnified by _ _[*name*]_ _.

EIGHTH AFFIRMATIVE DEFENSE
Setoff

20. Any amount sought to be recovered in this action is barred in whole or in part by the amount owing from plaintiff to defendant.

WHEREFORE, defendant requests judgment as follows:

1. That plaintiff take nothing by the complaint, which will be dismissed with prejudice.

2. That defendant recover from plaintiff costs in the amount of $_ _ _ _ _ _.

3. That the Court order further reasonable relief.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of affirmative defenses pleaded in answers to complaint, see §§25.30-25.64.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§25.84 E. Form: Verification of Answer

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

VERIFICATION

I am a defendant in this action. I have read the foregoing answer to the complaint. The matters stated in the answer are true of my own knowledge except those matters stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: If the complaint is verified, the defendant must file a verified answer. See §25.17. The verification may immediately follow the attorney's signature at the end of the document or appear on a separate page attached as the final page of the verified answer. On effect of failure to verify answer when required, see §25.9.

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§25.85 F. Form: Amendment to Answer

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**AMENDMENT TO ANSWER**
vs	)	**TO COMPLAINT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	

Defendant, _ _[*name*]_ _, amends the answer filed _ _[*date*]_ _, to the complaint of plaintiff, _ _[*name*]_ _, in this action as follows:

1. The answer to paragraph 2 of plaintiff's first cause of action should be deleted and replaced with "Answering paragraph 2, defendant admits the allegations of the first sentence of this paragraph and denies the remaining allegations."

2. The answer to paragraph 4 of plaintiff's first cause of action should be amended to substitute the name "Johnson" for "John."

3. The answer to paragraph 5 of plaintiff's second cause of action should be amended to substitute "three times" for "two times."

4. The denials answering paragraph 3 of plaintiff's fifth cause of action should be deleted and replaced with "Answering paragraph 3, defendant admits the allegations in the first sentence of this paragraph and denies the remaining allegations."

5. The following paragraph should be added:

FIFTH AFFIRMATIVE DEFENSE
Unclean Hands

16. Plaintiff's claims for relief are barred by plaintiff's unclean hands.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On amended and supplemental answers, see §§25.70-25.79.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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G. Motion to File Amended Answer

§25.86 1. Form: Notice of Motion

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AMENDED ANSWER;** _ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court for an order granting leave to file an amended answer in this action under Code of Civil Procedure §473 on the ground that information was discovered after filing of the original answer in this action and, thus, amendment should be allowed in furtherance of justice.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _, _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each party); ___ office copies.

Comment: For discussion of noticed motion for leave to file amended answer, see §25.77 and Cal Rules of Ct 3.1324.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§25.87 2. Form: Memorandum in Support of Motion

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**MEMORANDUM SUPPORTING**
vs	)	_ _[*NAME*]_ _**'S MOTION FOR**
	)	**LEAVE TO FILE AMENDED**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**ANSWER**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

FACTS: In the original answer filed in this action, the name "John" improperly designates the principal agent of plaintiff, _ _[*name*]_ _, whose legal name has subsequently been discovered to be "Johnson." Facts occurring before defendant, _ _[*name*]_ _, filed its answer to the complaint, but discovered by defendant only after filing the answer, indicate that an affirmative defense of unclean hands should be asserted in this action.

I. ANY PLEADING MAY BE AMENDED IN FURTHERANCE OF JUSTICE.

Code of Civil Procedure §473 provides: "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding ... the name of any party.... The court may likewise, in its discretion, after notice to the adverse party, allow ... an amendment to any pleading."

At this early stage of the proceedings, it is appropriate to permit all claims and defenses to be asserted for the furtherance of justice. No prejudice will be incurred by plaintiff as a result of this addition to the answer.

II. CONCLUSION.

For the foregoing reasons, defendant is entitled to an order granting leave to file an amended answer in this action.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each party); ___ office copies.

Comment: California Rules of Court 3.1324 requires a declaration to be attached that states the effect of the amendment, why the amendment is proper, when facts giving rise to the amended allegations were discovered; and the reasons the request for amendment was not made earlier. See §§25.77, 25.88. On formal requirements for supporting memorandum, see §§12.30-12.42.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading

paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§25.88 3. Form: Declaration

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _, **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**LEAVE TO FILE AMENDED**
	)	**ANSWER**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am an attorney duly licensed to practice law before this Court and appear for defendant, _ _[*name*]_ _**, in this action.**

2. The following information is true and correct of my personal knowledge and, if called to do so, I could and would testify competently to it.

3. Attached is a copy of defendant's amended answer.

4. The effect of the amendment is _ _[*specify*]_ _**.**

5. The amendment is necessary and proper because _ _[*specify*]_ _**.**

6. Facts giving rise to the amended allegations were discovered on _ _[*date*]_ _**.**

7. The request for amendment was not made earlier because _ _[*specify*]_ _**.**

8. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each party); ___ office copies.

Comment: California Rules of Court 3.1324 requires a declaration to be attached that states the effect of the amendment, why the amendment is proper, when facts giving rise to the amended allegations were discovered; and the reasons the request for amendment was not made earlier. See §25.77. On formal requirements for declarations

filed in support of noticed motions, see §§12.43-12.53.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§25.89 4. Form: Order

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER FOR LEAVE TO FILE**
vs	)	**AMENDED ANSWER**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for leave to file an amended answer to the complaint of plaintiff, _ _[*name*]_ _, in this action was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Good cause appearing,

IT IS ORDERED that defendant be granted leave to file an amended answer in the form attached to the notice of motion submitted to this Court on _ _[*date*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of court orders that may be proposed and submitted to the court with the party's moving papers, see §§12.106-12.107.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.11-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/25 Answers/ H. Judicial Council Forms/§25.90 1. Form: General Denial (Judicial Council Form PLD-050)

H. Judicial Council Forms

§25.90 1. Form: General Denial (Judicial Council Form PLD-050)

PLD-050

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
GENERAL DENIAL	CASE NUMBER::

If you want to file a general denial, you MUST use this form if the amount asked for in the complaint or the value of the property involved is $1,000 or less.

You MAY use this form for a general denial if:

1. The complaint is not verified; ***or***
2. The complaint is verified and the case is a limited civil case (the amount in controversy is $25,000 or less), BUT NOT if the complaint involves a claim for more than $1,000 that has been assigned to a third party for collection.

(See Code of Civil Procedure sections 85–86, 90–100, 431.30, and 431.40.)

1. DEFENDANT (*name):*
   generally denies each and every allegation of plaintiff's complaint.
2. ☐ DEFENDANT states the following FACTS as separate affirmative defenses to plaintiff's complaint *(attach additional pages if necessary):*

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DEFENDANT OR ATTORNEY)

If you have a claim for damages or other relief against the plaintiff, the law may require you to state your claim in a special pleading called a cross-complaint or you may lose your right to bring the claim. (See Code of Civil Procedure sections 426.10–426.40.)

The original of this *General Denial* must be filed with the clerk of this court with proof that a copy was served on each plaintiff's attorney and on each plaintiff not represented by an attorney. There are two main ways to serve this *General Denial*: by personal delivery or by mail. It may be served by anyone at least 18 years of age EXCEPT you or any other party to this legal action. Be sure that whoever serves the *General Denial* fills out and signs a proof of service. You may use the applicable Judicial Council form (such as form POS-020, POS-030, or POS-040) for the proof of service.

Form Adopted for Mandatory Use
Judicial Council of California
PLD-050 [Rev. January 1, 2009]

GENERAL DENIAL

CEB

Code of Civil Procedure, §§ 431.30, 431.40
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: This form must be used if denying a complaint that demands $1000 or less. On using official forms, see §25.22.

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Source: Civil Litigation/California Civil Procedure Before Trial/25 Answers/§25.91 2. Form: Answer--Personal Injury, Property Damage, Wrongful Death (Judicial Council Form PLD-PI-003)

§25.91 2. Form: Answer—Personal Injury, Property Damage, Wrongful Death (Judicial Council Form PLD-PI-003)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(NAME AND ADDRESS)*: TELEPHONE NO.:	FOR COURT USE ONLY
ATTORNEY FOR *(NAME)*:	
Insert name of court, judicial district or branch court, if any, and post office and street address:	
PLAINTIFF:	
DEFENDANT:	
ANSWER—Personal Injury, Property Damage, Wrongful Death ☐ **COMPLAINT OF (name):** ☐ **CROSS-COMPLAINT OF *(name)*:**	CASE NUMBER:

1. This pleading, including attachments and exhibits, consists of the following number of pages: _____

DEFENDANT OR CROSS-DEFENDANT *(name)*:

2. ☐ Generally **denies** each allegation of the unverified complaint or cross-complaint.

3 a. ☐ DENIES each allegation of the following numbered paragraphs:

b. ☐ ADMITS each allegation of the following numbered paragraphs:

c. ☐ DENIES, ON INFORMATION AND BELIEF, each allegation of the following numbered paragraphs:

d. ☐ DENIES, BECAUSE OF LACK OF SUFFICIENT INFORMATION OR BELIEF TO ANSWER, each allegation of the following numbered paragraphs:

e. ☐ ADMITS the following allegations and generally denies all other allegations:

Form Approved for Optional Use
Judicial Council of California
PLD-PI-003 [Rev. January 1, 2007]

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Print

SHORT TITLE:	CASE NUMBER:

ANSWER—Personal Injury, Property Damage, Wrongful Death

f. ☐ DENIES the following allegations and admits all other allegations:

g. ☐ Other *(specify)*:

AFFIRMATIVELY ALLEGES AS A DEFENSE

4. ☐ The comparative fault of plaintiff or cross-complainant *(name)*:
as follows:

5. ☐ The expiration of the Statute of Limitations as follows:

6. ☐ Other *(specify)*:

7. DEFENDANT OR CROSS - DEFENDANT PRAYS
For costs of suit and that plaintiff or cross-complainant take nothing.
☐ Other *(specify)*:

(Type or print name) (Signature of party or attorney)

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §25.22.

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Source: Civil Litigation/California Civil Procedure Before Trial/25 Answers/§25.92 3. Form: Answer--Contract (Judicial Council Form PLD-C-010)

§25.92 3. Form: Answer—Contract (Judicial Council Form PLD-C-010)

Print

PLD-C-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS): TELEPHONE: ATTORNEY FOR (NAME):	FOR COURT USE ONLY:
Insert name of court, judicial district or branch court, if any, and post office and street address:	
PLAINTIFF:	
DEFENDANT:	
ANSWER—Contract ☐ **TO COMPLAINT OF (name):** ☐ **TO CROSS-COMPLAINT (name):**	CASE NUMBER:

1. This pleading, including attachments and exhibits, consists of the following number of pages: _____
2. DEFENDANT *(name):*
   answers the complaint or cross-complaint as follows:
3. Check ONLY ONE of the next two boxes:
   a. ☐ Defendant generally denies each statement of the complaint or cross-complaint. *(Do not check this box if the verified complaint or cross-complaint demands more than $1,000.)*
   b. ☐ Defendant admits that all of the statements of the complaint or cross-complaint are true EXCEPT:
      (1) Defendant claims the following statements are false *(use paragraph numbers or explain):*

☐ Continued on Attachment 3.b.(1).

(2) Defendant has no information or belief that the following statements are true, so defendant denies them (*use paragraph numbers or explain):*

☐ Continued on Attachment 3.b.(2).

If this form is used to answer a cross-complaint, plaintiff means cross-complainant and defendant means cross-defendant.

Form Approved for Optional Use
Judicial Council of California
PLD-C-010 [Rev. January 1, 2007]

ANSWER—Contract

CEB

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Print

PLD-C-010

SHORT TITLE:	CASE NUMBER:

ANSWER—Contract

4. ☐ AFFIRMATIVE DEFENSES Defendant alleges the following additional reasons that plaintiff is not entitled to recover anything:

☐ Continued on Attachment 4.

5. ☐ Other

6. DEFENDANT PRAYS
   a. that plaintiff take nothing.
   b. ☐ for costs of suit.
   c. ☐ other *(specify):*

.....
(Type or print name)

_____
(Signature of party or attorney)

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §25.22.

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Source: Civil Litigation/California Civil Procedure Before Trial/25 Answers/§25.93 4. Form: Answer--Unlawful Detainer (Judicial Council Form UD-105)

§25.93 4. Form: Answer—Unlawful Detainer (Judicial Council Form UD-105)

Print

UD-105

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO:	*FOR COURT USE ONLY*
ATTORNEY FOR *(Name)*:	
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	CASE NUMBER:
ANSWER—Unlawful Detainer	

1. Defendant *(names)*:

   answers the complaint as follows:

2. ***Check ONLY ONE of the next two boxes*:**
   a. ☐ Defendant generally denies each statement of the complaint. *(Do not check this box if the complaint demands more than $1,000.*
   b. ☐ Defendant admits that all of the statements of the complaint are true EXCEPT
      (1) Defendant claims the following statements of the complaint are false *(use paragraph numbers from the complaint or explain)*:

      ☐ Continued on Attachment 2b (1).
      (2) Defendant has no information or belief that the following statements of the complaint are true, so defendant denies them *(use paragraph numbers from the complaint or explain)*:

      ☐ Continued on Attachment 2b (2).

3. AFFIRMATIVE DEFENSES (***NOTE:** For each box checked, you must state brief facts to support it in the space provided at the top of page two (item 3j)).*
   a. ☐ *(nonpayment of rent only)* Plaintiff has breached the warranty to provide habitable premises.
   b. ☐ *(nonpayment of rent only)* Defendant made needed repairs and properly deducted the cost from the rent, and plaintiff did not give proper credit.
   c. ☐ *(nonpayment of rent only)* On *(date)*: before the notice to pay or quit expired, defendant offered the rent due but plaintiff would not accept it.
   d. ☐ Plaintiff waived, changed, or canceled the notice to quit.
   e. ☐ Plaintiff served defendant with the notice to quit or filed the complaint to retaliate against defendant.
   f. ☐ By serving defendant with the notice to quit or filing the complaint, plaintiff is arbitrarily discriminating against the defendant in violation of the Constitution or laws of the United States or California.
   g. ☐ Plaintiff's demand for possession violates the local rent control or eviction control ordinance of *(city or county, title of ordinance, and date of passage)*:

      (Also, briefly state the facts showing violation of the ordinance in item 3j.)
   h. ☐ Plaintiff accepted rent from defendant to cover a period of time after the date the notice to quit expired.
   i. ☐ Other affirmative defenses are stated in item 3j.

Form Approved by the Judicial Council of California
UD-105 [Rev. January 1,2007]

ANSWER—Unlawful Detainer

CEB

Civil Code, §1940 et seq.;
Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

Print

UD-105

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

3. AFFIRMATIVE DEFENSES (cont'd)
   j. Facts supporting affirmative defenses checked above *(identify each item separately by its letter from page one)*:

   (1) ☐ All the facts are stated in Attachment 3j. (2) ☐ Facts are continued in Attachment 3j.
4. OTHER STATEMENTS
   a. ☐ Defendant vacated the premises on *(date)*:
   b. ☐ The fair rental value of the premises alleged in the complaint is excessive *(explain)*:

   c. ☐ Other *(specify)*:

5. DEFENDANT REQUESTS
   a. that plaintiff take nothing requested in the complaint.
   b. costs incurred in this proceeding.
   c. ☐ reasonable attorney fees.
   d. ☐ that plaintiff be ordered to (1) make repairs and correct the conditions that constitute a breach of the warranty to provide habitable premises and (2) reduce the monthly rent to a reasonable rental value until the conditions are corrected.
   e. ☐ Other *(specify)*:

6. ☐ Number of pages attached *(specify)*:

UNLAWFUL DETAINER ASSISTANT (Business and Professions Code sections 6400- 6415)

7. *(Must be completed in all cases)* An **unlawful detainer assistant** ☐ did not ☐ did for compensation give advice or assistance with this form. *(If defendant has received **any** help or advice for pay from an unlawful detainer assistant, state:*
   a. Assistant's name: b. Telephone No.:
   c. Street address, city, and ZIP:

   d. County of registration: e. Registration no.: f. Expires on (date):

▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT OR ATTORNEY)

▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT OR ATTORNEY)

(Each defendant for whom this answer is filed must be named in item 1 and must sign this answer unless his or her attorney signs.)

VERIFICATION

(Use a different verification form if the verification is by an attorney or for a corporation or partnership.)

I am the defendant in this proceeding and have read this answer. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT)

Copies: Original (file with court clerk); ___ copies for service (one for each defendant to be served); ___ office copies.

Comment: On using official forms, see §25.22.

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26

Cross-Complaints

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I. INTRODUCTION

§26.1 A. Scope of Chapter

This chapter discusses the rules and tactical considerations that counsel who contemplate filing a cross-complaint should be familiar with and the procedures for preparing, filing, serving, and responding to a cross-complaint. It sets forth an overview (see §§26.3-26.6) and discusses compulsory and permissive cross-complaints (see §§26.7-26.21), restrictions on the use of cross-complaints (see §§26.22-26.24), tactical considerations (see §§26.25-26.29), and procedures (see §§26.30-26.55). It also contains diagnostic questions (see §26.56), a checklist (see §26.57), and forms (see §§26.58-26.62).

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§26.2 B. Governing Law

Cross-complaints are governed by CCP §422.10.

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II. OVERVIEW

§26.3 A. Nature and Function of Cross-Complaint

The cross-complaint is one of four pleadings permitted in a civil action. CCP §422.10. It is the only pleading other than the complaint that can demand affirmative relief. It is subject to the same format and content rules as the complaint. See CCP §§422.30, 425.10. See also §§26.30-26.43.

The cross-complaint is designed to discourage piecemeal disposition of legal grievances. It permits (and, in some cases, compels) a party named as a defendant or cross-defendant in a civil complaint or cross-complaint to assert, in the same lawsuit, claims for affirmative relief that the party has against a plaintiff or cross-complainant and, if there is subject-matter relationship, against a defendant, cross-defendant, or new party. On compulsory cross-complaints see CCP §§426.10-426.70 and §§26.7-26.15. On permissive cross-complaints, see CCP §427.10 and §§26.16-26.21.

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§26.4 1. Independent Cause of Action

The cause of action stated by the cross-complaint is independent of that pleaded in the complaint. The issues raised by the cross-complaint are "completely severable." Thus, an appellate court cannot review denial of leave to file a cross-complaint on an appeal from a summary judgment on the complaint. *Security Pac. Nat'l Bank v Adamo* (1983) 142 CA3d 492, 496, 191 CR 134. See *Shepard & Morgan v Lee & Daniel, Inc.* (1982) 31 C3d 256, 259, 182 CR 351, in which the court held that the defendant's and cross-complainant's response to the plaintiff's request for admissions was not binding against the defendant in its cross-claim for indemnity against a third party and could not support a motion for nonsuit by the third party on the cross-complaint.

An action (*i.e.,* a civil action or special proceeding; see CCP §581(a)(1)) cannot be dismissed at a plaintiff's request when a defendant has sought affirmative relief by cross-complaint. CCP §581(h). However, the complaint or any cause of action contained in it may be dismissed by the plaintiff without the defendant's consent. See CCP §581(c). If the complaint is so dismissed, the proceeding continues on the cross-complaint alone. Similarly, when there is an involuntary dismissal of the complaint, a cross-complainant's cause of action on the cross-complaint is unaffected. *Tomales Bay Oyster Corp. v Superior Court* (1950) 35 C2d 389, 393, 217 P2d 968. See 5 Witkin, California Procedure, *Pleading* §1159 (5th ed 2008). Because a cross-complaint creates an action distinct and independent from the initial pleading, a malicious prosecution action may be predicated on the filing of a groundless cross-complaint. *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 50, 118 CR 184.

The cross-complaint must be a separate document. CCP §428.40. This ensures that the cross-action is distinct from affirmative defenses raised by answer (*e.g.,* statute of limitations, statute of frauds) that attack the claim's validity but do not seek affirmative relief. The distinction is important because an adverse party must respond to a cross-complaint whereas an affirmative defense is deemed to be denied and no response is required. CCP §431.20. See generally 5 Witkin, Procedure, *Pleading* §1083.

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§26.5 2. Similarity to Complaint

The cross-complaint provisions in the Code of Civil Procedure were designed to establish consistency in treatment of complaints and cross-complaints. See 10 Cal L Rev'n Comm'n Reports 507, 522 (1971). Thus, in a number of statutes, "complaint" includes "cross-complaint," "plaintiff" includes "cross-complainant," and "defendant" includes "cross-defendant." In addition, the rules on format and content of pleadings demanding relief are the same for complaints and cross-complaints. CCP §425.10. See §§26.30-26.43. Uniform rules also apply to objections, denials, and defenses to the complaint or cross-complaint (CCP §§430.10-431.70; see §26.53), time to respond (CCP §432.10), motions to strike (CCP §435), summary judgments (CCP §437c), and joinder of parties (see, *e.g.,* CCP §389 on compulsory joinder and CCP §428.20 on permissive joinder).

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§26.6 B. Who May File

A cross-complaint may be filed by anyone against whom a complaint or cross-complaint has been filed. CCP §428.10.

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III. COMPULSORY AND PERMISSIVE CROSS-COMPLAINTS DISTINGUISHED

A. Compulsory Cross-Complaint

§26.7 1. Basic Rule: Related Cause of Action

Code of Civil Procedure §§426.10-426.70 govern compulsory cross-complaints. Except as otherwise provided by statute, if a party against whom a complaint or cross-complaint has been filed and served fails to allege in a cross-complaint any related cause of action which that party has against the plaintiff or cross-complainant at the time of service of its answer, the party may not thereafter assert the unpleaded related cause of action in another action against the plaintiff or cross-complainant. CCP §426.30(a). See *Russo v Scrambler Motorcycles* (1976) 56 CA3d 112, 117, 127 CR 913 (summary judgment, granted to defendants on ground that plaintiff's cause was barred because plaintiff failed to file cross-complaint in earlier action brought by defendants, was reversed; only related causes of action existing at time of service of answer to plaintiff's complaint affected by CCP §426.30). For exceptions to the above rule, see §§26.8-26.15. Leave of court is required to file the cross-complaint if it is not filed before or at the same time as the answer to the complaint or cross-complaint. CCP §§426.50, 428.50. See §26.48.

"Related cause of action" is defined as "a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." CCP §426.10(c). See Comment to CCP §426.10; *Align Tech., Inc. v Tran* (2009) 179 CA4th 949, 959, 102 CR3d 343 (upholds order sustaining demurrer of employee sued by former employer for breach of contract and patent conversion because employer's claims, which were logically related to cross-complaint brought by employee in previous suit, had not been raised at time of cross-complaint); *Currie Med. Specialties v Bowen* (1982) 136 CA3d 774, 186 CR 543. See also 5 Witkin, California Procedure, *Pleading* §1177 (5th ed 2008).

A tort defendant's cause of action for implied or equitable indemnity is separate and distinct from the plaintiff's tort action. Generally, for statute of limitations purposes, a cause of action for implied or equitable indemnity does not accrue until the tort defendant has suffered actual loss through payment. *Valley Circle Estates v VTN Consol.* (1983) 33 C3d 604, 611, 189 CR 871 (equitable indemnity); *E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 506, 146 CR 614 (implied indemnity). See *Christian v County of Los Angeles* (1986) 176 CA3d 466, 471, 222 CR 76 (partial or total equitable indemnity). But see Govt C §901 concerning claims against public entities, discussed in §26.27. See also CCP §337.15, discussed in §26.24. On accrual of cause of action based on express indemnity, see CC §2778. Thus, it has been held that a cause of action for implied indemnity among defendants does not constitute a compulsory cross-complaint in the underlying action because such a cause of action does not accrue until the indemnitee has suffered actual loss through payment. *E.L. White, Inc. v City of Huntington Beach, supra*.

The defendant's failure to allege such a cause of action by cross-complaint in the underlying action does not bar the defendant from thereafter proceeding with its indemnity claim in a separate and independent action. See *E.L. White, Inc. v City of Huntington Beach, supra*. See also *County of Riverside v Loma Linda Univ.* (1981) 118 CA3d 300, 315, 173 CR 371 (failure of defendant to file cross-complaint for comparative equitable indemnity in underlying action against unnamed concurrent tortfeasor held not to preclude defendant from thereafter maintaining indemnity claim in separate and independent action). Although not compulsory, a cross-complaint may nevertheless be filed by a tort defendant in the form of an action for declaratory relief alleging a cause of action for indemnity. See §26.27. On cross-complaints for indemnity, tactical considerations on filing them, and time limits to present written claims when a public entity is involved, see §26.27.

For discussion of indemnity generally (including express indemnity), see 5 Witkin, Summary of California Law, *Torts* §§112-123 (10th ed 2005). See also 5 Witkin, Procedure, *Pleading* §§925-926.

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§26.8 2. Exceptions

Code of Civil Procedure §§426.30(b), 426.40, and 426.60 provide exceptions to the compulsory cross-complaint requirement. When any of those exceptions (see §§26.9-26.15) apply, a cross-complaint need not be pleaded. These exceptions, however, will not prevent independent operation of the doctrines of res judicata or collateral estoppel. See Comment to CCP §426.60. On inapplicability of res judicata to small claims actions, see §6.22A.

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§26.9 a. No Personal Jurisdiction Over Defendant

A cross-complaint need not be pleaded by a party over whom the court in which the action is pending does not have jurisdiction to render a personal judgment. CCP §426.30(b). This situation arises when the court has obtained jurisdiction only over property owned by the defendant. See Comment to CCP §426.30. If the defendant elects to file a cross-complaint, however, the defendant is required to assert all related causes of action in the cross-complaint. Comment to CCP §426.30.

NOTE: A defendant who elects to file a cross-complaint becomes subject to the court's jurisdiction to render a personal judgment in that action. See generally Comment to CCP §410.10.

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§26.10 b. Nonappearing Defendant

A cross-complaint need not be pleaded by a defendant or cross-defendant who does not file an answer to the complaint or cross-complaint against him or her. CCP §426.30(b). (This situation may arise when the defendant or cross-defendant defaults or when the complaint or cross-complaint against him or her is dismissed after the court sustains a demurrer without leave to amend.)

PRACTICE TIP: A defendant or cross-defendant who elects not to file a cross-complaint should consider the effect of possible application of res judicata or collateral estoppel in any subsequent action. On res judicata and collateral estoppel generally, see 7 Witkin, California Procedure, *Judgment* §§334-482 (5th ed 2008).

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§26.11 c. Actions Not Maintainable

The following exceptions to the compulsory cross-complaint rule (see §26.7) for situations in which the cross-claim cannot be maintained are contained in CCP §426.40(a)-(b):

- Adjudication of the cause of action not pleaded requires the presence of additional parties over whom the court cannot acquire jurisdiction. CCP §426.40(a).
- Both the court in which the action is pending and any other court to which the action is transferable under CCP §396 are prohibited by the federal or state constitution or by a statute from entertaining the cause of action not pleaded (*e.g.,* claims over which the federal courts have exclusive jurisdiction). CCP §426.40(b).

In a state court proceeding, if a cause of action created by a federal statute arises out of the same transaction or occurrence and the state and federal courts have concurrent jurisdiction, a compulsory cross-complaint in the state court proceedings is required and the exception under CCP §426.40(b) does not apply. Comment to CCP §426.40. Moreover, if causes of action created by both state and federal statutes arise out of the same transaction or occurrence and the federal court has exclusive jurisdiction over the federal cause of action, the defendant must nevertheless file a compulsory cross-complaint alleging the state cause of action to avoid waiver of that cause of action under CCP §426.30. See Comment to CCP §426.40.

Under CCP §426.40(b), however, the defendant's inability to allege in the cross-complaint the federal cause of action over which the federal court has exclusive jurisdiction does not bar him or her from bringing an independent action on that federal claim in federal court. See Comment to CCP §426.40. For further discussion of rules when federal courts have concurrent or exclusive jurisdiction over potential claim, see Comment to CCP §426.40. On federal jurisdiction generally, see chap 7.

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§26.12 d. Another Action Pending

Under CCP §426.40(c), the compulsory cross-complaint rule (see §26.7) does not apply if, at the time of commencement of the action, the cause of action not pleaded was the subject of another pending action. (Any such cause of action pleaded as a cross-complaint would be subject to demurrer under CCP §430.10(c).)

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§26.13 e. Special Proceedings

The compulsory cross-complaint requirement of CCP §426.30(a) (see §26.7) is expressly inapplicable to special proceedings. Special proceedings are excepted by CCP §426.60(a), and the rules on compulsory cross-complaints in those cases may be found in the particular statute governing the proceeding. See Comment to CCP §426.60. For definition of "special proceeding," see CCP §§22-23.

Notwithstanding CCP §426.60(a), the compulsory cross-complaint requirement of CCP §426.30(a) does apply to eminent domain proceedings. CCP §426.70(a). The related cause of action in an eminent domain proceeding may be asserted by cross-complaint whether or not the party asserting such cause of action has presented a claim in compliance with Govt C §§900-935.7 to the plaintiff in the original eminent domain proceeding. CCP §426.70(b). For further discussion of eminent domain proceedings, see §26.23.

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§26.14 f. Small Claims

Small claims actions are specifically excepted by CCP §426.60(b) from the compulsory cross-complaint requirement of CCP §426.30(a) (see §26.7). A cross-complaint is not required even though the related action is for an amount within the small claims court's jurisdiction. See Comment to CCP §426.60.

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§26.15 g. Declaratory Relief

Cases that involve only an action for declaratory relief under CCP §§1060-1062.5 are excepted by CCP §426.60(c) from the compulsory cross-complaint requirements of CCP §426.30(a) (see §26.7). See *Russo v Scrambler Motorcycles* (1976) 56 CA3d 112, 117, 127 CR 913. This exception, however, does not extend to cases in which any party to the action seeks a remedy other than or in addition to declaratory relief. In those situations, the compulsory joinder provisions of CCP §426.30(a) apply. See Comment to CCP §426.60(c).

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B. Permissive Cross-Complaint

1. Against Complaining Party

§26.16 a. General Rule

A party may assert by cross-complaint any cause of action that he or she has, regardless of its nature, against any party who filed a complaint or cross-complaint against him or her. CCP §428.10(a). See *Dabney v Shippey* (1974) 40 CA3d 990, 115 CR 526 (cross-complaint not permitted by party when complaint does not state cause of action against him or her).

Unlimited cross-complaints may be filed against an opposing party even if there is no factual relationship between the causes of the two parties. See Comment to CCP §428.10, which notes that this is also the rule under Fed R Civ P 13. This right is independent of, and in addition to, the right to file a cross-complaint on a related cause of action under CCP 428.10(b), discussed in §26.18. However, cross-complaints on unrelated causes of action may not be filed against the plaintiff in an eminent domain proceeding. CCP §428.10(a). See §26.23.

A permissive cross-complaint against the complaining party is not limited to causes of action that exist at the time the responding party serves an answer. However, leave of court, which may be granted in the interest of justice at any time during the course of the action, is required for a party to file a cross-complaint against any of the parties who filed the complaint or a cross-complaint against that party unless the cross-complaint is filed before or at the same time as the answer to the complaint or cross-complaint. CCP §428.50(a), (c). See §§26.44-26.49 on when to file a cross-complaint. On cross-complainant's right to join new parties, see CCP §428.20, discussed in §26.19.

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§26.17 b. When Complaining Party Is Assignee

Under CCP §368, except for a negotiable promissory note or bill of exchange transferred before maturity in good faith for good consideration, assignment of a chose in action is "without prejudice to any set-off, or other defense existing at the time of, or before, notice of assignment." CCP §368. See also Com C §3305 (holder in due course takes instrument free from most defenses). Thus, except for a holder in due course of a negotiable instrument as indicated above, if an assignee has filed a complaint or cross-complaint against a party, the party may assert by cross-complaint against the assignee (in addition to the causes of action specified in §26.16) any cause of action that the party has against the assignor to the extent that it constitutes a setoff. Any judgment on that cause of action in the cross-complaint is limited to the value of the assigned claim. See generally 5 Witkin, California Procedure, *Pleading* §1169 (5th ed 2008). On right to offset claim barred by statute of limitations generally, see §26.24.

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§26.18 2. Against Noncomplaining Party

A defendant or cross-defendant may file a cross-complaint against any person, whether or not he or she is already a party to the action, if the cross-complaint asserts a cause of action that either (a) arises out of the same transaction, occurrence, or series of transactions or occurrences as the action brought against him or her, or (b) asserts a claim, right, or interest in the property or controversy that is the subject of the action against him or her. CCP §428.10(b). See *Paragon Real Estate Group of San Francisco, Inc. v Hansen* (2009) 178 CA4th 177, 186, 100 CR3d 234 (CCP §428.10 explicitly authorized defendant's cross-complaint for equitable indemnity even though cross-defendant was already defendant in case). As long as there is at least one such subject-matter related cause of action against each cross-defendant, the cross-complainant can join any unrelated cause of action he or she has against any of the cross-defendants. See §26.20.

On total or partial indemnity, see *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 605, 146 CR 182, in which the supreme court reiterated the right of defendants to file a cross-complaint, founded on a claim of total or partial indemnity, against a previously unnamed party. See also §§26.7, 26.27.

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3. Joinder

§26.19 a. Parties

A cross-complaint authorized under CCP §428.10(a) or §428.10(b) may join any person as a cross-complainant or cross-defendant, whether or not he or she is already a party to the action if, viewing the cross-complaint as an independent action, joinder would have been permitted under the statutes governing joinder of parties. CCP §428.20. On permissive joinder of parties generally, see CCP §§378 (plaintiffs), 379 (defendants), discussed in §§14.11-14.12. On compulsory joinder, see CCP §389, discussed in §§14.9-14.10.

Under CCP §379.5, when parties have been joined under CCP §378 or §379 (permissive joinder), the court may make such orders as appear just to prevent a party from being embarrassed, delayed, or put to undue expense, and may order separate trials or make any other order as required by the interests of justice.

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§26.20 b. Causes of Action

A cross-complaint authorized under CCP §428.10(a) or §428.10(b) may allege any additional causes of action against any cross-defendant, whether against the original party or a stranger to the action. CCP §428.30. The sole exception to this rule relates to joinder of causes against the plaintiff in an eminent domain proceeding. See §26.23.

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§26.21 C. When Court May Sever

The court has broad authority to resolve problems caused by permissive or compulsory joinder. Under CCP §1048(b), the court may order separate trials for any causes of action (including those asserted in a cross-complaint) or issues if separate trials would be more convenient, expeditious, and economical, or would avoid prejudice. Similarly, when parties have been joined under CCP §378 or §379 (permissive joinder), the court may make orders as appear just to prevent a party from being embarrassed, delayed, or put to undue expense, and may order separate trials or make any other order as required by the interests of justice. CCP §379.5.

A severance creates two separate actions, one of which the court may even transfer to a different court while retaining jurisdiction over the other. *Omni Aviation Managers, Inc. v Municipal Court* (1976) 60 CA3d 682, 131 CR 758.

For further discussion of severance, see chap 43.

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IV. RESTRICTIONS ON USE OF CROSS-COMPLAINTS

§26.22 A. Summary Proceedings

Cross-complaints expanding the scope of litigation would defeat the purpose of summary proceedings, such as unlawful detainer, designed to afford fast relief in narrowly limited cases. The language of CCP §1170, stating that a defendant in an unlawful detainer action may appear and answer or demur, has been construed to mean that ordinarily a cross-complaint is not permitted. *Arnold v Krigbaum* (1915) 169 C 143, 145, 146 P 423. Exceptions to this rule are discussed in *Union Oil Co. v Chandler* (1970) 4 CA3d 716, 722, 84 CR 756. See California Eviction Defense Manual §§14.54-14.57 (2d ed Cal CEB 1993).

Proceedings for summary restitution under CCP §908 (ordering restitution on a reversal of judgment by the appellate court) are subject to the same rule. See *Buckman v Tucker* (1937) 9 C2d 403, 71 P2d 69 (construing former CCP §957, on which CCP §908 is based). A cross-complaint is permissible, however, if restitution is sought by an independent action rather than by the summary procedure. See *Buckman v Tucker, supra*. See also 5 Witkin, California Procedure, *Pleading* §1162 (5th ed 2008).

NOTE: The remedy for an improperly filed cross-complaint in a summary proceeding is a motion to strike under CCP §436(b).

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§26.23 B. Eminent Domain Proceedings

A cross-complaint against a plaintiff in an eminent domain proceeding is compulsory when it involves a related cause of action. CCP §426.70. On definition of "related cause of action," see §26.7.

A cross-complaint in an eminent domain proceeding is permissible against any person, whether or not a party, if it states a related cause of action or asserts a right or interest in the property involved in the complaint. CCP §428.10(b). Thus, a cross-complaint stating such a cause of action may be filed against other codefendants. See CCP §428.10(b). See also *People v Buellton Dev. Co.* (1943) 58 CA2d 178, 185, 136 P2d 793 (construing former CCP §442). However, the general rule permitting assertion of unrelated causes of action against the complaining party (see §26.16) does not apply to an eminent domain proceeding. CCP §428.10(a). For further discussion of cross-complaints in eminent domain matters, see Condemnation Practice in California §8.58 (3d ed Cal CEB 2005).

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§26.24 C. Statute of Limitations; Setoff in Answer

A cross-complaint cannot assert a cause of action that was barred by the statute of limitations when the original action was filed. See 3 Witkin, California Procedure, *Actions* §448 (5th ed 2008). A cross-complaint stating a related cause of action against the plaintiff may be filed after the statute of limitations has run if the cross-complainant's right of action was alive when the complaint was filed. However, a cross-complaint against a new party or codefendant must be timely on the date it is filed or the statute of limitations will constitute a valid defense. See *Trindade v Superior Court* (1973) 29 CA3d 857, 106 CR 48 (under former CCP §442, statute of limitations held tolled with respect to cross-complaint against plaintiff; dictum to contrary when cross-complaint against new party or codefendant).

Note that CCP §337.15 provides for a 10-year statute of limitations on claims for damages against a contractor, subcontractor, and other specified persons. If an action is brought within that period under CCP §337.15(c), a cross-complaint for equitable indemnity under CCP §428.10(b) may be brought against a party responsible for the defects after the 10-year period of CCP §337.15(a) has expired. See *Valley Circle Estates v VTN Consol.* (1983) 33 C3d 604, 189 CR 871 (CCP §337.15(c) applied; general contractor's cross-complaint for equitable indemnity against subcontractor held proper). The exception to the 10-year statute of limitations under CCP §337.15(c) does not apply, however, if the cross-complaint for indemnity is not transactionally related to the original construction. See *Sandy v Superior Court* (1988) 201 CA3d 1277, 247 CR 677. On cross-claims for indemnity, see §26.27.

If a cross-complaint is barred by the statute of limitations, the defendant may be able to assert the claim in an answer as a setoff. CCP §431.70; see *Construction Protective Servs., Inc. v TIG Specialty Ins. Co.* (2002) 29 C4th 189, 126 CR2d 908. Under this provision, when cross-demands for money have existed between two persons at a time when neither demand was barred by the statute of limitations, the demands may be set off against each other. Thus, the defendant may assert in an answer that the two demands are compensated to the extent that they equal each other, even though the claim would otherwise be barred when the answer is filed. CCP §431.70; see 29 C4th at 192. This relief by setoff is available regardless of death or assignment. CCP §431.70. For purposes of §431.70, "a money judgment is a `demand for money' and, as applied to a money judgment, the demand is barred by the statute of limitations when enforcement of the judgment is barred under" provisions in CCP §§683.010-683.320. CCP §431.70.

The remedy afforded by CCP §431.70 differs from that available in a cross-complaint because relief as a setoff cannot exceed the relief granted to the other party. The setoff procedure is not available, however, if the cross-demand should have been asserted as a compulsory cross-complaint in an earlier action under CCP §426.30. CCP §431.70. See Comment to CCP §431.70.

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V. TACTICAL CONSIDERATIONS

§26.25 A. Compulsory Cross-Complaint

Failure to file a compulsory cross-complaint bars any subsequent proceeding on that cause of action. See §26.7. If there is any doubt whether a particular cause of action is compulsory, it is prudent to file the cross-complaint to avoid a possible waiver. Furthermore, even though a cross-complaint is not compulsory under CCP §426.30, failure to file the cross-complaint in some situations might risk loss of the cause of action by the independent application of res judicata or collateral estoppel rules. This risk is limited, however, because unrelated claims are not likely to involve similar issues. For relief from failure to file compulsory cross-complaint, see CCP §426.50, discussed in §26.44.

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§26.26 B. Permissive Cross-Complaint

Several factors must be weighed in deciding whether to file a permissive cross-complaint. The attorney should consider whether evidence in the main action may prejudice the trier of fact in ruling on a cross-complaint. If so, it may be better to proceed by separate action rather than by cross-complaint. Moreover, the multiplicity of new issues or parties introduced by a cross-complaint could prove confusing to the trier of fact and create a barrier to effective presentation of the cross-complainant's case. Although the attorney may move to sever causes of action or separate issues for trial, severance is within the court's discretion and could be denied in a particular case. See CCP §§379.5, 1048, discussed in §26.21.

The decision on parties to be named in the cross-complaint may affect the costs of the litigation. For example, when there is an increase in the number of parties and in the scope of the issues, the time and cost of discovery may be significantly increased. In addition, it may be more difficult to settle the lawsuit if additional parties are involved, each with separate interests.

Furthermore, a cross-complaint must be filed where the original action was filed. A party may be able to select a more desirable venue by bringing a separate action.

On the other hand, bringing a cause of action as a cross-complaint may permit a party to bring the cause to trial less expensively or sooner than if it were brought as a separate action.

If significant discovery will be needed from a third party against whom a cross-complaint may be asserted, it may be desirable to proceed by cross-complaint to allow discovery by interrogatories (CCP §§2030.010-2030.410) and demands to inspect documents, tangible things, land or other property, and electronically stored information (CCP §2031.010) from that party.

Bringing the cause of action as a cross-complaint may avoid the necessity of repeating discovery in a subsequent action. See Evid C §1292 for rules concerning the limited circumstances in which former testimony may be used against a person who was not a party to the former proceeding.

A cross-complaint against an existing party may be served by mail under CCP §§1010-1020. This may eliminate difficulties in effecting service under CCP §§415.10-416.90 (as required to acquire initial jurisdiction over a party), particularly if the party to be served is likely to avoid service of process.

On when cross-complaint should be filed and consequences of failure to file on time, see §§26.44-26.45. See also §26.25 on possible independent application of res judicata or collateral estoppel.

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§26.27 C. Cross-Complaint for Indemnity

Actions for indemnity present a common situation in which the defendant's attorney must decide whether to file a cross-complaint or a separate action. The defendant's attorney should consider filing a cross-complaint against a third party when, *e.g.,* the defendant's liability may be shifted to that third party on the basis of breach of warranty or express or implied indemnity. Similarly, the defendant's attorney should consider filing a cross-complaint against a concurrent tortfeasor for total or partial indemnity on a comparative fault basis (often called equitable or comparative equitable indemnity).

A cross-complaint for indemnity properly takes the form "of an action for declaratory relief." *Valley Circle Estates v VTN Consol.* (1983) 33 C3d 604, 612, 189 CR 871; *Christian v County of Los Angeles* (1986) 176 CA3d 466, 471, 222 CR 76. See *Rimington v General Acc. Group of Ins. Cos.* (1962) 205 CA2d 394, 23 CR 40 (cross-complaint for declaratory relief, seeking indemnity if defendant found liable, sufficient under CCP §1060). See also CCP §86(a)(7). The following illustrates a situation in which a cross-complaint in the form of an action for declaratory relief seeking indemnification might be appropriate. An insured person is harmed by a third party; the insured asks for payments from his or her insurer under the policy; the insurer refuses to pay; the insured sues the insurer on the policy but does not sue the third party. In these circumstances, the insurer can answer the action by the insured, claiming that it is not liable under the policy, and at the same time cross-complain against the third party for a declaration that, if the insurer is liable to the insured, the third party is liable to the insurer. See *Liberty Mut. Ins. Co. v Harris, Kerr, Forster & Co.* (1970) 10 CA3d 1100, 1102, 89 CR 437 (insurers agreed to indemnify insured for any loss due to employee dishonesty).

PRACTICE TIP: Although defendants may wish to assert a cross-complaint for indemnity to avoid having to bring a second action later, doing so may be tactically unwise in certain instances because it may prevent the defendants from presenting a united front to the underlying claim. The trier of fact may interpret fighting among defendants and cross-defendants as a sign that the plaintiff's cause of action has merit, thus reducing chances for a defense judgment.

In tort actions, cross-complaints are frequently brought against concurrent tortfeasors for partial indemnity on a comparative fault basis. See *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 607, 146 CR 182. Generally, such cross-complaints are brought to avoid the needless expense of litigating the same matter twice: first in the main action and later in a second action for indemnification. Absent a special relationship, a cross-complaint for equitable indemnity is not subject to dismissal solely because apportionment of fault is available through the assertion of an affirmative defense in the main action. *Paragon Real Estate Group of San Francisco, Inc. v Hansen* (2009) 178 CA4th 177, 187, 100 CR3d 234, citing *Platt v Coldwell Banker Residential Real Estate Servs.* (1990) 217 CA3d 1439, 1446, 266 CR 601.

An assignment to plaintiffs of a settling defendant's cross-complaint for indemnity against a nonsettling defendant can give the plaintiffs actual authority to proceed to trial on the cross-complaint. For example, in *Casey v Overhead Door Co.* (1999) 74 CA4th 112, 87 CR2d 603, disapproved on other grounds in *Jimenez v Superior Court* (2002) 29 C4th 473, 127 CR2d 614, the plaintiffs settled with the original defendant and received an assignment of the defendant's rights against the third party cross-defendant. The court found that, under CCP §368.5, the transfer of interest did not abate the proceeding, and the plaintiffs had authority to proceed on the cross-complaint even though they had not substituted themselves in the cross-complaint in place of the defendant.

Sometimes, defendants agree to defer filing cross-complaints among themselves, enter into agreements to allocate the risk of loss instead of filing cross-complaints, or agree to resort to arbitration as a means of resolving existing cross-claims. Thus, before filing a cross-complaint for indemnity, counsel should consider the benefit of defendants presenting a united front, the expense of subsequent litigation if a cross-complaint is not filed, the benefit of a more expeditious resolution of the controversy if a cross-complaint is filed (see *Shepard & Morgan v Lee & Daniel, Inc.* (1982) 31 C3d 256, 261, 182 CR 351), the complexity and expense of trying the underlying case if a cross-complaint is filed, the possibility of entering into agreements dispensing with the need to file a cross-complaint, and the possible effect that bringing in new parties as cross-defendants may have in raising or lowering the percentage of fault that the jury may attribute to the plaintiff.

For computing the time limits prescribed in Govt C §§911.2, 911.4, 912, and 945.6, a cause of action for equitable indemnity or partial equitable indemnity against a public entity accrues on the date on which a defendant is served with

the complaint that gives rise to the defendant's claim for equitable indemnity or partial equitable indemnity. Govt C §901. The defendant's failure to first present a timely written claim to the public entity has been held to bar a cross-complaint against the public entity for equitable indemnity. *State v Superior Court (Shortstop)* (1983) 143 CA3d 754, 192 CR 198 (decided before claim limitation period of Govt C §911.2 increased from 100 days to 6 months; cross-complainants required to comply with Government Claims Act (formerly known as Tort Claims Act) claim filing requirements and to allege that they had done so in cross-complaint; otherwise, cross-complaint subject to demurrer). See *Greyhound Lines v County of Santa Clara* (1986) 187 CA3d 480, 231 CR 702 (claim for equitable indemnity accrued on date when defendant served with complaint; court without jurisdiction to grant relief under Govt C §946.6 when application to file late claim under Govt C §911.4 filed more than 1 year after accrual of cause of action). For further discussion, see California Government Tort Liability Practice §§4.31, 5.11, 6.23 (4th ed Cal CEB 1999).

On the ability of a defendant who is timely sued under CCP §337.15(a) to file a cross-complaint for indemnity against the party responsible for a defect even if the cross-complaint is filed after the limitation period specified in CCP §337.15(a), see §26.24.

On disallowance generally (for public policy reasons) of cross-complaints for equitable indemnity by former attorneys sued for legal malpractice against successor attorneys, see *Austin v Superior Court* (1999) 72 CA4th 1126, 85 CR2d 644 ("well-established precedent [holds] that a lawyer sued by a former client for legal malpractice may not cross-complain against plaintiff's present lawyer for indemnity or contribution"). See also *Kroll & Tract v Paris & Paris* (1999) 72 CA4th 1537, 86 CR2d 78 (when both firms worked on case until 10 days before trial, then one firm took over, lost case, and was sued by client, firm could not cross-complain against other firm that had worked on case, although court suggested it could assert comparative negligence). See generally §26.7.

NOTE: A defendant who unsuccessfully seeks indemnification is not barred from later seeking contribution if the statutory requirements of CCP §875 are met. *Coca-Cola Bottling Co. v Lucky Stores, Inc.* (1992) 11 CA4th 1372, 14 CR2d 673.

When an insured receives medical payments from an insurer, and then later recovers from a third party tortfeasor, the insurer cannot assert an equitable lien on the recovery against the insured's attorney who received the payments and passed them on to the insured. *Farmers Ins. Exch. v Smith* (1999) 71 CA4th 660, 83 CR2d 911.

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§26.28 D. Cross-Complaint Changing Jurisdictional Classification of Case

The filing of a cross-complaint that causes the amount in controversy to exceed the maximum amount allowed for a limited civil case changes the jurisdictional classification (see CCP §32.5) of the case. The caption of the cross-complaint must state that the action is "a limited civil case to be reclassified by cross-complaint" (or words to that effect) and must be accompanied by the reclassification fees required by CCP §403.050. CCP §403.030.

Code of Civil Procedure §§403.010-403.090 provide a method for determining whether a case should be classified as a limited or unlimited civil case. See chap 6. The rule set forth in CCP §403.020 is similar to the rule on the effect of cross-complaints under former law. See *Eveleth v American Brass & Iron Foundry, Plastics Div.* (1962) 203 CA2d 41, 44, 21 CR 95 (cross-complaint asking damages above jurisdictional limit of municipal court required court to suspend proceedings and transfer matter to court of competent jurisdiction). But see *Omni Aviation Managers, Inc. v Municipal Court* (1976) 60 CA3d 682, 131 CR 758 (cross-complaint alleging damages above municipal court jurisdictional limit did not warrant transfer of original complaint to superior court because cross-complaint was not integral to issues raised by complaint and answer). For additional discussion of rules on classification and reclassification of civil matters, see chap 6.

WARNING: Filing a cross-complaint that is (1) "presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," (2) not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," or (3) without evidentiary support may result in the imposition of sanctions. CCP §128.7.

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§26.29 E. Limitation on Voluntary Dismissal of Action

A plaintiff is deprived of the unilateral right to voluntarily dismiss the action when a defendant seeks affirmative relief by cross-complaint. CCP §581(h). See §26.4. In certain instances, this may have tactical significance for the defendant's counsel. For example, if a plaintiff pleads alternative causes of action, including a cause of action for rescission without seeking punitive damages, and neither a notice of rescission has been given nor an offer to restore benefits received under the contract has been made, service of the pleading is deemed such notice or offer or both. CC §1691. The defendant may wish to accept the offer of rescission (without admitting liability for the underlying grounds for rescission such as fraud; see CC §1689) and thereby limit his or her exposure to liability and the plaintiff's potential recovery. By filing a cross-complaint alleging acceptance of the rescission and seeking affirmative relief (*e.g.,* return of the consideration given by the defendant), the plaintiff will be unable to unilaterally dismiss the action and will also be precluded from recovering on those causes of action based on affirmance of the contract. See *Paularena v Superior Court* (1965) 231 CA2d 906, 914, 42 CR 366 (defendant's acceptance of rescission limited trial to issue of damages under rescission cause of action rather than for damages under other causes of action for violation of statutory duty, negligence, breach of warranty, and fraud).

This same tactical consideration of preventing the plaintiff from being able to unilaterally dismiss the action may be present if the plaintiff alleges, among other causes of action, a cause of action for involuntary corporate dissolution. The defendant may desire to elect a Corp C §2000 buy-out of the plaintiff shareholder to avoid dissolution. Unless the defendant alleges such election by cross-complaint, the defendant's buy-out right may be defeated by the plaintiff's dismissal of the action. See *Cubalevic v Superior Court* (1966) 240 CA2d 557, 49 CR 698 (decided under former Corp C §§4658-4659; no cross-complaint alleging buy-out election filed; plaintiff's voluntary dismissal defeated defendant's pursuit of buy-out remedy). See also *Merlino v Fresno Macaroni Mfg. Co.* (1946) 74 CA2d 120, 168 P2d 182 (decided under former rule allowing affirmative relief in answer; defendants gave notice of election to buy stock in answer; plaintiffs unsuccessful in attempt to dismiss action; judgment rendered in favor of defendants).

As a practical matter, when a defendant seeks affirmative relief by a compulsory cross-complaint (see §26.7), the plaintiff will usually not wish to dismiss any related cause of action under CCP §581(c). If the plaintiff were to do so, arguably his or her dismissed cause of action would be considered to be a compulsory cross-complaint to the defendant's cross-complaint and, under CCP §426.30(a), the plaintiff would be barred thereafter in any other action from asserting that cause of action against the defendant. Furthermore, if the court ruled favorably on the defendant's cross-complaint, collateral estoppel or res judicata might act as a bar if such an action were again alleged against the defendant.

NOTE: Affirmative relief may not be sought in an answer. CCP §431.30(c). See *Aetna Cas. & Sur. Co. v Humboldt Loaders* (1988) 202 CA3d 921, 249 CR 175. To prevent a defendant from being able to unilaterally dismiss the action under CCP §581(b)(1), affirmative relief must be sought by a defendant's cross-complaint. See CCP §581(h); *Aetna Cas. & Sur. Co. v Humboldt Loaders, supra* (plaintiff had absolute right to dismiss because no defendants sought affirmative relief by cross-complaint).

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VI. PROCEDURES

A. Drafting Cross-Complaint

§26.30 1. Format

The cross-complaint must be asserted in a physically separate document, not as part of an answer. CCP §428.40. Its format and content are subject to the same rules that govern complaints. For caption and content, see CCP §§422.30 and 425.10. Cross-complaints must conform to the requirements of Cal Rules of Ct 2.100-2.119. See chaps 11, 15.

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§26.31 a. Caption

▶ To download **Word** version, right click and choose *Save Target As*

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The caption of a cross-complaint is essentially the same as the caption of a complaint (see CCP §422.30, discussed in chap 15) except for a double caption and the substitution of "cross-complainant" for "plaintiff" and "cross-defendant" for "defendant" in describing the parties. The title of the main action need list only the first party on each side, designating others by "*et al*." or "and others" (CCP §422.40), but the title of the cross-complaint itself should name each party to the cross-complaint. Court clerks may decline to issue a summons unless the new cross-defendants are named in the caption. The title of the action should show that there was a prior pleading demanding relief such as the following:

John Smith, Plaintiff vs Henry Jones, Defendant	**No. 123 456 CROSS-COMPLAINT FOR DAMAGES—BREACH OF CONTRACT**
Henry Jones, Cross-Complainant and Defendant, vs John Smith and William Johnson, Cross-Defendants.	

California Rules of Court 2.111(6) requires that the caption of a cross-complaint state the nature of the paper and the character of the cross-action, *e.g.,* "CROSS-COMPLAINT FOR INDEMNITY."

NOTE: After the cross-complaint has been filed identifying all the parties to the cross-complaint, the captions of subsequent pleadings or other documents customarily refer only to the first party on each side (short caption), with an appropriate indication of the other parties (*e.g.,* "*et al.*") in accordance with CCP §422.40. All cross-complaints are collectively referred to at the bottom of the short caption as "and Related Cross-Actions." Cal Rules of Ct 2.111(4).

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§26.32 b. Form: Introductory Clause

It is customary to insert an introductory clause below the caption. See §15.4. More elaborate introductions have been used in the past, but the simple form is now commonly used:

Cross-complainant, _ _[*name*]_ _, alleges:

To avoid confusion, it is often convenient to define shorthand references for the parties, to be used in the body of the cross-complaint, *e.g.*:

Cross-complainant, Acme Manufacturing Company of California, Inc. ("Acme"), alleges:

When there are multiple cross-defendants against whom different causes of action will be alleged, an introductory heading before each cause of action should specify the name of the party against whom each cause of action is asserted, *e.g.*:

First Cause of Action Against Cross-Defendant, General Co., Inc.

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§26.33 c. Allegations

Both a complaint and a cross-complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language. CCP §425.10(a)(1).

The sufficiency of allegations in a cross-complaint is judged in the same manner as if it were an independent action. See §§15.26-15.27 on requirements for allegations in complaints. If the cross-complaint is asserted against a noncomplaining party or stranger under CCP §428.10(b), the cross-complainant must allege sufficient facts to connect the cross-defendant with the subject matter of the original action. See §26.18.

As with a complaint, no claim for punitive damages against a health care provider may be included in a cross-complaint unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed on motion by the party seeking the amended pleading. CCP §425.13. On required showing for motion to be granted and time limitation for bringing motion, see CCP §425.13.

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§26.34 d. Demand for Relief (Prayer)

A cross-complaint must contain a demand for judgment for the relief to which the pleader claims he or she is entitled, often called the "prayer." CCP §425.10(a)(2), (b). If money or damages are demanded, the amount must be stated, except in actions (other than limited civil cases) for personal injury or wrongful death; in these cases the amount must not be stated, but the complaint shall comply with CCP §422.30 (caption requirements) and, in a limited civil case, with Govt C §70613(b) (requirements for first paper in limited civil case). CCP §425.10(b). In a personal injury or wrongful death case, the defendant may serve a request for a statement of damages at any time. For discussion of statement of damages, see §15.7. For discussion of limited civil cases, see chap 6.

The amount of exemplary (punitive) damages sought may not be stated in any civil matter. CC §3295(e).

The prayer normally also contains a request for costs of suit and "for such other and further relief as the Court may deem just and proper." In addition, the prayer should request (1) an award of attorneys' fees if there is a contractual, statutory, or other basis for such an award, and (2) any other relief sought, such as injunctive or declaratory relief.

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§26.35 e. Subscription

Every cross-complaint must be signed by at least one attorney of record in the attorney's individual name or by the party, if the party is unrepresented. CCP §128.7(a). For further discussion of subscription, see §15.13. For discussion of CCP §128.7, see §1.6.

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§26.36 f. Verification

The rules for verification of cross-complaints are the same as for complaints. See §§15.14-15.21. In short, verification is optional unless statutorily required for the type of action involved. If the cross-complaint is verified, the answers to it must also be verified. See CCP §446.

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§26.37 2. Optional Judicial Council Forms

The Judicial Council has issued several approved forms which can be used to create all or a part of a cross-complaint. See §§26.37-26.42. Use of the forms is optional. See generally Cal Rules of Ct 1.35.

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§26.38 a. Cross-Complaint: Personal Injury, Property Damage, Wrongful Death

The Judicial Council has approved a form cross-complaint captioned Cross-Complaint—Personal Injury, Property Damage, Wrongful Death (Judicial Council Form PLD-PI-002). See §26.61. The form is essentially a cover sheet which indicates the causes of action asserted and includes allegations pertaining primarily to the capacity of the parties. Either specially prepared (see §26.42) or form (see §§26.40-26.41) causes of action may be attached to this form. The form also contains optional causes of action for indemnification, apportionment of fault, and declaratory relief.

A reproducible copy may be found in California Judicial Council Forms Manual, Form PLD-PI-002 (Cal CEB 1981), or California Civil Litigation Forms Manual §12.3 (Cal CEB 1980).

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§26.39 b. Cross-Complaint: Contract

The Judicial Council has approved a form cross-complaint for use in contract actions captions Cross-Complaint—Contract (Judicial Council Form PLD-C-001). See §26.62. The form is essentially a cover sheet, with allegations pertaining primarily to the capacity of the parties, to which either specially prepared (see §26.42) or form (see §§26.40-26.41) causes of action may be attached. Unlike the Judicial Council cross-complaint for personal injury, property damage, and wrongful death (see §26.38), this form may be used for complaints as well as for cross-complaints.

A reproducible copy may be found in California Judicial Council Forms Manual, Form PLD-C-001 (Cal CEB 1981), or California Civil Litigation Forms Manual §7.21 (Cal CEB 1980).

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Source: Civil Litigation/California Civil Procedure Before Trial/26 Cross-Complaints/§26.40 c. Causes of Action

§26.40 c. Causes of Action

The Judicial Council has issued forms for the following causes of action that may be attached to the forms in §§26.61-26.62:

- Cause of Action—Breach of Contract (Judicial Council Form PLD-C-001(1))
- Cause of Action—Common Counts (Judicial Council Form PLD-C-001(2))
- Cause of Action—Fraud (Judicial Council Form PLD-C-001(3))
- Cause of Action—General Negligence (Judicial Council Form PLD-PI-001(2))
- Cause of Action—Intentional Tort (Judicial Council Form PLD-PI-001(3))
- Cause of Action—Motor Vehicle (Judicial Council Form PLD-PI-001(1))
- Cause of Action—Premises Liability (Judicial Council Form PLD-PI-001(4))
- Cause of Action—Products Liability (Judicial Council Form PLD-PI-001(5))

Additional specially prepared causes of action may be attached to form causes of action. See §26.42. For reproducible copies of the above forms, see California Judicial Council Forms Manual, Form PLD-PI-001(1)-(5), PLD-C-001(1)-(3) (Cal CEB 1981), and California Civil Litigation Forms Manual §§7.15-7.19, 7.22-7.24 (Cal CEB 1980).

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Source: Civil Litigation/California Civil Procedure Before Trial/26 Cross-Complaints/§26.41 d. Exemplary Damages Attachment

§26.41 d. Exemplary Damages Attachment

The Judicial Council has approved an Exemplary Damages Attachment (Judicial Council Form PLD-PI-001(6)), that may be used when appropriate. For a reproducible copy of this form, see California Judicial Council Forms Manual, Form PLD-PI-001(6) (Cal CEB 1981), or California Civil Litigation Forms Manual §7.20 (Cal CEB 1980).

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§26.42 e. Attachment of Nonform Causes of Action

Causes of action for which Judicial Council forms are not available may be attached to the Judicial Council cover sheet form cross-complaint for personal injury, property damage, wrongful death (see §§26.38, 26.61), or cross-complaint for contract (see §§26.39, 26.62). For consistency, other causes of action to be used with form pleadings should be prepared in a style similar to that of the Judicial Council form, Cause of Action. In particular, the paragraphs of each cause of action should be numbered starting from 1, and each paragraph should bear a mnemonic alphabetic prefix (*e.g.,* the first paragraph in the Judicial Council form, "Cause of Action—Premises Liability," is designated "Prem. L-1").

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§26.43 3. Special Rule: Small Claims Courts

A defendant in an action in a small claims division may file a claim not to exceed the jurisdictional limit (currently $5000 except for certain actions against guarantors) in the same proceeding on a form furnished by the court clerk. CCP §§116.220, 116.360.

When a defendant in a small claims action has a claim against the plaintiff that exceeds the jurisdictional limit of the small claims court but that would be the subject of a cross-complaint, the defendant may file a complaint in a court of competent jurisdiction and request the small claims court to transfer the action to the second court. CCP §116.390(a). The defendant makes the request by filing, at or before the time set for hearing the plaintiff's action, a declaration stating the facts of the second action, together with a copy of the new complaint. CCP §116.390(b). The defendant must cause a copy of the declaration and complaint to be personally delivered to the plaintiff at or before the time set for the small claims hearing. CCP §116.390(b).

The small claims court will render a judgment in the small claims action unless the interests of justice require a prejudgment transfer to the court in which the defendant's action is pending, in which case both actions are tried in the second court. CCP §116.390(c). If the action is transferred, the small claims plaintiff need not pay any transmittal, appearance, or filing fee in the second court but must pay the filing fees required of a defendant if he or she appears in the second action, and that court will award costs incurred as a consequence of transfer (including attorney fees and filing fees). CCP §116.390(e).

NOTE: A defendant who files a defendant's claim in a small claims action gives up the right to appeal an adverse judgment on that claim. *Anderson v Superior Court* (1990) 226 CA3d 698, 276 CR 18.

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B. Filing

1. Time Requirements

§26.44 a. Cross-Complaint Against Plaintiff or Cross-Complainant

A cross-complaint must be filed against any party who filed a complaint or a cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint. CCP §§426.30, 428.50(a). If such a cross-complaint is not filed within that time, leave of court to file the cross-complaint is required. CCP §§426.50, 428.50(c).

A cross-complaint against a party who has appeared in the action must be accompanied by proof of service of the cross-complaint at the time it is filed. Cal Rules of Ct 3.110(c) (not applicable to unlawful detainer, family law proceedings, or proceedings with different service requirements prescribed by law). The court, on its own motion or on the application of a party, may extend or otherwise modify the time provided in Cal Rules of Ct 3.110(c). An application for a court order extending the time to serve a pleading must be filed before the time for service has elapsed. The application must be accompanied by a declaration showing why service has not been made, documenting the efforts that were made to effect service, and specifying the date by which service is proposed to be effected. Cal Rules of Ct 3.110(e). Unless the court has granted an order extending the time to serve a complaint or cross-complaint, failure to serve and file pleadings as required under this rule may result in an Order to Show Cause being issued as to why sanctions shall not be imposed. Cal Rules of Ct 3.110(f). When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less that 5 calendar days before the hearing. Cal Rules of Ct 3.110(i).

For compulsory cross-complaints (see §§26.7-26.15), leave of court to file the cross-complaint against a plaintiff or a cross-complainant after the answer has been filed should be liberally granted. Code of Civil Procedure §426.50 provides that at any time during the course of the action a party who through oversight, inadvertence, mistake, neglect, or other cause has failed to plead a cause of action subject to the compulsory cross-complaint requirements may apply to the court to amend its pleadings, or to file a cross-complaint, to assert such a cause of action. The court must grant the motion, on such terms as may be just to the parties, if the party who failed to plead the cause of action acted in good faith. CCP §426.50. The court is required to liberally construe §426.50 to avoid forfeiture of causes of action. CCP §426.50.

On motion for leave to file cross-complaint, see §26.48.

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§26.45 b. Cross-Complaint Against Someone Other Than Plaintiff or Cross-Complainant

A cross-complaint against someone who did not file a complaint or a cross-complaint against the party (see §26.18) may be filed as a matter of right at any time before the court has set a date for trial. CCP §428.50(b). The right to file such a cross-complaint has been held to expire after the first trial date is set. *Loney v Superior Court* (1984) 160 CA3d 719, 723, 206 CR 769. Thus, the later vacating of a trial date does not reopen the right to file a cross-complaint as a matter of right. *Loney v Superior Court, supra.*

If such a cross-complaint is not filed before the court has set the trial date, the party must obtain leave of court to file the cross-complaint. CCP §428.50(c). Leave of court to file the cross-complaint may be requested at any time during the course of the action. CCP §428.50(c). The court may grant leave to file the cross-complaint in the interests of justice. CCP §428.50(c). In exercising its discretion, the court considers such factors as whether a later filing is fair to the party bringing the action and whether it will create problems of interference with the trial date and court calendar. Thus, the evidence presented in support of the motion should show why granting the motion would be in the interests of justice. The closer the matter is to trial, however, the more reluctant the court may be to allow new cross-complaints, because the chances of trial delay will be increased. The court may attach conditions to its grant of leave to ensure justice to the parties.

Local rules developed under the Trial Court Delay Reduction Act (Govt C §§68600-68620) may further restrict the time when cross-complaints may be filed as a matter of right.

PRACTICE TIP: As a practical matter, to avoid unnecessary expense, cross-complaints should be filed before or with the answer whenever possible. Otherwise, a newly added party may be able to repeat discovery already taken. Moreover, depositions may not be usable against parties who did not have the opportunity to participate.

If the cross-complaint adds new parties, it must be served on all parties, and proofs of service on the new parties must be filed within 30 days after the cross-complaint is filed. Cal Rules of Ct 3.110(c) (not applicable to unlawful detainer, family law proceedings, or proceedings with different service requirements prescribed by law).

On cross-complaint against public entity for equitable indemnity or partial equitable indemnity and time limitation for presenting written claim to public entity, see §26.7.

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§26.46 2. Where to File

The cross-complaint is filed with the clerk of the court in which the action is pending. For cross-claims exceeding jurisdictional amount in small claims actions, see §26.43.

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§26.47 3. Filing Fees

No filing fee is required for the cross-complaint unless it is the first paper filed by the party (see Govt C §70612). When filing necessitates a transfer from one court to another, the court may require that the cross-complainant pay appropriate costs and fees. See CCP §§396(b), 399(a); §26.26.

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§26.48 4. Motion for Leave to File Cross-Complaint

Procedures concerning motion practice generally are discussed in chap 12. Counsel should bear in mind that the moving papers should include a copy of the proposed cross-complaint. See Cal Rules of Ct 3.1324, dealing with the analogous motion to amend pleadings. For form of notice of motion for leave to file cross-complaint, see §26.58. For order granting leave to file cross-complaint, see §26.60.

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§26.49 5. Effect of Statute of Limitations

In general, the statute of limitations applies to cross-complaints as it does to complaints. *Liberty Mut. Ins. Co. v Fales* (1973) 8 C3d 712, 715 n4, 106 CR 21. There are, however, a couple of special twists.

When cross-demands for money have existed between persons at any time when neither demand was barred by the statute of limitations, and one person begins an action, the other person may assert the defense of payment in the answer; the cross-demands are compensated to the extent they equal each other, even though an independent action would be barred by the statute of limitations at the time the answer is filed. CCP §431.70. If the cross-demand would otherwise be time barred, however, affirmative relief is not available. Relief is limited to a setoff against the relief granted to the other party. CCP §431.70.

No setoff is available if the claim should have been asserted by cross-complaint in a prior action under CCP §426.30 (compulsory cross-complaint), but the holder failed to do so.

Cross-complaints that arise from the same events or transaction as the complaint relate back to the filing of the complaint for statute of limitations purposes. *Sidney v Superior Court* (1988) 198 CA3d 710, 244 CR 31. The relation-back rule also applies to an amended cross-complaint. *Sidney v Superior Court, supra* (cross-complaint for property damage sustained in accident alleged in complaint; amended cross-complaint for personal injuries relates back even though it would have been time barred if it had been an amended complaint).

The relation-back rule does not apply if the defendant instead raises the claim in an independent action. *Luna Records Corp. v Alvarado* (1991) 232 CA3d 1023, 283 CR 865.

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C. Service

§26.50 1. Serve Existing Parties by Mail

Service of a cross-complaint must be made on each party to the action. CCP §428.60. If a party on whom the cross-complaint is to be served has already appeared in the action, no summons is required. Service should be made on the party's attorney of record, or on the party if the party has no attorney. CCP §428.60(2). Service is permitted in the manner provided for service of process on new parties (see CCP §§415.10-416.90) or as provided for service of notices of motion under CCP §§1010-1020 (see chap 18). Under the latter methods, the cross-complaint may be mailed, together with an affidavit of service by mail, to the attorney or party at his or her business or residence address. See CCP §§1012-1013a, discussed in chap 18. Service on existing parties is normally made by mail because it is usually the most convenient and least expensive mode of service. Proof of service on existing parties must be served and filed with the cross-complaint. See CCP §465.

PRACTICE TIP: When leave of court to file a cross-complaint will be requested, counsel for the cross-complainant will frequently request that the court's order granting leave to file the cross-complaint provide that the cross-complaint be deemed filed and served as of the date of the court's order. This practice expedites service of the cross-complaint and eliminates the procedural step of serving the cross-complaint a second time. See form of order in §26.60.

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§26.51 2. Serve Summons and Other Pleadings on New Parties

If a party has not previously appeared in the action, a summons on the cross-complaint must issue, and a copy of the summons and cross-complaint must be served as if an original action was being commenced. CCP §428.60(1). See §26.31 for inclusion of names of new cross-defendants in caption of cross-complaint. Proof of service must be made on the form approved by the Judicial Council. CCP §417.10(f). Failure to serve and return the summons within three years after the date of filing will ordinarily result in dismissal of the cross-complaint as to the unserved cross-defendants. CCP §§583.110, 583.210. Code of Civil Procedure §583.210(b) also provides for filing the proof of service of summons within 60 days after the 3-year limit. For methods by which service of process may be effected, see CCP §§415.10-416.90 and chap 17.

A cross-complainant must serve a copy of the complaint, or if it has been amended, the most recently amended complaint and any answers to it on cross-defendants who have not previously appeared. Cal Rules of Ct 3.222.

NOTE: A new party to the action will usually be interested in all the pleadings and discovery taken before the date of service of the cross-complaint on it. On receipt of the cross-complaint, the attorney for the new cross-defendant will generally request a complete copy of the file from the court or another party to the action.

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§26.52 3. Delay in Service Will Not Prevent Trial-Setting

To avoid delays in setting trial caused by defendants who file but do not timely serve cross-complaints, judges implementing the Trial Court Salary Reduction Act (Govt C §§68600-68620) have the discretion to serve cross-complaints not ready for trial and proceed to trial on the complaints. See Cal Rules of Ct 3.727(11).

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D. Defensive Procedures

§26.53 1. Responses to Cross-Complaint

The cross-defendant must appropriately respond to a cross-complaint (see §26.4) and may use any procedural option available to a defendant in an independent action. Thus, *e.g.,* the cross-defendant may answer, demur to, or move to strike the whole cross-complaint or any part of it within 30 days after service. CCP §432.10. See CCP §§430.10-430.80 (demurrer), 431.10-431.70 (answer), 435 (motion to strike). At a later stage of the litigation, the cross-defendant may file a motion for summary judgment or summary adjudication. CCP §437c.

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§26.54 2. Special Answer by Third Party Defendant

A person against whom a claim has been made by complaint or cross-complaint may himself or herself, as a "third party plaintiff," cross-complain against a "third party defendant" for contribution or indemnity. The third party defendant may answer or respond to that cross-complaint and may also file a separate special answer that asserts defenses that the third party plaintiff could have asserted against the original plaintiff or cross-complainant. CCP §428.70. This special answer protects the third party defendant from a collusive or careless failure by the third party plaintiff to assert defenses that would defeat or diminish the original claim. See Comment to CCP §428.70; *Administrative Mgmt. Servs. v Fidelity & Deposit Co.* (1982) 129 CA3d 484, 488, 181 CR 141. See §26.27 on cross-complaints for indemnity.

This special answer must be filed as a separate document at the time the third party defendant files his or her answer to the cross-complaint. CCP §428.70(b). The pleading should be titled "SPECIAL ANSWER OF CROSS-DEFENDANT, _ _[*name*]_ _, TO _ _[*COMPLAINT/CROSS-COMPLAINT*]_ _ OF _ _[*name*]_ _." The introductory clause should read:

Cross-defendant, _ _[*name*]_ _, hereby asserts the following special answer against _ _[*plaintiff/cross-complainant*]_ _, _ _[*name*]_ _, in this action:

This special answer must be served on both the third party plaintiff and on the person who asserted the cause of action against the third party plaintiff. CCP §428.70(b). Because both have already appeared in the action, service is effected in the manner discussed in §26.50.

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§26.55 3. Cross-Defendant's Cross-Complaint

The cross-defendant may assert by cross-complaint any cause of action that the cross-defendant has against the cross-complainant. CCP §428.10(a). If the cross-defendant has a "related cause of action," as defined by CCP §426.10(c), it must be asserted by cross-complaint unless it is subject to certain exceptions. CCP §426.30(a). See §§26.7-26.15. The cross-defendant may also cross-complain against a person who is not yet a party to the action (CCP §428.10(b); see §26.18), and may join those parties and causes of action that would have been permitted had the cross-complaint been filed as an independent action. See CCP §§428.20, 428.30, discussed in §§26.19-26.20. The cross-defendant must join in the cross-complaint those parties required under CCP §389. For discussion of compulsory joinder of parties, see chap 14.

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§26.56 VII. DIAGNOSTIC QUESTIONS

Answers to the following questions can aid counsel in deciding whether to file a cross-complaint.

1. **Will the defendant's claim against the plaintiff be later barred if a cross-complaint is not filed? See §26.7.**
2. **Will the action be overly complicated factually by asserting factually unrelated claims in a permissive cross-complaint against the plaintiff? See §26.16.**
3. **If third parties are brought into the action by cross-complaint, will their claims or defenses confuse the jury or reduce the defendant's prospect of prevailing? See §26.26.**
4. **Will cross-complaining against the plaintiff and bringing in all other parties related to the subject matter of the action enhance settlement possibilities or reduce the defendant's potential liability exposure to the plaintiff? See §26.26.**
5. **Will bringing the defendant's claim through a cross-complaint rather than through a separate action (assuming that the claim is not subject to a compulsory cross-complaint) increase the defendant's chance of getting to trial quickly?**
6. **Will a separate action (assuming that the claim is not subject to a compulsory cross-complaint) allow a more favorable venue?**
7. **Is the court likely to sever the cross-complaint from the plaintiff's action? See §26.21.**
8. **Will evidence presented in the plaintiff's case dispose a judge or jury to find in favor of potential cross-defendants rather than enhance the defendant's chance of recovering against cross-defendants? See §26.26.**
9. **Will filing a cross-complaint preclude the plaintiff from recovering on or dismissing certain causes of action? See §26.29.**
10. **Will failure to file a cross-complaint have any possible collateral or res judicata effect if an adverse judgment is obtained in the principal action?**

For discussion of tactical considerations generally, see §§26.25-26.29. See also §§26.10, 26.45.

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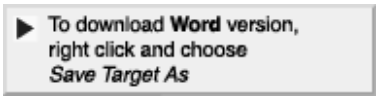
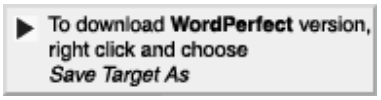
§26.57 VIII. CHECKLIST: PROCEDURE FOR PREPARING CROSS-COMPLAINT





- Allege any related causes of action against plaintiff or cross-complainant who filed complaint or cross-complaint against party (compulsory cross-complaint) (see §§26.7-26.15, 26.25)
- If desired, allege any causes of action regardless of their nature against party who filed complaint or cross-complaint (permissive cross-complaint) (see §§26.16-26.17, 26.26)
- If desired, allege any causes of action against any person, whether or not already party to action, that either (a) arise out of same transaction, occurrence, or series of transactions or occurrences as action brought against party, or (b) assert a claim, right, or interest in property or controversy that is subject of action against party (permissive cross-complaint) (see §§26.18, 26.26)
- Determine whether all format requirements of California Rules of Court have been complied with (Cal Rules of Ct 2.100-2.119; see §§26.30-26.35)
- Determine whether verification is required (see §26.36)
- Determine whether to use an optional Judicial Council form, if available, to create all or part of cross-complaint (see §§26.37-26.43)
- Determine effect, if any, of statute of limitations (see §26.24)

Against Plaintiff or Cross-Complainant

- File with clerk of court where action pending before or at time of answer to complaint or cross-complaint (CCP §428.50(a))
- Obtain leave of court to file cross-complaint if filing after answer (CCP §428.50(c))

Against Someone Other Than Plaintiff or Cross-Complainant

- File with clerk of court where action pending at any time before court sets trial date (CCP §428.50(b))
- Obtain leave of court to file cross-complaint if filing after court sets trial date (CCP §428.50(c))
- Serve the attorney of record for each appearing party or, if none, each appearing party (CCP §428.60(2))
- Serve summons and cross-complaint on each party who has not appeared as if original action were commenced (CCP §428.60(1))
- Timely return summons with proof of service to court (see §26.51)

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IX. FORMS

A. Motion for Leave to File Cross-Complaint

§26.58 1. Form: Notice of Motion for Leave to File Cross-Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE CROSS-COMPLAINT;**
_ _[*Name(s)*]_ _**,** **Defendant(s)**	_ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
	Hearing: _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court under** _ _[*e.g., Code of Civil Procedure §§426.50 and 428.50(c)*]_ _ **for an order granting** _ _[*him/her/it*]_ _ **leave to file a cross-complaint, a copy of which is attached as Exhibit** _ _**. The ground for issuance of this order is that granting leave to file the cross-complaint is in the interest of justice in that** _ _[*specify*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§26.44-26.49. A notice of motion must be accompanied by a memorandum in support of the motion. Cal Rules of Ct 3.1112(a), 3.1113(a). Failure to do so may be construed by the court as an admission that the motion is not meritorious and may be cause for its denial. Cal Rules of Ct 3.1113(a). On content and when a table of contents and table of authorities are required, see Cal Rules of Ct 3.1113. For a form of memorandum, see chap 12.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§26.59 2. Form: Sample Declaration Supporting Motion for Leave to File Cross-Complaint

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF JOHN J.**
vs	)	**BAKER SUPPORTING**
	)	**MOTION FOR LEAVE TO FILE**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**CROSS-COMPLAINT**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

John J. Baker declares:

1. I am an attorney licensed to practice law in the State of California and am one of counsel for defendant Peter P. Smith ("Smith") in this action. Except as otherwise stated, I have personal knowledge of every fact stated in this declaration and, if called as a witness, could and would testify competently thereto.

2. As alleged in the complaint, Smith and plaintiff Elizabeth Jones ("Jones") are partners in a business known under the fictitious name of "Delightful Catering."

3. In the complaint, Jones alleges that Smith misappropriated business opportunities belonging to Delightful Catering, diverting them to a competing business owned by his brother, Gregory Smith. Among other things, the complaint seeks damages for this alleged diversion of business opportunities.

4. The books of Delightful Catering have at all times been maintained by Jones. Since the commencement of disputes between them in September 1988, Jones has denied Smith access to the books and records of Delightful Catering.

5. The answer was filed on January 22, 2000.

6. On February 23, 2000, in response to a notice to produce documents at deposition, Jones produced the books and records of Delightful Catering. The records reveal that Jones without authorization issued herself "bonus checks" in a total sum of $57,000 from the accounts of Delightful Catering during 1997 and 1998. As shown by the attached declaration of Smith, he had no prior knowledge of such bonus payments to Jones.

7. Smith must file the cross-complaint attached as Exhibit A, which sets forth his causes of action against Jones relating to the bonus payments, because he may be barred by Code of Civil Procedure §426.30(a) from later asserting the causes of action in a separate action. Furthermore, even if the causes of action alleged in Exhibit A are not "related" causes of action within the meaning of §426.30(a), it is in the interests of judicial economy to resolve all disputes between the parties relating to Delightful Catering in a single action.

8. The action has been at issue for less than four months. The matter has not yet been set for trial and discovery. Jones and her counsel have at all relevant times had possession of the books and records on which

the cross-complaint is based.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: This sample form illustrates a declaration that might accompany a notice of motion for leave to file a cross-complaint. A declaration by Peter P. Smith would also be submitted. The caption of a declaration must state the declarant's name and "specifically identify the motion or other proceeding which it supports or opposes." Cal Rules of Ct 3.1115.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§26.60 B. Form: Order Granting Leave to File Cross-Complaint

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER GRANTING LEAVE TO FILE CROSS-COMPLAINT**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, for leave to file a cross-complaint was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*E.g., Defendant*]_ _, _ _[*name*]_ _, be granted leave to file a cross-complaint in the form of Exhibit _ _, attached to the motion.

[*Add if appropriate*]

[*Option 1*]

2. _ _[*E.g., Defendant*]_ _ have _ _ days from this date to serve the cross-complaint on _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _.

[*Option 2; see §26.50*]

2. The cross-complaint be filed and deemed served on _ _[*e.g., plaintiff*]_ _ on this date.

[*Add if appropriate*]

[3.]_ _[*E.g., Plaintiff*]_ _, _ _[*name*]_ _, have _ _[*e.g., 30 days*]_ _ to plead to the cross-complaint.**

[*Continue*]

[4.]_ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: In considering whether to file the proposed order along with the motion, counsel should find out what the customary practice is in the court or department that will hear the motion. If a proposed order is submitted, it should not be attached to the motion papers. Cal Rules of Ct 3.1113(m). For discussion of proposed orders, see chap 12.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/26 Cross-Complaints/§26.60A C. Form: Summons--Cross-Complaint (Judicial Council Form SUM-110)

§26.60A C. Form: Summons—Cross-Complaint (Judicial Council Form SUM-110)

Print

SUM-110

SUMMONS
Cross-Complaint
(CITACION JUDICIAL–CONTRADEMANDA)

NOTICE TO CROSS-DEFENDANT:
(AVISO AL CONTRA-DEMANDADO):

YOU ARE BEING SUED BY CROSS-COMPLAINANT:
(LO ESTÁ DEMANDANDO EL CONTRADEMANDANTE):

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the cross-complainant. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center *(www.courtinfo.ca.gov/selfhelp)*, your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site *(www.lawhelpcalifornia.org)*, the California Courts Online Self-Help Center *(www.courtinfo.ca.gov/selfhelp)*, or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por esqrito en esta corte y hacer que se entregue una copia al contrademandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California* (www.sucorte.ca.gov)*, en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services,* (www.lawhelpcalifornia.org)*, en el Centro de Ayuda de las Cortes de California* (www.sucorte.ca.gov)*, o oniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):

SHORT NAME OF CASE (*from Complaint*): *(Nombre de Caso):*

CASE NUMBER: *(Número del Caso):*

The name, address, and telephone number of cross-complainant's attorney, or cross-complainant without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del contrademandante, o del contrademandante que no tiene abogado, es):

DATE: *(Fecha)* Clerk, by *(Secretario)* _____ , Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons *(POS-010).)*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual cross-defendant.
2. ☐ as the person sued under the fictitious name of *(specify):*
3. ☐ on behalf of *(specify):*

under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other *(specify):*

4. ☐ by personal delivery on *(date)*:

Form Adopted for Mandatory Use
Judicial Council of California
SUM-110 [New January 1, 2009]

SUMMONS—CROSS-COMPLAINT CEB

Code of Civil Procedure, §§ 412.20, 428.60, 465
www.courtinfo.ca.gov

Copies: Original (file with court clerk); ___ copies for service (one for each party to be served); ___ office copies.

Comment: All cross-defendants and cross-complainants should be listed on the summons. See CCP §412.20(a)(2). Counsel should complete Items 1-3 for each copy before the copies are sent for service. On specific requirements, see §§17.9 (action against corporation or unincorporated association) and 17.10 (action against fictitiously named defendants). Item 4 should be completed by the process server if service is made by personal delivery. See CCP §415.10.

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Source: Civil Litigation/California Civil Procedure Before Trial/26 Cross-Complaints/§26.61 D. Form: Cross-Complaint--Personal Injury, Property Damage, Wrongful Death (Judicial Council Form PLD-PI-002)

§26.61 D. Form: Cross-Complaint—Personal Injury, Property Damage, Wrongful Death (Judicial Council Form PLD-PI-002)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
SHORT TITLE:	
CROSS-COMPLAINANT: CROSS-DEFENDANT: ☐ DOES 1 TO _____	
CROSS-COMPLAINT—Personal Injury, Property Damage, Wrongful Death ☐ **AMENDED *(Number)*:** **Causes of Action *(check all that apply)*:** ☐ **Apportionment of Fault** ☐ **Declaratory Relief** ☐ **Indemnification** ☐ **Other *(specify)*:**	
Jurisdiction *(check all that apply)*: ☐ **ACTION IS A LIMITED CIVIL CASE ($25,000 or less)** ☐ **ACTION IS AN UNLIMITED CIVIL CASE (exceeds $25,000)** **It** ☐ **is** ☐ **is not reclassified as unlimited by this cross-complaint**	CASE NUMBER:

1. CROSS-COMPLAINANT *(name)*:

   alleges causes of action against CROSS-DEFENDANT *(name)*:

2. This pleading, including exhibits and attachments, consists of the following number of pages: _____

3. Each cross-complainant named above is a competent adult
   a. ☐ **except** cross-complainant *(name)*:
      (1) ☐ a corporation qualified to do business in California
      (2) ☐ an unincorporated entity *(describe)*:
      (3) ☐ a public entity *(desciribe)*:
      (4) ☐ a minor ☐ an adult
         (a) ☐ for whom a guardian or conservator of the estate or a guardian ad litern has been appointed
         (b) ☐ other *(specify)*:
      (5) ☐ other *(specify)*:

   ☐ Information about additional cross-complainants who are not competent adults is contained in Cross-Complaint—Attachment 3.

Form Approved for Optional Use
Judicial Council of California
PLD-PI-002 [Rev. January 1, 2007]

CROSS-COMPLAINT—Personal Injury, Property Damage, Wrongful Death

Code of Civil Procedure, § 425.12

Print

SHORT TITLE:	CASE NUMBER:

4. Each cross-defendant named above is a natural person
   a. ☐ **except** cross-defendant *(name)*:
      (1) ☐ a business organization, form unknown
      (2) ☐ a corporation
      (3) ☐ an unincorporated entity *(describe)*:
      (4) ☐ a public entity *(describe)*:
      (5) ☐ other *(specify)*:
   b. ☐ **except** cross-defendant *(name)*:
      (1) ☐ a business organization, form unknown
      (2) ☐ a corporation
      (3) ☐ an unincorporated entity *(describe)*:
      (4) ☐ a public entity *(describe)*:
      (5) ☐ other *(specify)*:

   ☐ Information about additional cross-defendants who are not natural persons is contained in Cross-Complaint-Attachment 4.

5. The true names and capacities of cross-defendants sued as Does are unknown to cross-complainant.

6. ☐ Cross-complainant is required to comply with a claims statute, **and**
   a. ☐ has complied with applicable claims statutes, **or**
   b. ☐ is excused from complying because *(specify)*:

7. ☐ _____ **Cause of Action—indemnification**
   (NUMBER)
   a. Cross-defendants were the agents, employees, co-venturers, partners, or in some manner agents or principals, or both, for each other and were acting within the course and scope of their agency or employment.
   b. The principal action alleges, among other things, conduct entitling plaintiff to compensatory damages against me. I contend that I am not liable for events and occurrences described in plaintiffs complaint.
   c. If I am found in some manner responsible to plaintiff or to anyone else as a result of the incidents and occurrences described in plaintiffs complaint, my liability would be based solely upon a derivative form of liability not resulting from my conduct, but only from an obligation imposed upon me by law; therefore, I would be entitled to complete indemnity from each cross-defendant.

8. ☐ _____ **Cause of Action—Apportionment of Fault**
   (NUMBER)
   a. Each cross-defendant was responsible, in whole or in part, for the injuries, if any, suffered by plaintiff.
   b. If I am judged liable to plaintiff, each cross-defendant should be required: (1) to pay a share of plaintiffs judgment which is in proportion to the comparative negligence of that cross-defendant in causing plaintiff's damages; and (2) to reimburse me for any payments I make to plaintiff in excess of my proportional share of all cross-defendants' negligence.

Print

SHORT TITLE:	CASE NUMBER:

9. ☐ _____ **Cause of Action—Declaratory Relief**
(NUMBER)

An actual controversy exists between the parties concerning their respective rights and duties because cross-complainant contends and cross-defendant disputes ☐ as specified in Cross-Complaint—Attachment 9
☐ as follows:

10. ☐ _____ **Cause of Action—*(specify)*:**
(NUMBER)

11. ☐ The following additional causes of action are attached and the statements below apply to each *(in each of the attachments, "plaintiff" means "cross-complainant" and "defendant" means "cross-defendant")*:
a. ☐ Motor Vehicle
b. ☐ General Negligence
c. ☐ Intentional Tort
d. ☐ Products Liability
e. ☐ Premises Liability
f. ☐ Other *(specify)*:

12. **CROSS-COMPLAINANT PRAYS** for judgment for costs of suit; for such relief as is fair, just, and equitable; and for
a. ☐ total and complete indemnity for any judgments rendered against me.
b. ☐ judgment in a proportionate share from each cross-defendant.
c. ☐ a judicial determination that cross-defendants were the legal cause of any injuries and damages sustained by plaintiff and that cross-defendants indemnify me, either completely or partially, for any sums of money which may be recovered against me by plaintiff.
d. ☐ compensatory damages
(1) ☐ (unlimited civil cases) according to proof.
(2) ☐ (limited civil cases) in the amount of: $
e. ☐ other *(specify)*:

13. ☐ The paragraphs of this cross-complaint alleged on information and belief are as follows *(specify paragraph numbers)*:

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF CROSS-COMPLAINANT OR ATTORNEY)

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.
Comment: See §§26.38-26.42.

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Source: Civil Litigation/California Civil Procedure Before Trial/26 Cross-Complaints/§26.62 E. Form: Complaint--Contract (Judicial Council Form PLD-C-001)

§26.62 E. Form: Complaint—Contract (Judicial Council Form PLD-C-001)

Print

PLD-C-001

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT: ☐ DOES 1 TO _____	
CONTRACT ☐ **COMPLAINT** ☐ **AMENDED COMPLAINT *(Number):*** ☐ **CROSS-COMPLAINT** ☐ **AMENDED CROSS-COMPLAINT *(Number):***	
Jurisdiction *(check all that apply):* ☐ **ACTION IS A LIMITED CIVIL CASE** **Amount demanded** ☐ **does not exceed $10,000** ☐ **exceeds $10,000 but does not exceed $25,000** ☐ **ACTION IS AN UNLIMITED CIVIL CASE (exceeds $25,000)** ☐ **ACTION IS RECLASSIFIED by this amended complaint or cross-complaint** ☐ **from limited to unlimited** ☐ **from unlimited to limited**	CASE NUMBER:

1. **Plaintiff*** *(name or names):*

   alleges causes of action against **defendant*** *(name or names):*

2. This pleading, including attachments and exhibits, consists of the following number of pages:
3. a. Each plaintiff named above is a competent adult
   ☐ **except** plaintiff *(name):*
   (1) ☐ a corporation qualified to do business in California
   (2) ☐ an unincorporated entity *(describe):*
   (3) ☐ other *(specify):*

   b. ☐ Plaintiff *(name):*
   a. ☐ has complied with the fictitious business name laws and is doing business under the fictitious name *(specify):*

   b. ☐ has complied with all licensing requirements as a licensed *(specify):*
   c. ☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3c.
4. a. Each defendant named above is a natural person

☐ **except** defendant *(name):*	☐ **except** defendant *(name):*
(1) ☐ a business organization, form unknown	(1) ☐ a business organization, form unknown
(2) ☐ a corporation	(2) ☐ a corporation
(3) ☐ an unincorporated entity *(describe):*	(3) ☐ an unincorporated entity *(describe):*
(4) ☐ a public entity *(describe):*	(4) ☐ a public entity *(describe):*
(5) ☐ other *(specify):*	(5) ☐ other *(specify):*

* If this form is used as a cross-complaint, plaintiff means cross-complainant and defendant means cross-defendant.

Form Approved for Optional Use
Judicial Council of California
PLD-C-001 [Rev. January 1, 2007]

COMPLAINT—Contract

CEB

Code of Civil Procedure, § 425.12

Print

PLD-C-001

SHORT TITLE:	CASE NUMBER:

4. *(Continued)*
   b. The true names of defendants sued as Does are unknown to plaintiff.
      (1) ☐ Doe defendants *(specify Doe numbers):* _____ were the agents or employees of the named defendants and acted within the scope of that agency or employment.
      (2) ☐ Doe defendants *(specify Doe numbers):* _____ are persons whose capacities are unknown to plaintiff.
   c. ☐ Information about additional defendants who are not natural persons is contained in Attachment 4c.
   d. ☐ Defendants who are joined under Code of Civil Procedure section 382 are *(names):*

5. ☐ Plaintiff is required to comply with a claims statute, **and**
   a. ☐ has complied with applicable claims statutes, *or*
   b. ☐ is excused from complying because *(specify):*

6. ☐ This action is subject to ☐ Civil Code section 1812.10 ☐ Civil Code section 2984.4.
7. This court is the proper court because
   a. ☐ a defendant entered into the contract here.
   b. ☐ a defendant lived here when the contract was entered into.
   c. ☐ a defendant lives here now.
   d. ☐ the contract was to be performed here.
   e. ☐ a defendant is a corporation or unincorporated association and its principal place of business is here.
   f. ☐ real property that is the subject of this action is located here.
   9. ☐ other *(specify):*

8. The following causes of action are attached and the statements above apply to each *(each complaint must have one or more causes of action attached):*
   ☐ Breach of Contract
   ☐ Common Counts
   ☐ Other *(specify):*

9. ☐ Other allegations:

10. **Plaintiff prays** for judgment for costs of suit; for such relief as is fair, just, and equitable; and for
    a. ☐ damages of: $
    b. ☐ interest on the damages
       (1) ☐ according to proof
       (2) ☐ at the rate of *(specify):* percent per year from *(date):*
    c. ☐ attorney's fees
       (1) ☐ of: $
       (2) ☐ according to proof.
    d. ☐ other *(specify):*

11. ☐ The paragraphs of this pleading alleged on information and belief are as follows *(specify paragraph numbers)*:

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PLAINTIFF OR ATTORNEY)

(If you wish to verify this pleading, affix a verification.)

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.
Comment: See §§26.39-26.42.

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27

Motions for Judgment on the Pleadings

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I. INTRODUCTION

§27.1 A Scope of Chapter

This chapter discusses the factors that should be assessed before determining whether to make a motion for judgment on the pleadings or to use an alternative procedure (*e.g.,* a demurrer to the complaint) (see §§27.3-27.9). Also discussed are the procedures for making and opposing the motion (see §§27.10-27.16). This chapter covers the judicial standards for granting the motion and the information needed for evaluating the likelihood of the motion's being granted (see §§27.17-27.21). It also discusses the effect of a judgment on the pleadings if the motion is granted, and the alternatives available to counsel for both sides after the court has made its decision (see §§27.22-27.25). Diagnostic questions (see §27.26), a detailed procedural checklist (see §27.27), and forms (see §§27.28-27.31) are at the end of the chapter.

NOTE: Unless otherwise stated, the words "plaintiff," "defendant," and "complaint" include "cross-complainant," "cross-defendant," and "cross-complaint."

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§27.2 B. Governing Law

Code of Civil Procedure §438 was added in 1993 to codify motions for judgment on the pleadings. Stats 1993, ch 456. This motion is a well-established procedure that is made on the same grounds and decided on the same bases as a general demurrer. *DeToro v Robinson* (1891) 91 C 371, 27 P 671 (motion for defendant); *Gay v Winter* (1867) 34 C 153 (motion for plaintiff). Case law preceding the enactment of §438 that is not conflicting will generally apply to a motion based on the statute.

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II. DETERMINING WHETHER TO MAKE THE MOTION

§27.3 A. Description

The motion for judgment on the pleadings asks the court to rule that:

- A complaint (or cross-complaint or alleged cause of action) does not state facts sufficient to constitute a cause of action. CCP §438(c)(1)(B)(ii). See *Smiley v Citibank* (1995) 11 C4th 138, 145, 44 CR2d 441; *Rannard v Lockheed Aircraft Corp.* (1945) 26 C2d 149, 151, 157 P2d 1; *Saltarelli & Steponovich v Douglas* (1995) 40 CA4th 1, 5, 46 CR2d 683; *Mathews v State ex rel Dep't of Transp.* (1978) 82 CA3d 116, 119, 145 CR 443.
- An answer or alleged defense does not state facts sufficient to constitute a defense. CCP §438(c)(1)(A). See *MacIsaac v Pozzo* (1945) 26 C2d 809, 812, 161 P2d 449; *Dobbins v Hardister* (1966) 242 CA2d 787, 791, 51 CR 866.

The court does not have subject matter jurisdiction of the cause of action alleged in the complaint. CCP §438(c)(1)(B)(i). The court may also grant a motion for judgment on the pleadings on its own motion on the same bases. CCP §438(c)(3).

Judgment on the pleadings may also be sought under the Federal Rules of Civil Procedure. See Fed R Civ P 12(c). In addition to the bases discussed above, a declaratory judgment may be sought when there are no facts in dispute under the complaint and a party is entitled to judgment as a matter of law. See *Wolfe v George* (9th Cir 2007) 486 F3d 1120 (challenging constitutionality of California's vexatious litigant law (CCP §391)).

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B. Other Procedures Compared

1. General Demurrer

§27.4 a. Time Limitations for Motion

A motion for judgment on the pleadings is basically a general demurrer, except that there are fewer time constraints. Like a general demurrer, a motion for judgment on the pleadings can address only the defects that appear either on the face of the pleading or of which judicial notice may be taken. CCP §438(d). Thus, the grounds for a motion for judgment on the pleadings are the same as for a general demurrer, *i.e.,* failure to state a cause of action. See *Smiley v Citibank* (1995) 11 C4th 138, 145, 44 CR2d 441; *Hejmadi v AMFAC, Inc.* (1988) 202 CA3d 525, 535, 249 CR 5 (summary judgment motion treated as motion for judgment on pleadings).

The main difference between a motion for a judgment on the pleadings and a general demurrer is that a motion for judgment on the pleadings may be made after the time to demur has expired. CCP §438(f). A motion may not be made under CCP §438 if a pretrial conference order has been entered under CCP §575, or within 30 days after the initial trial date, whichever is later, without court permission. CCP §438(e).

Before the addition of CCP §438, a motion for judgment on the pleadings could be made at any time, even at trial. However, in view of CCP §430.80, which provides that grounds for a general demurrer are never waived, it seems likely that the former nonstatutory motion for judgment on the pleadings may be made after the time for making the statutory motion has expired when the pleadings fail to state a cause of action. See also *Smiley v Citibank* (1995) 11 C4th 138, 145 n2, 44 CR2d 441 (court noted enactment of §438 in upholding common law motion for judgment on the pleadings); *Saltarelli & Steponovich v Douglas* (1995) 40 CA4th 1, 5, 46 CR2d 683 (court treated defective summary judgment motion as "nonstatutory motion for judgment on the pleadings"); 6 Witkin, California Procedure, *Proceedings Without Trial* §187 (5th ed 2008).

Code of Civil Procedure §438(g) requires that there be a material change in the applicable case or statutory law if the moving party had previously unsuccessfully demurred on the same grounds. A party who has not demurred may move for judgment on the pleadings whether or not a change has occurred in the applicable law.

PRACTICE TIP: Unless there is a possibility that the complaint will be dismissed in its entirety (*i.e.,* the complaint cannot be amended to state a cause of action), some attorneys believe that a demurrer serves only to educate the plaintiff on the weaknesses of the case. These attorneys will answer and allege affirmative defenses to a defective complaint, and then file a motion for judgment on the pleadings after discovery has solidified the plaintiff's position and when defects in a cause of action may be more difficult to cure.

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§27.5 b. When Demurrer Should Be Filed

The defendant may move for judgment on the pleadings after having filed an answer and the time for the defendant to demur has expired, instead of demurring. CCP §438(f)(2). See *Dias v California Employment Stabilization Comm'n* (1952) 113 CA2d 374, 248 P2d 427. However, if the defendant decides to challenge the complaint, it is usually better to file a demurrer. See chap 23. Statutes and rules provide safeguards for a demurring party that are not guaranteed to a party moving for judgment on the pleadings. Also, certain defenses, *e.g.,* statute of limitations, may be deemed waived if they are not raised by demurrer or answer. See *Petersen v W.T. Grant Co.* (1974) 41 CA3d 217, 223, 115 CR 874.

The plaintiff may move for judgment on the pleadings after an answer has been filed and the time to demur has expired or may demur to the answer. CCP §438(f)(1). It is usually preferable to demur if the plaintiff discovers the defect in the answer in the 10 days normally allotted to demur to an answer. CCP §430.40(b). Because the demurrer is a procedure with which the court may be more familiar, the judge may find it easier to sustain a demurrer than to grant a motion for judgment on the pleadings.

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§27.6 2. Motion to Strike

A motion for judgment on the pleadings may sometimes be a successful alternative to a motion to strike (see chap 24). For instance, motions for judgment on the pleadings have been granted in the following circumstances:

- The pleading was "evasive, frivolous, or sham" (see *Adjustment Corp. v Hollywood Hardware & Paint Co.* (1939) 35 CA2d 566, 569, 96 P2d 161);
- Denials raised no issues, because improperly made on information and belief (see *Dobbins v Hardister* (1966) 242 CA2d 787, 51 CR 866);
- Specific allegations or admissions contradicted the general allegations in the same pleading (see *Hardy v Admiral Oil Co.* (1961) 56 C2d 836, 841, 16 CR 894); and
- The answer to a verified complaint was not verified (see *H. G. Bittleston Law & Collection Agency v Howard* (1916) 172 C 357, 362, 156 P 515).

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§27.7 3. Summary Judgment

A motion for judgment on the pleadings tests the sufficiency of the *pleadings*. The purpose of a motion for summary judgment is to learn whether there are any triable *issues of material fact* and thus whether the moving party is entitled to judgment as a matter of law (see chap 36). However, a motion for summary judgment necessarily includes a test of the sufficiency of the pleadings, and, as such, its legal effect is similar to a motion for judgment on the pleadings. *Durbin v Fletcher* (1985) 165 CA3d 334, 341, 211 CR 483.

Because the court may look only to the face of the pleading under attack and to matters that may be judicially noticed in a motion for judgment on the pleadings, a motion for summary judgment is often a preferred procedure because it may be supported by evidence. However, a purported motion for summary judgment not supported by admissible evidence may be treated as a motion for judgment on the pleadings. See *Mulkey v Reitman* (1966) 64 C2d 529, 531, 50 CR 881; *Saltarelli & Steponovich v Douglas* (1995) 40 CA4th 1, 5, 46 CR2d 683; *Hejmadi v AMFAC, Inc.* (1988) 202 CA3d 525, 535, 249 CR 5.

PRACTICE TIP: In deciding whether to file a motion for summary judgment as opposed to a motion for judgment on the pleadings, counsel should carefully analyze whether sufficiency of the pleadings or sufficiency of the evidence will be tested. Note the court's opinion in *Hejmadi v AMFAC, Inc.* (1988) 202 CA3d 525, 536, 249 CR 5: "In our opinion it was inappropriate and bad motion practice for defendants to submit to the court for summary adjudication, matters which essentially tested the sufficiency of the pleadings. Nor was it appropriate for the trial court to decide pleading sufficiency questions as issues without substantial controversy." When there is substantial uncertainty, the better course is to file both a motion for judgment on the pleadings and a motion for summary judgment in the alternative.

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C. Effect of Motion; Timing

§27.8 1. Before Trial

A successful, or even partially successful, motion for judgment on the pleadings before trial can eliminate a cause of action or defense and thus narrow the issues. An order granting a motion with leave to amend may require the opposing party to clarify causes of action or defenses. The amendment may thus spotlight further deficiencies in the asserted cause of action or defense.

A motion for judgment on the pleadings may be made at any time after the pleading under attack has been filed and the time to demur has expired and before final judgment has been entered. *Shabrick v Moore* (1961) 195 CA2d 56, 59, 15 CR 310. See *Stoops v Abbassi* (2002) 100 CA4th 644, 650, 122 CR2d 747. See generally 6 Witkin, California Procedure, *Proceedings Without Trial* §193 (5th ed 2008). However, the court's permission must be obtained to file a statutory motion after a pretrial conference order has been entered under CCP §575 or within 30 days after the initial trial date, whichever is later. CCP §438(e). But see §27.3.

PRACTICE TIP: Because the opposing party is normally given an opportunity to amend the pleading (see §27.19), many counsel wait to file the motion until after some discovery (deposition, interrogatories) has committed the opposing party to a certain position. Doing so may foreclose the possibility of the opposing party's tailoring the evidence to support the addition of facts to an amended pleading.

A party may move for judgment on the pleadings even when a demurrer on the same grounds was previously overruled if a material change has occurred in the applicable law. CCP §438(g). See *Donohue v State* (1986) 178 CA3d 795, 799, 224 CR 57.

Questions remain about whether the former nonstatutory motion for judgment on the pleadings may be made if no material change has been made in the applicable law. Before CCP §438(g) added the requirement of a change in applicable law, when a demurrer was erroneously overruled, the demurring party could raise the same issue regarding sufficiency of the pleadings by a motion for judgment on the pleadings. If that motion was erroneously denied, the moving party could, at the next opportunity, file a second motion on the same grounds for judgment on the pleadings. 178 CA3d at 800. See also 6 Witkin, Procedure, *Proc Without Trial* §195.

Several cases suggest that a nonstatutory motion may still be made. See, *e.g.*, *Smiley v Citibank* (1995) 11 C4th 138, 145 n2, 44 CR2d 441 (court noted enactment of CCP §438 in upholding common law motion for judgment on the pleadings); *Saltarelli & Steponovich v Douglas* (1995) 40 CA4th 1, 5, 46 CR2d 683 (court treated defective summary judgment motion as "nonstatutory motion for judgment on the pleadings").

A judge who has overruled a demurrer is not bound by that ruling and may grant a motion for judgment on the pleadings. See *Davis v City of Santa Ana* (1952) 108 CA2d 669, 684, 239 P2d 656. The motion may also be granted by a different judge. See *Shabrick v Moore* (1961) 195 CA2d 56, 58, 15 CR 310.

However, if a demurrer was previously overruled on the same grounds, it is good practice for the party making a nonstatutory motion for judgment on the pleadings to inform the court in the notice of motion or supporting papers when the demurrer was made and by whom it was overruled, and state the reasons the present motion should be granted. This is particularly true, in light of CCP §1008 (disclosure requirements when motion reconsidered or renewed), if a previous motion for judgment on the pleadings was denied, even though there is authority to suggest that it is permissible to continue to raise the issue until the court rules properly. See *Donohue v State, supra.* See §§12.113-12.118 on motions to reconsider.

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§27.9 2. During Trial

A motion for judgment on the pleadings may be made at any time during trial until entry of judgment. See *Stoops v Abbassi* (2002) 100 CA4th 644, 650, 122 CR2d 747; *Shabrick v Moore* (1961) 195 CA2d 56, 59, 15 CR 310. However, the court's permission must be obtained to make the motion. CCP §438(e). Because all parties are before the court, prior written notice is unnecessary. The moving party may state the grounds, and cite or furnish a brief of the authorities relied on. See *Morel v Morel* (1928) 203 C 417, 264 P 760; *Macbeth v West Coast Packing Corp.* (1947) 83 CA2d 96, 99, 187 P2d 815.

Any evidence introduced at the trial before the motion was made will not be considered; the court looks only to the face of the pleading. See *Lortz v Connell* (1969) 273 CA2d 286, 292, 78 CR 6; *Silver v Beverly Hills Nat'l Bank* (1967) 253 CA2d 1000, 1004, 61 CR 751. If evidence has been received, a motion for nonsuit is usually preferable to a motion for judgment on the pleadings. See *Sockett v Gottlieb* (1960) 187 CA2d 760, 763, 9 CR 831. A motion for nonsuit has the effect of a demurrer to the evidence; it concedes the truth of the facts presented by the plaintiff, but contends that those facts are insufficient as a matter of law to establish a prima facie case. *Conte v Girard Orthopedic Surgeons Med. Group, Inc.* (2003) 107 CA4th 1260, 1266, 132 CR2d 855.

PRACTICE TIP: Purposefully delaying the motion until trial is rarely the best tactic. The court may refuse to hear the motion or continue the trial to give the opposing party an opportunity to respond to the motion, be more generous in permitting amendment of the pleading, and permit amendment to conform to proof. See *Beverage v Canton Placer Mining Co.* (1955) 43 C2d 769, 778, 278 P2d 694. This is particularly true if the party had no prior notice of the pleading defect (*e.g.,* the issue was not raised by demurrer or by an objection in the answer).

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III. PROCEDURES

A. Drafting the Motion

§27.10 1. Grounds

The grounds for a motion for judgment on the pleadings are the same as the grounds for a general demurrer—failure to state a cause of action or defense, or lack of subject matter jurisdiction. CCP §438(c)(1)(B)(i). The motion performs the same functions as a general demurrer and therefore admits all material and issuable facts pleaded. *Barker v Hull* (1987) 191 CA3d 221, 224, 236 CR 285.

The grounds of the motion must appear on the face of the challenged pleading or from any matter of which the court may take judicial notice. If the motion is based on matters of which the court may take judicial notice under Evid C §§452-453, the matters must be specified in the notice of motion or in the supporting points and authorities. CCP §438(d).

The statement of grounds in the motion may refer to parts of the pleading under attack rather than to the whole pleading (CCP §438(c)(2)), *e.g.*:

- The first cause of action in the complaint does not state facts sufficient to constitute a cause of action;
- The first defense does not state facts sufficient to constitute a defense to any cause of action in the complaint; or
- The answer does not state facts sufficient to constitute a defense to plaintiff's first cause of action.

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Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/§27.11 2. Supporting Papers

§27.11 2. Supporting Papers

When made before trial, a written notice of motion must be served and filed. CCP §438(i)(2). A memorandum in support of the motion must accompany the notice of motion. Cal Rules of Ct 3.1112(a), 3.1113.

Because a motion for judgment on the pleadings attacks only the face of the pleadings and does not reach evidentiary issues, declarations and affidavits containing evidentiary material in support of the motion are not appropriate. CCP §438(d). However, a declaration disclosing a prior motion for judgment on the pleadings or a declaration for the limited purpose of showing that counsel has met and conferred with the opposing party is proper.

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§27.12 3. Request for Judicial Notice

A request may be made for the court to take judicial notice of matters within the reach of Evid C §452, including the court's records. Under Evid C §453, judicial notice is compulsory on request. The request must be made in a separate document listing the specific items for which notice is requested and must comply with Cal Rules of Ct 3.1306(c). Cal Rules of Ct 3.1113(*l*). For form, see §12.143.

The requesting party must furnish the court with enough information to allow judicial notice to be taken. Generally, the party requesting judicial notice should provide the court and each party with a copy of the material to be judicially noticed. Cal Rules of Ct 3.1306(c). If the request pertains to material that is part of a court file, the requesting party should specify in writing which part of the file is to be noticed, and make arrangements with the clerk to have the file in the courtroom for the hearing. Cal Rules of Ct 3.1306(c).

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§27.13 4. Filing and Service

The motion and supporting memorandum of points and authorities and request for judicial notice, if included, must be filed and served no later than 16 court days before the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). If service is by mail, that time must be extended as provided in CCP §1005(b). The court order may shorten these time limits. CCP §1005(b); Cal Rules of Ct 3.1300(b). On law and motion papers generally, see chaps 11-12.

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Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/§27.14 B. Opposing the Motion

§27.14 B. Opposing the Motion

A party whose pleading has been attacked by a motion for judgment on the pleadings is entitled to file points and authorities in opposition to the motion. See *Moore v California Minerals Prods. Corp.* (1953) 115 CA2d 834, 836, 252 P2d 1005. In addition, the party may:

- Move for leave to amend, and offer an amendment to cure the claimed defects before the hearing;
- Permit judgment to be taken eliminating part of the pleading and proceed on remaining causes of action or defenses;
- Permit judgment to be taken and entered, then appeal from the judgment; or
- Oppose the motion, and if it is granted, move for leave to amend to cure matters ruled defective.

See also §§27.18-27.20.

Opposition papers may also be accompanied by a request for the court to take judicial notice. See §27.12. Opposition to the motion must be filed and served at least nine court days before the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). The opposition papers must be served by personal delivery, fax, express mail, or other method consistent with CCP §§1010-1013, and reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c).

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Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/§27.15 C. Reply Papers

§27.15 C. Reply Papers

Any reply papers by the moving party must be filed and served at least 5 court days before the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). The reply papers must be served by personal delivery, fax, express mail, or other method consistent with CCP §§1010-1013, and reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c).

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§27.16 D. Attending the Hearing

Unless satisfied with a previously announced tentative ruling, or the court permits telephone appearances, counsel for the parties normally attend the hearing on the motion. On court hearing procedures generally, see chap 12.

The opposing party's failure to attend the hearing does not constitute a waiver of any cause of action or defense, and the court must still rule on the sufficiency of the pleading. See *Dobbins v Hardister* (1966) 242 CA2d 787, 797, 51 CR 866. If the defective pleading can be corrected, the court must grant leave to amend, even though the party opposing the motion was not in court to request leave. See *Pylon, Inc. v Olympic Ins. Co.* (1969) 271 CA2d 643, 656, 77 CR 72 (summary judgment based on facts alleged in pleadings; no evidence presented to court).

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IV. COURT RULING

A. Guiding Principles

§27.17 1. Generally Only Allegations in Pleading or Matters Judicially Noticed May Be Considered

In ruling on a motion for judgment on the pleadings the court can consider only the allegations in the pleading under attack, and matters of which the court must or may take judicial notice. CCP §438(d); *Colberg, Inc. v State ex rel Dep't of Pub. Works* (1967) 67 C2d 408, 412, 62 CR 401; *Kachig v Boothe* (1971) 22 CA3d 626, 630, 99 CR 393; *Cristmat, Inc. v County of Los Angeles* (1971) 15 CA3d 590, 598, 93 CR 325.

In a motion attacking an otherwise sufficient complaint, the defendant cannot refer to defenses asserted in the answer. The court must "view the complaint in isolation" to determine whether it states a cause of action. *Hughes v Western MacArthur Co.* (1987) 192 CA3d 951, 955, 237 CR 738; *Elmore v Tingley* (1926) 78 CA 460, 464, 248 P 706.

In some instances, however, the plaintiff has used allegations in the defendant's answer to cure a defective complaint. *Way v Shaver* (1906) 2 CA 650, 84 P 283 (answer supplied essential allegation missing from plaintiff's complaint: complaint failed to allege defendant's denial of trust, but answer denied the trust). See 6 Witkin, California Procedure, *Proceedings Without Trial* §188 (5th ed 2008).

In at least one case, a document neither incorporated in the pleadings nor included in a request for judicial notice was considered by the court in a motion for judgment on the pleadings. However, the document was referred to in the complaint (which alleged its legal effect) and a certified copy was attached to the opposing party's trial brief. The appellate court decided that the document was thus before the trial court and its provisions properly considered in connection with a motion for judgment on the pleadings. *Lumbermens Mut. Cas. Co. v Vaughn* (1988) 199 CA3d 171, 178, 244 CR 567.

A defendant may successfully move for judgment on the pleadings even when the answer is defective, because the relevant inquiry is whether the complaint fails to state facts sufficient to constitute a cause of action. *Franklin v Municipal Court* (1972) 26 CA3d 884, 899, 103 CR 354.

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§27.18 2. Allegations Must Be Taken to Be True

On a motion by a defendant, allegations of the complaint are taken to be true. *Fire Ins. Exch. v Superior Court* (2004) 116 CA4th 446, 452, 10 CR3d 617; *Sullivan v County of Los Angeles* (1974) 12 C3d 710, 714 n3, 117 CR 241; *Koehrer v Superior Court* (1986) 181 CA3d 1155, 1171, 226 CR 820. However, "admissions" of the truth or falsity of allegations in the pleadings "made for the purpose of ruling on the motion vanish as soon as the motion is ruled upon." *Silver v Beverly Hills Nat'l Bank* (1967) 253 CA2d 1000, 1005, 61 CR 751.

In considering the parties' allegations, the court must construe the pleadings liberally. CCP §452; *Mobil Oil Corp. v Exxon Corp.* (1986) 177 CA3d 942, 947, 223 CR 392. Thus a defendant's motion for judgment on the pleadings as to the entire complaint should be granted only if there is complete absence of an essential allegation in the cause of action. *Rannard v Lockheed Aircraft Corp.* (1945) 26 C2d 149, 151, 157 P2d 1; *Lortz v Connell* (1969) 273 CA2d 286, 291, 78 CR 6.

The court should deny the motion attacking the complaint if the complaint, on its face, states a cause of action, unless the cause of action is conclusively rebutted by matter established by judicial notice. *Colberg, Inc. v State ex rel Dep't of Pub. Works* (1967) 67 C2d 408, 412, 62 CR 401; *Middaugh v Board of Trustees* (1975) 45 CA3d 776, 780, 119 CR 826; *Kachig v Boothe* (1971) 22 CA3d 626, 630, 99 CR 393. See 6 Witkin, California Procedure, *Proceedings Without Trial* §§185, 187 (5th ed 2008).

A plaintiff who objects to the sufficiency of the answer by moving for a judgment on the pleadings is asking the court to disregard the answer and to grant the relief requested in the complaint. Therefore, the complaint must state facts sufficient to constitute a cause of action, and the answer must neither raise a material issue nor state facts sufficient to constitute a defense. *McClain v City of S. Pasadena* (1957) 155 CA2d 423, 430, 318 P2d 199. The judge must deem every allegation of the answer to be true and all allegations of the complaint that are controverted by the answer to be untrue. *MacIsaac v Pozzo* (1945) 26 C2d 809, 813, 161 P2d 449.

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§27.19 3. Leave to Amend Is Routinely Granted: Failure to Grant Considered Abuse of Discretion

Granting leave to amend a pleading the court finds insufficient is at the trial court's discretion. CCP §438(h)(1); *Hejmadi v AMFAC, Inc.* (1988) 202 CA3d 525, 536, 249 CR 5. The court may even make its own motion for judgment on the pleadings. See *Fire Ins. Exch. v Superior Court* (2004) 116 CA4th 446, 451 n2, 10 CR3d 617. However, the court will usually allow leave to amend to correct the deficiency; it may be an abuse of discretion to deny a party an opportunity to amend after granting a motion for judgment on the pleadings, particularly if there is any reasonable probability that the plaintiff might be able to state a good cause of action. See *MacIsaac v Pozzo* (1945) 26 C2d 809, 815, 161 P2d 449 (denial of leave to amend "would in many cases be an absolute denial of justice"). See also *Dobbins v Hardister* (1966) 242 CA2d 787, 796, 51 CR 866.

There is even more reason to grant leave to amend when the asserted defects in the pleading were not called to the party's attention by demurrer, or otherwise, early in the case. *San Diego Boy Scouts of Am. v City of Escondido* (1971) 14 CA3d 189, 194, 92 CR 186. See 6 Witkin, California Procedure, *Proceedings Without Trial* §194 (5th ed 2008).

If leave to amend is granted, the party against whom the motion was granted has 30 days to file an amended complaint or answer. CCP §438(h)(2). Note, however, that local fast-track rules may allow less than 30 days.

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§27.20 4. Right to Amend Is Not Unlimited

Despite the liberality with which the court allows a party to amend a pleading, the right to amend is not unqualified. If a party has had several chances to amend a defective pleading and fails to do so (*Hardy v Admiral Oil Co.* (1961) 56 C2d 836, 842, 16 CR 894), or if the defect is not curable by amendment (*Shabrick v Moore* (1961) 195 CA2d 56, 60, 15 CR 310), the court may grant the motion for judgment on the pleadings. See also *Estate of Marler* (1957) 148 CA2d 30, 35, 306 P2d 105 (party's unreasonable delay in amending pleading when answer had raised defect).

Although the court may not consider matters outside the pleadings in ruling on a motion for judgment on the pleadings, the court may consider evidentiary matters in exercising its discretion in determining a party's motion to amend. *Lortz v Connell* (1969) 273 CA2d 286, 292, 78 CR 6 (defendant's motion for judgment on pleadings and plaintiff's motion to amend complaint made orally during trial).

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§27.21 B. Order

An order denying a motion for judgment on the pleadings may be a minute order recorded by the court clerk during the hearing. The order is not appealable (on other procedures available after denial, see §§27.22-27.25), and the lawsuit will proceed on the pleadings as originally filed.

An order granting a motion for judgment against an entire pleading may also be a minute order, or the prevailing party may prepare a proposed order (see form in §27.29). The order itself is not appealable. *Old Town Dev. Corp. v Urban Renewal Agency* (1967) 249 CA2d 313, 317, 57 CR 426. The moving party should prepare a form of judgment, submit it to the judge for signature, and ask the clerk to enter it in the judgment book. The judgment is entered as a matter of course. See CCP §438(h)(3); *Le Breton v Stanley Contracting Co.* (1911) 15 CA 429, 434, 114 P 1028. The judgment so entered is appealable. *Old Town Dev. Corp. v Urban Renewal Agency, supra.*

If the motion is granted as to fewer than all causes of action alleged in a complaint or cross-complaint, or as to one or more defenses in an answer that nevertheless raises triable issues, a formal written order is appropriate to show what issues remain. Such an order is not a judgment. See *Budrow v Wheatcraft* (1953) 115 CA2d 517, 522, 252 P2d 637, disapproved on other grounds in *Carney v Simmonds* (1957) 49 C2d 84, 315 P2d 305. The lawsuit will proceed on the remaining issues. See *Deming v Smith* (1937) 19 CA2d 683, 685, 66 P2d 454. When the final judgment on those issues is rendered, it can show the causes or defenses as to which the judgment on the pleadings was given. See *Northern Light Mining Co. v Blue Goose Mining Co.* (1914) 25 CA 282, 143 P 540.

With multiple parties, a judgment on the pleadings may be entered in favor of one party at the time the motion is granted, and the court may then try the case among the remaining parties. See *Macbeth v West Coast Packing Corp.* (1947) 83 CA2d 96, 187 P2d 815; *O'Moore v Driscoll* (1933) 135 CA 770, 28 P2d 438.

NOTE: Whatever the order, CCP §1019.5 provides that when a motion is granted or denied, unless the court otherwise orders, the prevailing party must give notice of the court's decision or order to all other parties or their attorneys, unless notice is waived by all parties in open court and is entered in the minutes.

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V. PROCEDURES AFTER COURT RULING

§27.22 A. Denial of Motion for Judgment on Pleadings

An order denying a motion for judgment on the pleadings is not appealable. The losing party may obtain a review in the trial court by motion for reconsideration under CCP §1008 (see §§12.114-12.118), or the filing of a new motion for judgment on the pleadings, and in the appellate court by appeal from the final judgment when it is entered. If the law clearly establishes the moving party's right to the order sought or if the motion raises questions of significant legal impact, a denial may be reviewed by writ of mandate. See, *e.g., Safeway Stores, Inc. v Superior Court* (1987) 190 CA3d 713, 716, 235 CR 636.

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Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/§27.23 B. Motion for Judgment on Pleadings Granted

§27.23 B. Motion for Judgment on Pleadings Granted

A party against whom a motion for judgment on the pleadings has been granted may pursue many of the same steps available after a ruling on a demurrer:

- Move for reconsideration (see *De La Beckwith v Superior Court* (1905) 146 C 496, 501, 80 P 717 (demurrer case));
- Appeal from the judgment entered (see *Budrow v Wheatcraft* (1953) 115 CA2d 517, 522, 252 P2d 637, disapproved on other grounds in *Carney v Simmonds* (1957) 49 C2d 84, 90, 315 P2d 305); or
- Petition for an extraordinary writ.

The party against whom a judgment on the pleadings has been improperly granted may also move for a new trial (even if there has been no prior trial) under CCP §657. See *Carney v Simmonds, supra*.

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§27.24 C. Issues on Appeal

An appeal from a judgment on the pleadings is reviewed in the same way as a judgment of dismissal following the sustaining of a general demurrer. *Lumbermens Mut. Cas. Co. v Vaughn* (1988) 199 CA3d 171, 178, 244 CR 567; *Barker v Hull* (1987) 191 CA3d 221, 224, 236 CR 285. Because the motion presents only issues of law, the issues before the appellate court are the same as those before the trial court. See *Fire Ins. Exch. v Superior Court* (2004) 116 CA4th 446, 453, 10 CR3d 617; *Clack v State ex rel Dep't of Pub. Works* (1969) 275 CA2d 743, 750, 80 CR 274.

In reviewing a judgment on the pleadings granted against plaintiff, the appellate court should disregard imperfections of form that could be cured by amendment, and decide whether the facts pleaded and judicially noticed entitle the plaintiff to any relief, including setting aside a prior judgment. *Kachig v Boothe* (1971) 22 CA3d 626, 631, 99 CR 393. Although an appellate court usually indulges every reasonable presumption in favor of sustaining the trial court, the reverse is true when a plaintiff appeals from a judgment on the pleadings; statements in the complaint are the framework for review of the judgment. *Lumbermens Mut. Cas. Co. v Vaughn, supra*; *Crain v Electronic Memories & Magnetics Corp.* (1975) 50 CA3d 509, 512, 123 CR 419.

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§27.25 D. Effect of Judgment: Res Judicata

A judgment on the pleadings is a judgment on the merits, rather than a dismissal of the plaintiff's suit or a striking of the defendant's answer. *Davis v City of Santa Ana* (1952) 108 CA2d 669, 686, 239 P2d 656. See generally 6 Witkin, California Procedure, *Proceedings Without Trial* §185 (5th ed 2008).

The judgment is res judicata to the same extent as a judgment entered after a general demurrer is sustained without leave to amend. *Pylon, Inc. v Olympic Ins. Co.* (1969) 271 CA2d 643, 655, 77 CR 72. The judgment may bar a subsequent action or defense alleging the same facts, but it does not bar a subsequent action or defense raising new issues or alleging new facts in support of the issues raised in the earlier cause or defense. *Keidatz v Albany* (1952) 39 C2d 826, 828, 249 P2d 264.

NOTE: When a defendant has moved unsuccessfully for judgment on the pleadings and has then sought review by extraordinary writ, the summary denial of the writ, without opinion, is not res judicata as to the underlying motion and will not prevent the defendant from renewing the motion in the trial court. See *Donohue v State* (1986) 178 CA3d 795, 801, 224 CR 57.

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§27.26 VI. DIAGNOSTIC QUESTIONS

Because the legal basis for the motion for judgment on the pleadings is identical to a general demurrer, counsel should review the diagnostic checklists on demurrers (see §§23.68-23.69):

Plaintiff

1. **Has the time to demur expired? If so, a motion for judgment on the pleadings could accomplish the same result as a demurrer.**
2. **Has a previous demurrer or motion for judgment on the pleadings been overruled? In that event, a new motion for judgment on the pleadings could still be appropriate (see §27.8).**
3. **Are there alternatives for the plaintiff (see §§27.4-27.7) that would better accomplish the same objective as a motion for judgment on the pleadings?**
    - **Demurrer to answer (see chap 23)**
    - **Move to strike the answer (see chap 24)**
    - **Move for summary judgment against defendant (see chap 36)**
    - **Use discovery to clear up any uncertainty in the answer**

Defendant

4. **Are there alternatives for the defendant (see §§27.4-27.7) that would better accomplish the same objective as a motion for judgment on the pleadings?**
    - **Raise the objection to the complaint in the answer (see chap 25; see Practice Tip in §27.4)**
    - **Move to strike the complaint (see chap 24)**
    - **Move for summary judgment against plaintiff (see chap 36)**
    - **Move to dismiss (see chap 39)**
    - **Use discovery to clear up any uncertainty in the complaint**

On the various discovery methods (*e.g.*, oral depositions, interrogatories, demands for production of documents and electronically stored information) authorized by the Civil Discovery Act (CCP §§2016.010-2036.050), see California Civil Discovery Practice (4th ed Cal CEB 2006).

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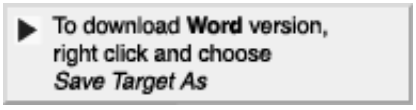
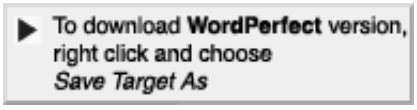
Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/§27.27 VII. CHECKLIST: PROCEDURE FOR PREPARING MOTION FOR JUDGMENT ON THE PLEADINGS

§27.27 VII. CHECKLIST: PROCEDURE FOR PREPARING MOTION FOR JUDGMENT ON THE PLEADINGS





Preparing Motion

Moving Party

- Decide whether to demur to answer or to complaint or, in alternative, to move for judgment on pleadings (see §§27.3-27.7)
- Determine whether time to demur to complaint or answer has expired (CCP §430.40(a))
- If required by local rules, attempt to informally resolve matter before filing motion; be prepared to show court by declaration accompanying papers that attempt has been made
- Prepare moving papers:
- Notice of motion and motion
- Supporting memorandum of points and authorities
- Request for judicial notice of any matters of which you wish court to take judicial notice
- Declaration regarding attempts to resolve informally, if required
- Serve moving papers (see §§27.10-27.13):
- At least 16 court days before hearing date (CCP §1005)
- If service is by mail, increase time periods as required by CCP §1005(b)

Opposing Party

- Decide whether to agree to amend answer or complaint to resolve motion

If motion made before trial and opposing party decides to oppose it rather than amend:

- Prepare opposing papers (see §27.14):
- Memorandum of points and authorities
- Request for judicial notice of any matter of which you wish court to take judicial notice
- Move for continuance of hearing date, if desired
- Prepare and serve cross-motion if desired
- Serve and file opposing papers not less than nine court days before noticed or continued hearing date unless court orders otherwise (CCP §1005(b))

If oral motion made at trial

- Reply with oral argument
- Ask court to be allowed to brief issues, or
- Ask court for permission to amend pleadings

If written motion made at trial

- Ask court to be allowed to brief issues, or
- Ask court for permission to amend pleadings

Moving Party

If motion made before trial

- Serve and file reply papers not less than five court days before the hearing date unless court orders otherwise (CCP §1005(b)) (see §27.15)
- Move for continuance of hearing date if desired

Motion made at time of trial may be made orally without notice.

Posthearing Procedures

Moving Party

If motion denied (see §27.22)

- Renew motion
- Petition for writ
- Move for reconsideration

Opposing Party

If motion granted (see §27.23)

- Move for reconsideration
- Appeal from entry of judgment
- Move for relief under CCP §473 because of mistake, inadvertence, surprise, or excusable neglect
- Move to set aside judgment for extrinsic fraud or mistake either by motion or in a separate action
- Amend pleading

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Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/ VIII. FORMS/ §27.28 A. Form: Notice of Motion for Judgment on Pleadings

VIII. FORMS

§27.28 A. Form: Notice of Motion for Judgment on Pleadings

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR JUDGMENT ON PLEADINGS** _ _[*; POINTS AND AUTHORITIES;*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	_ _[*DECLARATION(S);*]_ _
	_ _[*PROPOSED ORDER*]_ _
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court for an order for judgment on the pleadings under Code of Civil Procedure §438**

[*Option 1: If plaintiff is moving party*]

in favor of plaintiff for _ _[*specify relief*]_ _ **and costs.**

[*Option 2: If defendant is moving party*]

that plaintiff take nothing by the complaint and that defendant, _ _[*name*]_ _**, recover costs.**

[*Continue*]

The grounds for issuance of this order are that the _ _[*complaint/cross-complaint/answer*]_ _ **does not state facts sufficient to constitute a** _ _[*cause of action/defense*]_ _ _ _[*and/or*]_ _ _ _[*the court has no jurisdiction of the subject of the cause of action alleged in the complaint*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__

_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§27.10-27.16 (motion for judgment on the pleadings), §§12.7-12.29 (formal requirements for notices of motion). Because the court must base its ruling only on the face of the pleading (or on matters that may be judicially noticed), an evidentiary declaration giving evidence in support of the motion is not proper. See §27.11.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/§27.29 B. Form: Order for Judgment on Pleadings

§27.29 B. Form: Order for Judgment on Pleadings

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER FOR JUDGMENT ON PLEADINGS**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, for judgment on the pleadings concerning** _ _[*e.g., defendant*]_ _ _ _[*name*]_ _**'s** _ _[*e.g., first amended cross-complaint*]_ _ **was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

After considering (1) the papers filed in support of and in opposition to the motion and (2) counsel's oral argument, the Court finds that _ _[*e.g., plaintiff*]_ _ **is entitled to judgment on the pleadings** _ _[*e.g., dismissing all causes of action in the first amended cross-complaint of* _ _[*name*]_ _]_ _**.**

IT IS ORDERED that:

1. Motion for judgment on the pleadings be granted.

2. Judgment be entered in favor of _ _[*e.g., plaintiff*]_ _ **and against** _ _[*e.g., defendant*]_ _**.**

3. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ **Judge of the** _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §27.21 (orders for judgment on the pleadings), §12.107 (use of proposed orders; formal requirements). A moving party who obtains a favorable ruling on a motion for judgment on the pleadings normally prepares the form of the judgment and has it signed by the judge and entered by the clerk. See *Budrow v Wheatcraft* (1953) 115 CA2d 517, 522, 252 P2d 637, disapproved on other grounds in *Carney v Simmonds* (1957) 49 C2d 84, 315 P2d 305. Except when the ruling goes only to part of the pleading and the case thus continues on some issues, the granting and entry of a formal judgment is necessary to conclude the action. See §27.21.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/§27.30 C. Form: Judgment on Pleadings

§27.30 C. Form: Judgment on Pleadings

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**JUDGMENT ON PLEADINGS**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _

The motion of _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, for judgment on the pleadings was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

On _ _[*date*]_ _, _ _[*a minute/an*]_ _ order was entered granting the motion _ _[*in part*]_ _ and giving _ _[*e.g., plaintiff*]_ _ until _ _[*date*]_ _, to amend the _ _[*complaint/answer*]_ _.

It appears and the Court finds that:

1. No amendment of the _ _[*complaint/answer*]_ _ was filed within the time given.

[*Option 1: If plaintiff is moving party*]

2. The complaint states a cause of action entitling plaintiff to the relief specified below, and the _ _[*e.g., answer, first defense*]_ _ fails to state facts sufficient to constitute a defense to the _ _[*e.g., complaint, first cause of action*]_ _.

IT IS ORDERED that plaintiff recover from defendant the amount of $_ _ _ _ _ _, as prayed for in the complaint, and costs in the amount of $_ _ _ _ _ _.

[*Option 2: If defendant is moving party*]

2. The _ _[*e.g., complaint and each cause of action in it, first cause of action*]_ _ _ _[*fails to state facts sufficient to constitute a cause of action*]_ _ _ _[*and/or*]_ _ _ _[*the court has no jurisdiction of the subject of the cause of action alleged in the complaint*]_ _.

IT IS ORDERED that plaintiff take nothing by the complaint, and that defendant recover costs in the amount of $_ _ _ _ _ _.

[*Continue*]

3. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: A moving party who obtains a favorable ruling on a motion for judgment on the pleadings normally prepares the form of the judgment and has it signed by the judge and entered by the clerk. See *Budrow v Wheatcraft* (1953) 115 CA2d 517, 522, 252 P2d 637, disapproved on other grounds in *Carney v Simmonds* (1957) 49 C2d 84, 315 P2d 305. Except when the ruling goes only to part of the pleading and the case thus continues on some issues, the granting and entry of a formal judgment is necessary to conclude the action. See §27.21.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/27 Motions for Judgment on the Pleadings/§27.31 D. Form: Memorandum of Points and Authorities Supporting Motion for Judgment on Pleadings

§27.31 D. Form: Memorandum of Points and Authorities Supporting Motion for Judgment on Pleadings

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**MEMORANDUM OF POINTS**
vs	)	**AND AUTHORITIES**
	)	**SUPPORTING _ _[*NAME*]_ _'S**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**MOTION FOR JUDGMENT ON**
	)	**PLEADINGS**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

FACTS: _ _[*Succinctly state facts underlying motion*]_ _.

I. THE COURT HAS POWER TO MAKE JUDGMENTS ON THE PLEADINGS.

Every Court has inherent power to provide for the orderly conduct of proceedings before it, and to control its processes and orders and to make them conform to law and justice. Code of Civil Procedure §128(a)(3), (a)(8). Judgment on the pleadings is an established practice in California courts. See 6 Witkin, California Procedure, *Proceedings Without Trial* §185 (5th ed 2008). Thus, the Court has the power to give judgment on the pleadings when there are grounds.

II. GROUNDS FOR JUDGMENT ON THE PLEADINGS INCLUDE FAILURE TO STATE CAUSE OF ACTION.

A party's failure to state a cause of action constitutes grounds for judgment on the pleadings. *Macbeth v West Coast Packing Corp.* (1947) 83 CA2d 96, 187 P2d 815. Defendant has a cross-complaint alleging _ _[*explain*]_ _, which fails to state a cause of action in that _ _[*list reasons with authority to support arguments*]_ _. Therefore, plaintiff is entitled to judgment on the pleadings and requests the Court to order dismissal of defendant's cross-complaint and order entry of judgment in plaintiff's favor as to all causes of action contained in the cross-complaint.

III. _ _[*Continue stating points, citing authorities, and arguing position advanced*]_ _.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__

_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§27.10-27.16 (motions for judgment on the pleadings); 12.30-12.42 (formal requirements for points and authorities).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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28

Interpleader

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I. INTRODUCTION

§28.1 A. Scope of Chapter; Terminology

Interpleader is a remedy that invokes the court's equitable power to dispose of a fund or property (the property or "the res") to which there are conflicting claims. The party in possession of the property (the "stakeholder") uses the remedy to bring claimants before the court, which can then adjudicate the merits of the claims and disburse the property. The remedy may be used by (a) a defendant who asserts a claim other than that of the plaintiff in the same action (CCP §386(a)) or (b) anyone faced with multiple claims that may give rise to double or multiple liability (CCP §386(b)).

A stakeholder who asserts no personal claim to the property (a "mere" or "disinterested" stakeholder) may move the court to allow it to deposit the property with the court and be discharged from further involvement, leaving the claimants to litigate their claims. A disinterested stakeholder may apply to the court for an attorney fee for initiating the interpleader proceeding.

An "interested" stakeholder asserts a claim to the property and continues to participate in the litigation.

NOTE: The interpleader remedy has broadened since its early origins and permits a party to invoke the court's assistance in distributing the property instead of doing so unilaterally at the party's own peril. California interpleader is now similar in scope to federal interpleader. See §28.3.

This chapter sets forth an overview of the procedure (see §§28.3-28.23), stakeholders' procedures (see §§28.24-28.38), claimants' procedures (see §§28.39-28.40), joined defendants' procedures (see §28.41), trial (see §§28.42-28.44), and forms (see §§28.45-28.50).

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§28.2 B. Governing Law

Interpleader is codified in CCP §§386-386.6.

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II. OVERVIEW

§28.3 A. Federal Interpleader

Federal interpleader (both "rule" and "statutory") is available and may be an appropriate remedy, depending on tactical considerations such as obtaining jurisdiction over the various claimants, choice of forum, and calendar considerations. See §28.24.

Substantively, state and federal interpleader rules and authority are similar in tactical considerations and requisites, and both are predicated on the same equitable concepts.

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Source: Civil Litigation/California Civil Procedure Before Trial/28 Interpleader/§28.4 B. Traditional Requirements Eliminated

§28.4 B. Traditional Requirements Eliminated

The trend of interpleader law has been to broaden its availability and to eliminate the following traditional requirements:

- Identity (that the same thing or obligation must be claimed by all parties against whom relief is demanded);
- Privity (that adverse claims must all be derived from a common source);
- Lack of interest (that the parties seeking relief must not have or claim an interest in the subject matter); and
- Indifference (that the parties seeking relief must have incurred no independent liability to any claimant).

Under CCP §386(a) a defendant in a pending action may substitute a party or file a verified cross-complaint in interpleader and obtain a discharge from liability to the conflicting claimants "although their titles or claims have not a common origin, or are not identical but are adverse to and independent of one another."

The classic method of bringing an interpleader action is set forth in CCP §386(b), which makes it clear that the interpleader remedy is available to any party against whom double or multiple claims are made, specifically authorizes a cross-complaint in interpleader or a separate action, and states that interpleader may be maintained "although the claims have not a common origin, are not identical but are adverse to and independent of one another, or the claims are unliquidated and no liability on the part of the party bringing the action or filing the cross-complaint has arisen." The applicant or interpleading party may deny liability in whole or in part to any or all of the claimants.

The statute explicitly eliminates the requirements of identity, privity, and lack of interest. Liberalized rules for joinder of causes of action and parties have probably eliminated the need for the indifference requirement. The parties must, however, bring an interpleader action without collusion and in good faith. See §28.6.

WARNING: When the interpleading party seeks to join as a defendant another party against whom a claim is being made by another claimant, the claims must arise from the same transaction or occurrence. For example, if an escrow company has multiple claims against it by alleged buyers, it can interplead the instrument and seek to add as a party defendant to the interpleader action the seller of the instrument, if at least one of the claimants has a claim against that seller. Another example is a bus accident in which the insurance carrier for the bus company decides to interplead its policy limits because of the multiplicity of claimants. If one of the claimants has an additional claim from the same accident against another driver, that driver may be joined as a party defendant to the interpleader action.

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§28.5 C. Two-Stage Procedure

An interpleader action is necessarily "two suits in one." *Lincoln Nat'l Life Ins. Co. v Mitchell* (1974) 41 CA3d 16, 19, 115 CR 723. The preliminary stage of an interpleader action is simply deciding the stakeholder's right to interplead. If this decision is made in the stakeholder's favor, the second stage is a decision on the merits of the various claims to the stake.

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§28.6 1. Stakeholder's Right to Interplead

The first stage, generally the one of most interest to the stakeholder, is the determination of the right of the stakeholder to interplead. The stakeholder who disclaims further interest in the money or property may seek dismissal by way of motion, bifurcated or severed trial, motion for summary judgment, stipulation of the parties, or other means.

PRACTICE TIP: A truly disinterested stakeholder should attempt to obtain a dismissal or discharge from the action as quickly as possible to reduce its own fees. The answers to the complaint-in-interpleader may establish the necessary elements for the applicant to seek discharge.

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§28.7 2. Litigation Between Claimants

A court that has determined that interpleader is the appropriate remedy then determines on the merits the various claimants' right to the property. When there are mutually exclusive claimants, the court may (a) turn the entire property over to one of the claimants or (b) first determine the relative value of the unliquidated claims and whether the respective rights of the claimants call for proportionate shares. There may follow a series of trials in which each claimant's case is litigated separately. The court may also decide to stay the proceedings pending arbitration and then confirm the arbitrator's award. See *Dial 800 v Fesbinder* (2004) 118 CA4th 32, 45, 12 CR3d 711 (court had subject matter jurisdiction over interpleader action but should stay action pending outcome of arbitration by rabbinical court in Israel under arbitration agreement between the claimants).

EXAMPLE: Such a scenario as the following could arise: An insurer that provides a general liability insurance coverage for a product manufacturer with aggregate limits below the value of the claims against the insured during the policy year interpleads the policy proceeds; each claimant against the insured is compelled to try his or her claim in the interpleader action with each claimant having a separate trial covering issues of liability, comparative fault, and damages; claimants who have successfully proved liability and damages against the insured apply the adjudicated amount of their claim proportionately to the policy proceeds, the insurer presumably retaining an interest in any unextinguished portion. Interpleader would thus protect both the insurer, which should not be compelled to decide the relative validity of competing claims, and the insured, who should not be required to waive the right to disclaim liability to any claimant.

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D. Typical Uses of Interpleader

§28.8 1. Insurance Policy Proceeds

An interpleader action to decide various claimants' right to insurance policy proceeds is a classic use of the interpleader process. If more than one claimant to the proceeds exists, one of the safest approaches for the insurance company is to interplead the proceeds, allowing the court to make the required determinations. This approach avoids problems of potential breach of the covenant of good faith and fair dealing to an insured or beneficiary of a policy. To enjoy this protection, however, there must be a good faith belief that a conflict exists requiring the court's intervention.

Interpleader can be used when there are conflicting claims to life insurance policy proceeds. See, *e.g., Union Mut. Life Ins. Co. v Broderick* (1925) 196 C 497, 238 P 1034. There are also situations in which the proceeds must be apportioned among various claimants.

Liability insurance companies are also frequently faced with conflicting claims to insurance policy proceeds. One catastrophic occurrence resulting in a multiplicity of claims may jeopardize the policy limits of the insured and give the insurance company the impossible task of choosing among claimants to the proceeds.

EXAMPLE: See *State Farm Fire & Cas. Co. v Tashire* (1967) 386 US 523, 18 L Ed 2d 270, 87 S Ct 1199, against the insurer; a federal interpleader action that arose from a bus accident. The court approved the use of interpleader by the insurer for the driver of the truck that had collided with the bus, even though the injury claims had not been reduced to judgments and there was no right of direct action. The court stated (386 US at 533):

> Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such judgment or to negotiate a settlement might appropriate all or a disproportionate slice of the fund before his fellow claimants were able to establish their claims. The difficulty such a race to judgment poses for the insurer, and the unfairness which may result to some claimants, were among the principal evils that the interpleader device was intended to remedy.

An insurance company need not disclaim its interests in the balance of the policy proceeds should the aggregate award to the claimants not exceed its policy limits. See CCP §386(b), which allows a party interpleading funds to retain an interest in the fund. Under CCP §386(b) an applicant or interpleading party may also deny liability in whole or in part to any or all of the claimants. It is thus possible for an insurance company facing a multiplicity of claims to interplead the fund, deny insurer liability, deny that the insured is liable to the claimants, deposit the funds in court, and retain an interest in whatever portion of the fund is not ultimately distributed to the claimants. This procedure compels the litigation of all California claims in one forum, without any admission of liability by either the insurer or the insured.

NOTE: An interpleading party retaining an interest in the fund is not entitled to discharge or dismissal and must remain a party to the action. Further, in the case of liability insurance policies, the party probably has an obligation to provide a defense to the insured.

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§28.9 2. Resolving Claims to Escrowed Property

An escrow holder confronted with adverse claims to a deposit of money or documents may use the interpleader remedy to, in essence, make the court the escrow holder in its place when the transaction to which the deposit relates has not been consummated. See *Security Trust & Sav. Bank v Carlsen* (1928) 205 C 309, 271 P 100; *Contra Costa Title Co. v Waloff* (1960) 184 CA2d 59, 7 CR 358. See also, concerning a trustee rather than an escrow holder, *Pacific Loan Mgmt. Corp. v Superior Court* (1987) 196 CA3d 1485, 242 CR 547.

NOTE: It can be a misuse of the remedy for a claimant to force a neutral stakeholder to interplead, thereby effectively impounding the funds in question. See Alexander, *Claims in Interpleader*, *Abuse and Remedy*, 44 Cal SBJ 210, 212 (1969). Sanctions may result against the misusing claimant; however, the potential for abuse should not preclude the escrow holder from using the remedy. See *Fritschiv v Teed* (1963) 213 CA2d 718, 29 CR 114 (attorney fee under CCP §386.6 to be paid by claimant); *Contra Costa Title Co. v Waloff, supra*.

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§28.10 3. Determining Right to Bank Deposits

Interpleader can be used to resolve conflicting claims to bank deposits.

EXAMPLE: In *White Dragon Prods., Inc. v Performance Guars., Inc.* (1987) 196 CA3d 163, 241 CR 745, the plaintiff filed an action of interpleader against certain claimants to compel them to litigate their several claims to a bank account of one of the claimants. In *Conner v Bank of Bakersfield* (1917) 174 C 400, 163 P 353, interpleader was used to determine conflicting claims to a certified check. See also *Continental Nat'l Bank v Stoltz* (1920) 46 CA 532, 189 P 712; *Bank of Am. Nat'l Trust & Sav. Ass'n v Mamakos* (ND Cal 1972) 57 FRD 198, aff'd (9th Cir 1975) 509 F2d 1217; *U.S. v Trans-World Bank* (CD Cal 1974) 382 F Supp 1100.

Interpleader was denied in *Crocker-Anglo Nat'l Bank v American Trust Co.* (1959) 170 CA2d 289, 338 P2d 617, to a bank that failed to make even a partial deposit, but sought an absolute discharge. See also *Bank of China v Wells Fargo Bank* (9th Cir 1953) 209 F2d 467 (interest and funds withheld); *Camp v Oakland Mortgage & Fin. Co.* (1931) 212 C 433, 298 P 974 (loan account); *Cassidy v Norton* (1914) 25 CA 433, 143 P 1057 (substitution of sheriff who levied on account).

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§28.11 4. Rents

In *Hancock Oil Co. v Hopkins* (1944) 24 C2d 497, 510, 150 P2d 463, the court (a) held that a tenant could maintain an interpleader action against its lessor and others despite the rule that a tenant may not question a landlord's title, (b) stated that the remedial interpleader statute should be liberally construed, but (c) cautioned that the tenant may not maintain such a suit on the mere pretext or suspicion of double vexation.

See *Signal Oil & Gas Co. v Taliaferro* (1962) 207 CA2d 271, 24 CR 593 (lessee discharged as long as it deposited rental payments with court); *Spangler v Spangler* (1909) 11 CA 321, 104 P 995.

NOTE: It is a misuse of interpleader to use it to exert unfair pressure on the lessor by denial of access to or interest on rents in order to secure a negotiating advantage with respect to an outstanding dispute. See analogous escrow situations in §28.9. Here, however, because it is not a claimant but the interpleading party who is misusing the procedure, the appropriate sanction may be denial of the remedy.

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§28.12 5. Properties Subject to Levy

An action in interpleader may be brought by a party served with a writ of attachment, garnishment, or execution.

EXAMPLE: In *Leroy v Bella Vista Inv. Co.* (1963) 222 CA2d 369, 35 CR 128, the maker of a promissory note was granted interpleader on an action relating to an amount subject to garnishment (less than the amount due on the note). In *Bank of Cal. v Mott Iron Works* (1896) 113 C 409, 45 P 674, a bank held collected notes for the defendant, and there was a conflict between the defendant's assignee and the alleged garnisher of the notes. See also *Durkin v Durkin* (1955) 133 CA2d 283, 284 P2d 185 (liens on bank accounts); *Williams v Gilmore* (1942) 51 CA2d 684, 125 P2d 539 (principal and interest on judgments—conflict between assignee and garnisher).

A party served with judicial process should ascertain whether the statutes enabling the judicial process provide immunity or a means to adjudicate the dispute.

EXAMPLE: In *Wechsler v Home Sav. & Loan Ass'n* (1976) 57 CA3d 563, 129 CR 380, the Internal Revenue Service and the taxpayer filed claims to an account held by a savings institution. Rather than interplead the sums, the institution complied with the levy and turned the funds over to the IRS. Under applicable provisions of the Internal Revenue Code, the institution was immune from suit by the taxpayer.

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§28.13 6. Miscellaneous Uses

Interpleader has been used to determine claims:

- To money paid by a defendant tortfeasor as a compromise in a prior wrongful death action (*Changaris v Marvel* (1964) 231 CA2d 308, 41 CR 774);
- To surplus funds of a trustee's sale (*Ahmanson Bank & Trust Co. v Tepper* (1969) 269 CA2d 333, 74 CR 774);
- To trust funds (*Fox v Sutton* (1900) 127 C 515, 59 P 939);
- Of attorneys against a trustee in settlement of a will (*Sullivan v Lusk* (1907) 7 CA 186, 94 P 91, disapproved on other grounds in *Monogram Co. of Cal. v Kingsley* (1951) 38 C2d 28, 237 P2d 265);
- To dividends on corporate stock (*Cross v Eureka Lake & Yuba Canal Co.* (1887) 73 C 302, 14 P 885);
- To corporate debts to stockholders (*Interlocking Stone Co. v Scribner* (1912) 19 CA 344, 126 P 178); and
- To impounded funds of a criminal defendant (*People v Vermouth* (1974) 42 CA3d 353, 116 CR 675).

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E. Other Procedures Compared

§28.14 1. Declaratory Relief

A stakeholder may seek declaratory relief under CCP §1060 (see chap 35) and move for deposit of the property in court under CCP §572 (see chap 34).

WARNING: Code of Civil Procedure §§1060 and 572 do not provide for immediate discharge of the party making the deposit. Moreover, an interpleading party is immunized from damages for further interest and for detention of property once delivered after the date of deposit (see CCP §386(c)). Also, CCP §386.6 allows an award of an attorney fee.

A claimant that takes the initiative by bringing its own action for declaratory relief (see *Pasadena Inv. Co. v Peerless Cas. Co.* (1955) 134 CA2d Supp 902, 286 P2d 1014), might avoid reduction of the funds by stakeholder and attorney fees, and a declaratory relief action may be entitled to priority. However, the stakeholder, a defendant in the declaratory relief action brought by the claimant, can bring its own cross-complaint in interpleader under CCP §386(a) or (b). See chap 26.

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§28.15 2. Summary Judgment

A motion for summary judgment may be used to determine that one or more claims to a fund are so insubstantial that they may be disposed of without trial. The defendant stakeholder may force joinder of a claimant or claimants by demurrer under CCP §430.10(d) (see also CCP §389) and move for total or partial summary judgment against the plaintiff, it may file a cross-complaint for declaratory relief and move for summary judgment against the other claimant or claimants, or it may file a verified cross-complaint in interpleader under CCP §386(a)-(b).

If all claimants are parties to the lawsuit and will be bound by the judgment, the stakeholder may acquiesce in a summary judgment against itself. As long as all parties have notice, participate fully, and no collusion is shown, the stakeholder may be bound by the judgment and may safely satisfy the judgment of the prevailing party under a court order. However, as a losing defendant the stakeholder may be liable for costs, and possibly attorney fees, depending on the circumstances.

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§28.16 3. Deposit in Court

Code of Civil Procedure §§572-574 provide for deposit in court of "money or other thing capable of delivery, which, being the subject of litigation," is held by a trustee or by any party other than the one to whom it is due. CCP §572. These provisions allow a party (a claimant) to move for an order requiring deposit by a party (a stakeholder) who admits the obligation in its pleading or during deposition or other examination, who has not elected to interplead and deposit. There is no express limit on the types of action in which deposit in court may be used. See generally chap 34.

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§28.17 4. Consolidation; Severance

To the extent that interpleader is intended to prevent multiplicity of litigation, with its consequent potential for conflicting results, interpleader is itself a form of consolidation, and a replacement remedy may be a motion to consolidate. See chap 43 on consolidation.

Alternatively, a defendant stakeholder may choose to seek a severance of its portion of the trial to allow issues pertaining to this stakeholder to be litigated first and to allow for the potential removal of the stakeholder or party before the more lengthy and complex trial between other claimants. See chap 43.

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§28.18 5. Bill of Peace

An equitable bill of peace is an injunction staying all separate actions except the one to be tried and may be an appropriate device to prevent multiplicity of lawsuits when separate actions involving common questions of fact and law are pending in different jurisdictions (and are therefore not subject to consolidation). See generally 4 Witkin, California Procedure, *Pleading* §348 (5th ed 2008).

Under CCP §386(f) interpleader provides for enjoining proceedings affecting the rights or obligations of a party to the interpleader.

NOTE: The court's ability to enjoin is limited to proceedings in California that involve a party to the interpleader. The language of CCP §386(f) does not purport to enjoin any court or person other than a direct party to the interpleader itself.

Federal interpleader. In *State Farm Fire & Cas. Co. v Tashire* (1967) 386 US 523, 18 L Ed 2d 270, 87 S Ct 1199, the court refused to sanction the concept of enjoining all suits arising from a mass accident, because it would deprive the injured parties of substantial rights and because the interpleading insurance company had a more limited interest in the outcome of the litigation.

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§28.19 6. Contractual Indemnity

A stakeholder faced with competing claims may try to negotiate a settlement with a claimant who has an apparently valid claim, in exchange for an indemnity agreement. The terms of the indemnity agreement would have to be drafted very carefully, guaranteeing that the claimant, if any later dispute arose, would pay all damages, costs, and attorney fees and would indemnify and hold harmless the stakeholder. The advantage of this procedure is that the claimant gets the immediate use of the funds, but it can be risky for the stakeholder if adequate security is not given. See CC §2778 on rules for construing indemnity contracts.

WARNING: Indemnity language has often been a trap for the unwary practitioner. Some indemnification, language that seems all-encompassing creates a "general" indemnification agreement that may be defeated if there is negligence on the part of the parties seeking indemnification. See, *e.g., McDonald & Kruse v San Jose Steel Co.* (1972) 29 CA3d 413, 105 CR 725. Effective indemnity language must be specific enough to reflect the negotiation of risk between the parties (see *C.I. Eng'rs v Johnson & Turner* (1983) 140 CA3d 1011, 189 CR 824).

A stakeholder who is sufficiently disinterested to be considering contractual indemnification should consider whether to use such an agreement or whether the stakeholder will be better protected by immediately filing the interpleader action and seeking discharge and reimbursement of attorney fees.

NOTE: Indemnification is appropriate when a particular claimant has a claim that seems overwhelmingly valid, but other parties are making claims as well, and the stakeholder is concerned about whether a good faith dispute in fact exists among the claimants. Even in such a case, interpleader may be a safer remedy.

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§28.20 7. Alternative Dispute Resolution; Settlement Conferences

Various means of alternative dispute resolution discussed in chap 45 might well work for funds or property that is the subject of multiple claims.

In a particular court, retired judges may serve, for a fee, as settlement officers, and the stakeholder could call for a voluntary settlement conference using such a judge. This solution requires all known claimants to attend the conference.

If the parties can reach an agreement and execute the appropriate releases, all parties have been saved the expense of the interpleader litigation. If the parties cannot agree, the stakeholder can then interplead the funds and can use the failure of the settlement conference to demonstrate the good faith nature of the dispute.

NOTE: Attempts to settle have proved especially useful for multiple claims to an insurance policy that may not be sufficient to fully satisfy all claims. The insurer's incentive to call for a voluntary settlement conference is to avoid the expense of an interpleader action, which may include the cost of defending its insured as well as the cost of filing the interpleader action. Moreover, the claimants are made aware of the expenses of attempting to prove their claims, and they may be drawn by the prospect of receiving the immediate benefits of the money.

The insurer who seeks to resolve disputes by settlement must make certain that all known claimants to the policy limits agree to attend, and must take all necessary steps to protect the interests of the insured. The insurer must consider the impact of extinguishing its policy limits if it is possible that additional claims may arise under the policy. An interpleader action allows the insurer to rely on the court to determine the identity of all potential claimants and thus protect the insured. If a voluntary settlement conference is used, it would be wise to obtain the insured's authorization to expend the entire policy limits for claimants who are invited to the conference, assuming that releases protecting the insured can be obtained.

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F. Statutory Features

§28.21 1. Special Situations

Statutes other than CCP §386 provide for interpleader to determine (a) the rights of claimants to money withheld under stop notices (CC §§3175, 3214), (b) conflicting claims of title or possession of goods by a bailee or warehouseman (Com C §7603), (c) conflicting assessments of real property by two or more counties (Rev & T C §4988), and (d) disputes on priority of liens on withheld taxes (Rev & T C §26133). These statutes merely state that such situations are proper ones for the use of interpleader and do not specify procedures to be followed. The procedures in CCP §386 apply.

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§28.22 2. Attorney Fees and Costs

An advantage of the interpleader statute is that the interpleading party may request costs and reasonable attorney fees under CCP §386.6. The recovery of costs and fees is discretionary and depends on the discharge of the party under CCP §386.5, and the court may order them paid out of the funds deposited. The court is also empowered to order that costs and fees be borne by one or more of the adverse claimants.

WARNING: Potential liability for costs and fees should discourage frivolous claims. It should also encourage potential claimants to attempt an early resolution because the funds in dispute may be reduced by the stakeholder's expenses.

The party seeking to recover costs and to obtain fees must follow the procedures in CCP §386.6. *Phillips v Barton* (1962) 207 CA2d 488, 24 CR 527. Attorney fees are awarded only for services related to interpleader and not those related to a contest between the stakeholder and the interpleaded parties, concerning either the correctness of the amount deposited or the interest of the plaintiff in the funds. *Sweeney v McClaran* (1976) 58 CA3d 824, 830, 130 CR 205. Attorney fees and costs can be awarded only from the amount deposited with the court, not from interest earned on interpleader accounts. *Canal Ins. Co. v Tackett* (2004) 117 CA4th 239, 11 CR3d 626. Moreover, if the interpleading party retains the funds rather than depositing the funds with the court, the interpleading party may not recover costs and attorney fees from those retained funds; costs and fees may be awarded only from amounts actually deposited with the court. *Wells Fargo Bank, N.A. v Zinnel* (2004) 125 CA4th 393, 22 CR3d 750.

NOTE: Attorney fees to the stakeholder are justified because the stakeholder has aided claimants by promoting early litigation over ownership of the funds, thus preventing multiple lawsuits. Additionally, it would be unfair to burden the stakeholder with attorney fees to guard itself against multiple litigation. See *Schirmer Stevedoring Co. v Seaboard Stevedoring Corp.* (9th Cir 1962) 306 F2d 188.

Fees are awarded on a discretionary basis and thus depend on a good faith belief that there are conflicting claims. If such a belief has no apparent basis, fees should not be awarded. *Prudential Ins. Co. v Burress* (SD Cal 1960) 181 F Supp 391; *Bank of Am. Nat'l Trust & Sav. Ass'n v Mamakos* (ND Cal 1972) 57 FRD 198, aff'd (9th Cir 1975) 509 F2d 1217. The court must balance the unfairness to the stakeholder in bringing an action in interpleader to protect itself against multiple claims against the unfairness to a valid claimant in being forced to incur attorney fees and litigation costs over a claim in which there is no genuine dispute. See Alexander, *Claims in Interpleader, Abuse and Remedy*, 44 Cal SBJ 210, 213 (1969). See generally Anno, *Allowance of Attorneys' Fees to Party Interpleading Claimants to Funds or Property*, 48 ALR2d 190, 220 (1956).

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§28.23 3. Staying Other Proceedings

After the commencement of an interpleader action by a complaint or cross-complaint, "[t]he court in which it is filed may enter its order restraining all parties to the action from instituting or further prosecuting any other proceeding in any court in the state affecting the rights and obligations as between the parties to the interpleader until further order of the court." CCP §386(f).

EXAMPLE: The court has the power to enjoin prosecution of all injury and death claims of parties in a multiparty personal injury action arising from a single event. The discretion to stay actions is not unlimited. See *California State Dep't of Educ. v Superior Court* (1979) 97 CA3d 977, 159 CR 265. Therefore, parties who are aggrieved by such an injunction may ask the court to relieve them of the effects of a stay order. A limitation on the discretion to stay other actions was recognized in the federal interpleader case, *State Farm Fire & Cas. Co. v Tashire* (1967) 386 US 523, 535, 18 L Ed 2d 270, 87 S Ct 1199. The district court was held to have had no power in interpleader to affect litigation in a multiparty case between the parties other than the plaintiff in interpleader and persons claiming from the fund.

Code of Civil Procedure §386(f) limits a restraining order to the parties to the action and to other proceedings "affecting the rights and obligations as between the parties to the interpleader." The statute seems not to affect the prosecution by another plaintiff in a separate suit against a defendant in interpleader. The injunction contemplated by CCP §386(f) is limited to other suits brought in California. Parties in interpleader in California who are also confronted with multiple suits in other jurisdictions should consider federal interpleader as a remedy.

NOTE: In *California State Dep't of Educ. v Superior Court, supra,* the trial court's denial of a request for preliminary injunction under CCP §386(f) was held to be an abuse of discretion once the petitioner in interpleader demonstrated an actual danger of multiple suits; the obligation then shifted to the defendants in interpleader to demonstrate to the court why the interpleader action was inadequate to preserve their rights or how they would be damaged if the court granted the preliminary injunction contemplated by §386(f). The considerations articulated by the United States Supreme Court in *State Farm Fire & Cas. Co. v Tashire, supra,* should guide the exercise of the trial court's discretion.

The ability to restrain further proceedings includes the ability to halt enforcement of judgment proceedings. In *Surety Co. of Pac. v Piver* (1983) 149 CA3d Supp 29, 197 CR 531, one party of the interpleader action already held a judgment against the surety. When the surety learned of more claimants it filed an interpleader action that was sufficient to restrain enforcement of the original claimant's judgment.

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III. STAKEHOLDERS' PROCEDURES

A. Tactical Considerations

§28.24 1. Choosing State or Federal Jurisdiction, Venue

A stakeholder who decides to pursue interpleader must determine whether federal or state jurisdiction should be invoked. One problem facing a California action may be obtaining jurisdiction over the various claimants, which may be more easily achieved with federal jurisdiction. This consideration is especially important because of the CCP §386(f) limitation on enjoining other proceedings. Because §386(f) limits its power to actions brought in California, a stakeholder will not necessarily achieve the peace from multiple litigation that is the object of the interpleader. Another factor is the comparative speed of relief afforded by the federal court. Calendars in many large, urban, California courts, are extremely congested, and a federal court can often resolve matters more expeditiously.

If federal interpleader is to be pursued, venue considerations affect whether to pursue "statutory" interpleader under 28 USC §§1335, 1397, and 2361 or "rule" interpleader under Fed R Civ P 22. Under statutory interpleader, venue is proper in any district where one of the claimants resides. 28 USC §1397. Under rule interpleader, venue is governed by the general venue provisions applicable to civil actions in federal court and may be brought in a district where the party seeking interpleader resides, where all parties to be interpleaded reside, or where the claim arose. Service of process under rule interpleader is governed by Fed R Civ P 4, which requires service to be made within the territorial limits of the state in which the federal court where the action is brought is located. For statutory interpleader, service of process may be made on the parties to be interpleaded anywhere in the United States where they reside or may be found. 28 USC §2361.

PRACTICE TIP: Statutory interpleader often provides benefits in regard to venue and service of process. The stakeholder may select any federal district in which one or more of the claimants reside as the venue of the action and may then serve process on any party in the United States.

"Rule" interpleader actions require complete diversity of citizenship, *i.e.*, diversity of citizenship between the stakeholder and all of the claimants, but "statutory" interpleader requires only minimal diversity, *i.e.,* diversity of citizenship between any two claimants. *State Farm Fire & Cas. Co. v Tashire* (1967) 386 US 523, 531, 18 L Ed 2d 270, 275, 87 S Ct 1199. For discussion of requirements for diversity jurisdiction, see §§7.48-7.81. The jurisdictional amount for rule interpleader is in excess of $75,000 (22 USC §1332(b)) and for statutory interpleader is $500. Fed R Civ P 4.

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§28.25 2. Effect of Insurer's Deposit of Policy Proceeds on Obligation to Defend

A liability insurer may interplead its policy proceeds in court, when faced with multiple claims against its insured, and then remain an "interested" stakeholder (*e.g.*, if the value of the claims does not exceed the policy limits, the insurer "keeps" the remainder). In such a circumstance, the insurer would clearly have a duty to continue to provide a defense to its insured, assuming the duty to defend arose in the first place. See §28.8.

An insurer may be a "disinterested" stakeholder because the policy limits have been exhausted. Most policies that create a duty to defend provide that the duty is terminated when policy limits are exhausted. However, cases suggest that the insurer would not be relieved of its duty to defend until the interpleader action is completed, although no California court has ruled on this precise issue. "Artificially" exhausting policy limits by tendering policy limits during pending litigation will not relieve the insurer of the duty to defend. See *Johnson v Continental Ins. Co.* (1988) 202 CA3d 477, 248 CR 412. An insurer's duty to defend may include the duty to pursue an appeal on behalf of its insured when there are reasonable grounds for appeal. An insurer may not simply interplead the policy limits and abandon defense of its insured by refusing to appeal. *Jenkins v Insurance Co. of N. Am.* (1990) 220 CA3d 1481, 272 CR 7. Thus, such an insurer would be unwise to unilaterally withdraw a defense absent a court order approving withdrawal.

However, this reasoning (and the opinions on which it is based) is applicable only to the "standard" policy language creating a *duty* to defend. Many newer forms of policies specify that the insurer has "the *right* but *not the obligation*" to defend its insured. This policy language may be read to allow the insurer to unilaterally determine whether it will defend, not defend, or initially undertake the defense and then withdraw. Such policy language has not been tested in this context, but its plain meaning seems clear that the insurer may withdraw from the defense after interpleading its policy limits and disclaiming interest in the return of any proceeds. The insurer might seek a court order authorizing the withdrawal of defense, perhaps in association with the motion for discharge.

Before filing an interpleader action, the insurer—having a duty to deal in good faith with the insured, who could become personally liable for an excess judgment—may wish to confer with the insured or the insured's separate counsel to see whether there is a strategy that will protect both. See California Liability Insurance Practice: Claims & Litigation §§15.26, 22.2 (Cal CEB 1991).

WARNING: Courts could hold that the commencement of an interpleader action by an insurer facing multiple claims that may exceed the policy limits is an "artificial exhaustion" of the policy limits that does not relieve the insurer of the obligation to provide a defense. An insurer might try to obtain a discharge from the interpleader action and commence a separate declaratory relief action against the insured, seeking a court declaration as to whether it is still obligated to defend. An insurer who unilaterally withdraws its defense after being discharged from an interpleader action would be risking a "bad faith" action by its insured.

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B. Meeting Threshold Requirements

§28.26 1. Showing Double Vexation

The right to interplead depends on "facts showing a reasonable probability of double vexation." *Hancock Oil Co. v Hopkins* (1944) 24 C2d 497, 510, 150 P2d 463. Code of Civil Procedure §386(a) refers to "conflicting claimants," and CCP §386(b) refers to claims that "may give rise to double or multiple liability." Claims may conflict because:

- They are mutually exclusive;
- They exceed a limited fund (or the stakeholder's liability); or
- One claimant asserts a claim because of attachment or garnishment.

The court in *Hancock* cautioned, however, that interpleader could not be maintained on a "pretext … of double vexation." The court in *Bank of Am. Nat'l Trust & Sav. Ass'n v Mamakos* (ND Cal 1972) 57 FRD 198, 201, aff'd (9th Cir 1975) 509 F2d 1217, refers to the "requirement of good faith doubt before commencing an interpleader action" under California or federal law. After the position of one of the claimants has been sustained, *e.g.,* on motion for summary judgment, it may be contended that the result indicates that the identity of the party entitled to the funds should have been obvious. Unless there is some indication of collusion or inequitable conduct, however (see *Young v Colyear* (1921) 54 CA 232, 234, 201 P 623; *Central Mont. Stockyards v Fraser* (Mont 1957) 320 P2d 981), a stakeholder is not required to decide between conflicting claims. The test seems to be whether one invoking interpleader can safely determine which claim is right, and if this cannot be done, interpleader is appropriate. See *Fidelity Sav. & Loan Ass'n v Rodgers* (1919) 180 C 683, 182 P 426.

Code of Civil Procedure §386(b) permits interpleader when the liability is prospective, stating that any person against whom double or multiple claims are made, or may be made, may bring an interpleader action, as may a defendant, even though the claims are unliquidated and no liability has arisen. One justification for this provision lies in the potential for multiple vexation in several unliquidated tort claims against a single insurance policy.

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2. Jurisdiction

§28.27 a. Over Interpleader Suits

The remedy of interpleader may be invoked in both unlimited and limited civil cases. Cal Const art VI, §10; CCP §86(a)(2). For discussion of trial court unification and limited civil cases, see chap 6.

NOTE: The plaintiff in a case in interpleader may make deposits after filing the initial complaint, but should accompany additional deposits with an amended complaint or cross-complaint (see CCP §386(b)) reflecting the increased amount in controversy. See *Great-West Life Assur. Co. v Superior Court* (1969) 271 CA2d 124, 76 CR 284. Consequently, if a case in interpleader is properly commenced as a limited civil case but subsequent deposits exceed the maximum amount allowable in a limited civil case, it appears the party making the excess deposit is obliged under CCP §403.020 to reclassify the case as an unlimited civil case and to pay the applicable reclassification fees.

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§28.28 b. Over Claimants

When the known or potential claimants to property are located in several states, the attorney should consider federal interpleader and the availability of nationwide process. See §28.24. California jurisdiction may be asserted over out-of-state defendants "on any basis not inconsistent with the Constitution of this state or of the United States." CCP §410.10. This provision is subject to the inconvenient forum limitation of CCP §410.30. If jurisdiction exists, several means of accomplishing service of process are provided in CCP §§415.10-415.50 so that difficulties in service are no longer a deterring factor.

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§28.29 3. Applicability of Joinder Statutes

Code of Civil Procedure §386, the interpleader statute, is part of Title 3, dealing with parties to civil actions. The statute provides that the "applicant or interpleading party may join as a defendant in such action any other party against whom claims are made by one or more of the claimants." CCP §386(b).

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§28.30 4. Applicability of Cross-Complaint Statute

All parties must be aware of the breadth of CCP §426.30, the compulsory cross-complaint statute. A stakeholder believing that its involvement in litigation will be minimized by filing an interpleader proceeding may find that its participation in the litigation becomes more extensive because of cross-complaints based on "related causes of action" against it or other parties. See chap 26.

A significant example is *Pacific Loan Mgmt. Corp. v Superior Court* (1987) 196 CA3d 1485, 242 CR 547. In that case, after a complaint in interpleader was filed, one of the defendants cross-complained against the plaintiff on theories of conversion, breach of fiduciary duty, negligence, abuse of process, interference with business relations, and intentional infliction of emotional distress, all of which were based on the plaintiff's refusal to deliver to this claimant the funds at issue. This court held that the plaintiff in interpleader was entitled to a summary judgment against this cross-complaint, but the holding has at least suggested the possibility that, in the proper case, such a cross-complaint, or at least the tort causes of action suggested in the cross-complaint, may be appropriate. The court of appeal stated (196 CA3d at 1491):

> There is no authority for the proposition that [plaintiff in intervention's] attempt to submit this dispute to a judicial tribunal, as expressly authorized by statute, can in itself be a tort. Presumably, the use of the interpleader procedure could be an abuse of process if it were clear beyond [dispute that defendant and cross-complainant in interpleader] had an immediate right to the funds. But instead, [defendant and cross-complainant in interpleader's] right to the funds is anything but plain.

Although it dismissed the particular cross-complaint at issue, the court recognized that, if the dispute over the claim is not legitimate, the interpleading party may be subject to an action for abuse of process.

It should be noted that this opinion contains some unfortunate language, which appears to overly limit the right to interpleader and which is not consistent with CCP §386. The court of appeal stated that "the statute in its present form, [CCP §386(b)], requires only that the stakeholder file a verified pleading disclaiming any interest in the money or property claimed. It is the stakeholder's avowed disinterest in the interpleaded proceeds which gives him the right to interplead." 196 CA3d at 1489.

As discussed above, the right to interplead does not cease if the stakeholder continues to deny liability to the claimants and asserts a right to the fund or a part of it. This unfortunate language probably results from the fact that in this particular case the stakeholder was in fact disinterested and was seeking a discharge. The court's interpretation of CCP §386(b) is accurate in asserting that the key to being *discharged* as an interpleading party is a lack of interest in the proceeds. The court in this case did not distinguish between a "mere" or "disinterested" stakeholder and an "interested" stakeholder.

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§28.31 C. Alternative Procedures When Stakeholder Is Defendant in Pending Action

When the stakeholder is a defendant in a pending action, three alternative procedures are available. The stakeholder may (1) move for substitution and discharge or dismissal under CCP §386(a) or §386.5 (see §28.32), (2) cross-complain under CCP §386(a) or (b) (see §28.35), or (3) file a complaint under CCP §386(b) (see §28.36).

The cross-complaint and complaint procedure are more cumbersome than the motion procedure under CCP §386(a) but they may be useful when the action is not on a contract or for specific personal property or when an answer has previously been filed. In this situation, leave to file the cross-complaint may be readily obtained by court order or stipulation, while leave to file a motion might be denied. Another advantage of the cross-complaint or complaint is that the stakeholder, by naming all potential claimants as parties and serving them with a summons, brings them before the court and under its jurisdiction. This procedure avoids the possibility of a discharge that would not protect against claims made by a nonparty.

The court may order deposit of funds on motion, and on the defendant's "depositing in court the amount claimed on the contract, or delivering the property or its value" the court may order substitution. CCP §386(a). Apparently, this deposit of funds is a prerequisite to an order for substitution by motion under §386(a). However, CCP §386(b) does not require deposit as a prerequisite to the remedy, particularly because the "applicant or interpleading party may deny liability in whole or in part to any or all of the claimants." This statement is consistent with Fed R Civ P 22, under which deposit is not jurisdictional, although it is permitted. See Fed R Civ P Official Forms 18 (interpleader complaint) and 21 (counterclaim), which do not mention a deposit. However, under statutory federal interpleader, the parties seeking interpleader are required to deposit the disputed funds in court or file a bond with the court. Thus, a defendant who denies all liability may not wish to make a deposit as a prerequisite to interpleader if it is filed under Rule 22.

Conversely, there are situations in which a defendant admits liability and wishes to make an immediate deposit to avoid accrual of interest. Under CCP §386(c) funds admitted to be payable may be deposited by a plaintiff or cross-complainant at the time of filing the interpleader action without first obtaining a court order. In this situation, as well as when the defendant wishes to make no deposit, the complaint or cross-complaint avenue may be preferable.

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§28.32 1. Motion for Discharge and Substitution or Dismissal

A motion by a defendant stakeholder against whom an action is pending on a contract or for specific personal property for discharge from liability on deposit with the court of an amount in dispute is authorized by CCP §§386(a) and 386.5.

Section 386(a) applies when the defendant alleges a claim made by a person not a party to the action who may be substituted into the action in place of the defendant. It provides for deposit of property as well as money.

Section 386.5 applies "where the only relief sought against one of the defendants is the payment of a stated amount of money alleged to be wrongfully withheld" and the defendant alleges conflicting claims by other parties to the action. A defendant in this situation seeks dismissal rather than substitution.

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§28.33 a. Timing of Motion

Code of Civil Procedure §386(a) requires an application for substitution to be made before an answer is filed. It is occasionally possible to withdraw an answer and then file a motion (*Israel v Bryan* (1921) 52 CA 66, 197 P 121), but this may be done only in the discretion of the court, and should not be relied on. On the other hand, the defendant may answer after filing a motion for substitution. *Cassidy v Norton* (1914) 25 CA 433, 143 P 1057.

Code of Civil Procedure §386.5 does not include a provision that the motion be made before the answer is filed. The declaration set forth in §28.45 which may be used in support of a motion either under CCP §386(a) or §386.5, contains a statement that no answer has been filed. If the motion is made under §386.5 and an answer has been filed, that statement should be deleted.

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§28.34 b. Drafting Moving Papers

Although CCP §§386(a) and 386.5 differ slightly in application, under either, a defendant stakeholder applies for an order by noticed motion, supported by a memorandum in support of the motion (see Cal Rules of Ct 3.1112(a), 3.1113(a)) and an affidavit (or declaration under CCP §2015.5). An attached declaration or affidavit should expressly state facts in evidentiary terms, complying with each of the requirements of the code section under which the moving party is proceeding. The defendant should repeat in the affidavit each item set forth in the notice as a ground of the motion, expanding on specific items as required by the complexity of the case.

Although not required, it may be useful for a defendant to state what efforts have been made to deliver the money or property to the proper person. These facts may be relevant to the court's exercise of discretion relating to discharge and the amount, if any, to be awarded as attorney fees. Some basis for the claim of a particular amount of attorney fees should be stated, and costs incurred should be itemized. The affiant should offer to make a deposit under the order sought.

The supporting memorandum should specify the pertinent portion of the applicable statutes, explaining each statute's applicability to the facts alleged in the complaint and set forth in the affidavit. Other substantive law should be cited, depending on the facts, the complexity of the case, and any anticipated opposition to the motion.

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§28.35 2. Cross-Complaint

Code of Civil Procedure §386(a)-(b) provides that a defendant against whom an action is pending may file a verified cross-complaint in interpleader, admitting no interest in an amount or property claimed, nor in any part of the amount or property, and alleging that all or a part of the amount or property is demanded by parties to the action, and apply to the court on notice to the parties for an order to deliver property, or a portion of it, or its value to whomever the court directs.

Code of Civil Procedure §386(a) limits the cross-complaint procedure to defendants "against whom an action is pending upon a contract, or for specific personal property," while CCP §386(b), enacted in 1975, makes the procedure available to any person, firm, corporation, association or other entity who is a defendant in an action brought on one or more claims that may give rise to double or multiple liability. The cross-complaint should contain allegations similar to those in a complaint in interpleader (see §28.37), and should be filed with the answer. The form of complaint set forth in §28.48 may be adapted for use as a cross-complaint. If that form is used, it should also contain a prayer that the complaint against cross-complainant be dismissed with prejudice. Service is made as in any suit. See chap 17 on service of process.

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§28.36 3. Complaint

Under CCP §386(b) a person, firm, corporation, association, or any other entity that is a defendant in an action on one or more claims of any nature that may give rise to double or multiple liability may bring a separate action against the claimants to force them to interplead. The stakeholder is then a plaintiff-in-interpleader. See §§28.37-28.38. In this situation, the now plaintiff-in-interpleader stakeholder may wish to consider staying the other proceedings. See §28.23.

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D. Procedures When Stakeholder Is Plaintiff in Interpleader

§28.37 1. Complaint in Interpleader

The complaint must be tailored to the circumstances. The facts to be alleged by a plaintiff stakeholder may vary widely, depending on:

- Circumstances surrounding the claims against the plaintiff (see §§28.8-28.13);
- Whether, and with respect to which parties, claims are admitted or contested; and
- Facts relating to the plaintiff's possession of money or other property.

It need not be alleged that the claims made against the plaintiff are valid. It is sufficient to describe them and to state that they are adverse and that the plaintiff cannot safely determine whom to pay. *Fidelity Sav. & Loan Ass'n v Rodgers* (1919) 180 C 683, 182 P 426. An allegation may be made that reasonable doubt exists whether the plaintiff can safely determine which claims are valid.

Historically, the complaint has included an allegation that there is no collusion between the stakeholder and any claimant, because the purpose of interpleader is to avoid harassment from claimants. Code of Civil Procedure §386(a) specifically requires this allegation to be made in an affidavit supporting a motion for substitution of defendants. However, because CCP §386(b) dispenses with the former requirements of lack of interest and indifferent stakeholder (see §28.4), allegations to this effect in complaints and cross-complaints may not be necessary. The complaint may also contain an allegation that there are claims against another party arising from the same transaction or occurrence.

The complaint may contain an offer to deposit under order of the court any money or property on which liability is admitted. (If plaintiff deposits funds payable without an order, under CCP §386(c) allegations and prayer should be modified accordingly.)

Both CCP §386(a) and (b) require that a cross-complaint in interpleader be verified. In view of the significance of the good faith issue in interpleader, both as to the stakeholder and as to claimants, it is better practice to verify the complaint as well.

At least one case has suggested a requirement for a verified pleading (*Pacific Loan Mgmt. Corp. v Superior Court* (1987) 196 CA3d 1485, 1489, 242 CR 547), stating "the statute … requires only that the stakeholder file a verified pleading disclaiming any interest in the money or property claimed." However, the references to the requirements of stating a cause of action in interpleader in this portion of this particular opinion are probably accurate only insofar as they relate to a disinterested stakeholder seeking discharge. The requirement of a verified pleading is specified in §386(a) only as it relates to a cross-complaint in interpleader, and that requirement of a verified cross-complaint in interpleader is repeated in §386(b). The statute is silent, however, on whether a complaint must be verified. However, because a verified complaint may itself be used in support of a motion for discharge or motion for summary judgment, or both, it is probably the better practice to verify the complaint as well.

For examples of complaints, see *Union Central Life Ins. Co. v Janssen* (1968) 260 CA2d 518, 67 CR 253 (life insurance proceeds); *Fidelity & Deposit Co. v Santa Monica Fin. Co.* (1960) 182 CA2d 211, 6 CR 213 (surety bond); *Sullivan v Lusk* (1907) 7 CA 186, 94 P 91, disapproved on other grounds in *Monogram Co. of Cal. v Kingsley* (1951) 38 C2d 28, 237 P2d 265 (attorney fees).

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§28.38 2. Service and Filing

The complaint is served in the same manner as other process in a lawsuit. See chap 17.

Among the first issues the practitioner must address are whether the action is a limited or unlimited civil case under California law and whether the matter ought to be filed in federal or state court. For further discussion of considerations involved in choice of forum, see §§28.23-28.24.

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IV. CLAIMANTS' PROCEDURES

§28.39 A. Alternative Procedures for Opposing Interpleader

Responding to a complaint or cross-complaint in interpleader is similar to responding to other pleadings. If the plaintiff-in-interpleader merely alleges a position as a disinterested stakeholder and seeks the adjudication of the court on the validity of the claims to the fund and seeks the deposit of the funds in the court, then the essential challenges to the filing of the action in interpleader are to contest the allegation that a conflict truly exists and to deny any allegation that the plaintiff cannot reasonably expect double vexation or multiple suits. Because the traditional requirements of interpleader have been eliminated (see §28.4), the essential defense against a "mere" or disinterested stakeholder is to simply challenge the good faith aspect of the complaint-in-interpleader. This challenge primarily involves disputing the question of multiplicity of other claims to the fund that may be valid. However, if several such claimants are before the court simultaneously, such challenges would not appear to have a reasonable chance of success, and the more practical approach may be to acquiesce to the resolution of the claims but to argue against granting attorney fees and costs to the plaintiff (see *Schirmer Stevedoring Co. v Seaboard Stevedoring Corp.* (9th Cir 1962) 306 F2d 188).

It has been suggested that an interpleader action brought in bad faith may support an abuse of process claim by the aggrieved claimant who has been deprived of the use of the fund and who has been forced to respond to the action in interpleader. The concept of cross-complaining on those grounds has not been expressly precluded by the courts (see *Pacific Loan Mgmt. Corp. v Superior Court* (1987) 196 CA3d 1485, 1491, 242 CR 547: "presumably the use of the interpleader procedure could be an abuse of process if it were clear beyond dispute that [defendant claimant] had an immediate right to the funds"). However, a cross-complaint for abuse of process may be premature, and therefore this remedy may have to wait until after the completion of the interpleader action.

If the right to interplead has been asserted in a motion by the defendant, the claimant should file and serve opposing declarations. If the claimant is responding to a complaint or cross-complaint, the full array of defensive pleadings is available.

A demurrer may be appropriate when the complaint or cross-complaint does not sufficiently allege the plaintiff's right to interplead. *City of Los Angeles v Amador* (1903) 140 C 400, 73 P 1049. For example, a complaint by a surety that does not show that the total claims exceed the amount of the obligation would be defective because the claims would not conflict. A demurrer may also be useful when not all claimants have been made parties or when judicial notice may be taken of a prior judgment establishing one of the claims. CCP §430.70.

The defendant may deny allegations of a complaint in an answer (CCP §386(d)):

> which shall be served upon all other parties to the action and which shall contain allegations of fact as to his ownership of or other interest in the amount of property and any affirmative defenses and the relief requested. The allegations in such answer shall be deemed denied by all other parties to the action, unless otherwise admitted in the pleadings.

Because interpleader is an equitable action, traditional equitable defenses should apply, including laches, estoppel, waiver, and unclean hands. However, if other claimants have valid claims to the fund, some of these defenses may serve only to preclude the discharge of the interpleading party and to preclude the interpleading party from seeking attorney fees, costs, and protection from accrued interest. Given the equitable power of the court to do equity among all parties, equally innocent claimants will probably not be precluded from their share of the fund because one of the claimants is able to establish an equitable defense against the interpleading party. The answering party should also bear in mind that many of the elements of the interpleader action must be affirmatively alleged in the complaint itself, and if alleged by the complaint, do not need to be denied as an affirmative defense, but rather a specific denial (in a verified answer) or a general denial (in an unverified answer) will be appropriate to place those matters at issue and the plaintiff-in-interpleader will bear the burden of proving them.

A claimant who acknowledges the stakeholder's status and right to interplead may indicate that position in his answer or response to the stakeholder's complaint or motion by admitting that the party seeking interpleader is in fact a mere

stakeholder (*Conner v Bank of Bakersfield* (1920) 183 C 199, 202, 190 P 801) and may file a cross-complaint against other claimants, setting out his or her cause of action in accordance with the applicable substantive law. He or she may also have to answer cross-complaints of other claimants. See chap 26.

A claimant who believes that there is no genuine issue of fact with respect to the rightfulness of the claim should consider filing both an answer and a cross-complaint and moving for summary judgment as the most expedient means to establish the claim and recover the subject matter. See §28.15.

The challenge to a plaintiff's right to interplead should include opposition to the plaintiff's request for attorney fees and costs and reasons for denial of the request.

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§28.40 B. Effect of Failure to Object to Discharge of Stakeholder

All objections to discharge of the stakeholder must be made at the time the answer to the complaint or cross-complaint is filed, or they are waived. The issue cannot be raised on appeal from the judgment in the trial between claimants. *San Francisco Sav. Union v Long* (1898) 123 C 107, 55 P 708; *Continental Nat'l Bank v Stoltz* (1920) 46 CA 532, 189 P 712. It has been suggested in a substitution case that the claimant lost his objection to the substitution because, although he had not expressly consented to the motion, he had not included the discharged defendant in subsequent proceedings, which constituted acquiescence. *Hellman Commercial Trust & Sav. Bank v Alden* (1929) 206 C 592, 275 P 794. Because this case has not been challenged, it would seem advisable to get all objections on the record and to keep the discharged party's name on all pleadings.

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§28.41 V. JOINED DEFENDANTS' PROCEDURES

Code of Civil Procedure §386(b) permits the applicant or interpleading party to "join as a defendant in such action any other party against whom claims are made by one or more of the claimants." This statement seems to permit an insurer to interplead its tortfeasor-insured. If the insurer does not do so, CCP §386(b) seems to authorize such a person to enter the action by filing a cross-complaint.

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VI. TRIAL

§28.42 A. First Stage

The first stage in an interpleader action is to determine whether the plaintiff has the right to interplead. If defendants in interpleader fail to challenge the plaintiff's right to interplead, or if there is a dispositive stipulation, there should be no need for a formal motion hearing or trial. If multiple claimants in fact assert claims to the fund in amounts that would exceed the fund, or if each claimant asserts an entitlement to the entirety of the res, then the multiplicity of claims that is the hallmark of the need for interpleader would appear to exist. Because the res may potentially be reduced by court order to the extent of any award of attorney fees and costs made to the discharged plaintiff in interpleader, claimants should not risk a reduction of funds by unnecessarily contesting a clear case of multiplicity of claims. Claimants would be better advised to stipulate to the discharge of the disinterested stakeholder and immediately proceed to the second stage of the trial.

The court will determine whether there are valid objections to the propriety of interpleader during the first stage. If the court determines this issue favorably to the plaintiff stakeholder, it will issue an interlocutory order compelling the payment into court of the sum the plaintiff admits to be due and then discharging a disinterested stakeholder. If the stakeholder is in fact interested and disclaims liability to the various claimants, no order of discharge will be issued, and the stakeholder's claims will be included with all other claimants in the second stage of the litigation. If the first stage cannot be resolved by stipulation, the plaintiff-in-interpleader should move for a discharge or for summary adjudication of issues, or both, to establish that the right to interpleader exists. If the stakeholder is disinterested, the motion for discharge should encompass both the issue of the right to interplead to determine its propriety and the issue of whether the stakeholder can be discharged, as well as an application for attorney fees under CCP §386.6. If that issue cannot be resolved by way of motion, the matter should be set for trial on a severed basis for the first stage to be tried only, and the matter would then come on for trial as a nonjury case and is tried prior to the time the claimants begin their litigation in the same court.

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B. Second Stage

§28.43 1. Right to Jury Trial

The right to a jury trial in an interpleader action is governed by CCP §386(e). This subsection was added by amendment in 1951 in an attempt to clarify the question of when a jury trial is appropriate in an interpleader action. Because interpleader is of equitable origin, no right to jury trial exists at common law. Nor does the right exist at the second stage litigation after discharge of the disinterested stakeholder, even if the original action would have been an action at law and regardless of whether the interpleader resulted from an original suit as compared to a cross-complaint or motion for substitution. *Hellman Commercial Trust & Sav. Bank v Alden* (1929) 206 C 592, 600, 275 P 794 (proceedings on granting a motion for substitution are governed by same rules as interpleader); *Union Mut. Life Ins. Co. v Broderick* (1925) 196 C 497, 238 P 1034 (complaint); *Adams v Grant Lodge of AOUW* (1894) 105 C 321, 38 P 914 (cross-complaint).

The danger of litigants' being denied a jury trial was the reason for the amendment adding CCP §386. See Progress Report of Senate Interim Judiciary Commission 40 (1951).

This amendment was in part adopted to avoid a stakeholder's admitting a small liability in order to prevent a jury trial.

The first portion of the subsection suggests that a jury trial can be required whenever one would otherwise be available at law. Taken as a whole, however, it has the effect of maintaining the previous rule on the litigation between the claimants while requiring a jury when a deficiency is claimed against the interpleader plaintiff, if one would otherwise be required.

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§28.44 2. Trial Between Conflicting Claimants; Final Judgment

On the determination of the appropriateness of the litigation for the interpleader remedy (and on discharge of a disinterested stakeholder), a trial on the merits is held between the rival claimants. At the conclusion of the trial, the court renders a judgment that awards the disputed property to the successful party or parties.

The trial court has the discretion under CCP §386(e) in the order of trial so that issues may be settled in order of difficulty and for the convenience of the court and the litigants. Therefore, the court can order trial of certain issues in the order most likely designed to simplify the litigation and to resolve disputes between claimants. See CCP §386(e).

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Source: Civil Litigation/California Civil Procedure Before Trial/28 Interpleader/ VII. FORMS/§28.45 A. Form: Notice of Motion for Discharge and Substitution or Dismissal

VII. FORMS

§28.45 A. Form: Notice of Motion for Discharge and Substitution or Dismissal

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER OF**
	)	_ _[*DISCHARGE AND*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*SUBSTITUTION/DISCHARGE*
	)	*AND DISMISSAL*]_ _ **OF**
	)	**DEFENDANT-STAKEHOLDER;**
	)	_ _[*SUPPORTING*
	)	*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
_____	)	

PLEASE TAKE NOTICE that defendant, _ _[*name*]_ _, moves the Court under Code of Civil Procedure §386 for an order that:

1. Defendant, _ _[*name*]_ _, deposit in Court on or before _ _[*date*]_ _, _ _[*the amount of $_ _ _ _ _ _/property consisting of _ _[specify]_ _]_ _, less the amount of $_ _ _ _ _ _, as costs and reasonable attorney fees incurred in bringing this motion, or another amount determined by the Court.

2. On making such deposit, defendant, _ _[*name*]_ _, be discharged from all liability asserted against _ _[*him/her/it*]_ _ with respect to such _ _[*money/property*]_ _ by plaintiff, _ _[*name*]_ _, defendant(s), _ _[*name(s)*]_ _, and nonparty claimant, _ _[*name*]_ _.

[*Option 1*]

3. _ _[*Name of nonparty claimant*]_ _ be substituted into this action as a party-defendant in place of _ _[*name of moving party*]_ _.

[*Option 2*]

3. The complaint in this action be dismissed against defendant, _ _[*name of moving party*]_ _.

[*Continue*]

The grounds for issuance of this order are that:

1. Defendant, _ _[*name*]_ _, has no interest in _ _[*e.g., all/half*]_ _ of the _ _[*money/property*]_ _ claimed by plaintiff in this action and is a mere stakeholder with respect to _ _[*it/that portion*]_ _.

2. Conflicting demands have been made for the _ _[*money/property*]_ _ on this defendant by _ _[*name*]_ _ and _ _[*name*]_ _, without any collusion with this defendant, and defendant cannot safely determine which demand is valid.

3. Defendant is entitled to an allowance of costs of $_ _ _ _ _ _ and reasonable attorney fees of $_ _ _ _ _ _ incurred in this action.

The hearing will take place on _ _[*date*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, in _ _[*department*]_ _ of the _ _[*court*]_ _ located at _ _[*full address*]_ _.

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of _ _[name]_ _, dated _ _ _ _]_ _, _ _[and]_ _ on all papers filed and records in this action _ _[, and on any evidence received at the hearing]_ _.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party and each named nonparty claimant); ___ office copies.

Comment: See §§28.32-28.34. This notice of motion may also be adapted for use in an interpleader action instituted by complaint (see §§28.36-28.38) or cross-complaint (see §28.35). If used after a cross-complaint in interpleader, it should contain a request that a judgment of interpleader be entered, requiring cross-defendants to interplead, dismissing the cross-complainant as a party, and dismissing the complaint against the cross-complainant. On the Cal Rules of Ct 3.1112(a) requirement of filing of a "motion," see chap 12.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§28.46 B. Form: Declaration Supporting Motion for Discharge and Substitution or Dismissal

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**ORDER OF** _ _[*DISCHARGE*
	)	*AND*
	)	*SUBSTITUTION/DISCHARGE*
	)	*AND DISMISSAL*]_ _ **OF**
	)	**DEFENDANT-STAKEHOLDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*defendant/attorney for defendant*]_ _, _ _[*name*]_ _**, in this action that was commenced on** _ _[*date*]_ _**, and is now pending in this Court.**

[*Add if appropriate*]

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.

3. _ _[*I have/Defendant has*]_ _ **not answered the complaint and time to do so has not expired.**

[*Continue*]

[4.] This action was brought to recover _ _[*specify*]_ _**.**

[5.] On _ _[*date*]_ _**, plaintiff,** _ _[*name*]_ _**, demanded** _ _[*specify*]_ _**.**

[6.] On _ _[*date*]_ _, _ _[*name of claimant*]_ _**, claimant, notified** _ _[*me/defendant*]_ _ **that** _ _[*state claims made by claimant*]_ _**. This claim was made without** _ _[*my/defendant's*]_ _ **collusion.**

[7.]_ _[*I do/Defendant does*]_ _ **not know and cannot determine the respective merits of the claims of plaintiff**

and claimant and therefore cannot safely _ _[*state performance demanded*]**_ _.**

[8.]**_ _**[*I have/Defendant has*]**_ _ no interest in _ _**[*identify disputed matter or portion of it to which no claim is made*]**_ _ and offer _ _**[*state action offered, e.g., to make deposit with Court*]**_ _ on being discharged from all liability to either plaintiff or claimant in order that they may interplead and settle their claims between themselves.**

[9.] As a result of filing this action, _ _[*I have/defendant has*]**_ _ incurred the following costs and attorney fees of $_ _ _ _ _ _ for the following services: _ _**[*Describe costs and services in detail*]**_ _.**

WHEREFORE, defendant prays for:

1. An order substituting claimant as a defendant, discharging _ _[*me/defendant*]**_ _ from all liabilities to plaintiff or claimant.**

2. Costs of this action, reasonable attorney fees, and other just relief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party and each named nonparty claimant); ___ office copies.

Comment: See §§28.6, 28.34. To justify a fee, the attorney who makes the declaration can describe in detail the legal services rendered.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/28 Interpleader/§28.47 C. Form: Order Discharging Defendant and Substituting Claimant as Defendant

§28.47 C. Form: Order Discharging Defendant and Substituting Claimant as Defendant

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER DISCHARGING DEFENDANT AND SUBSTITUTING CLAIMANT AS DEFENDANT**
_ _[*Name(s)*]_ _, **Defendant(s)**	
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for the following order was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. Defendant be discharged _ _[*from this action and*]_ _ from all liability to plaintiff, _ _[*name*]_ _, and to claimant, _ _[*name*]_ _, _ _[*on the amount admitted*]_ _ on depositing _ _[*e.g., with the court clerk*]_ _ $_ _ _ _ _ _, less $_ _ _ _ _ _ for costs and attorney fees.

2. The clerk deposit the remainder of the fund at interest, subject to further order of this Court.

3. Claimant be substituted as defendant in the place of _ _[*name*]_ _, defendant.

4. Plaintiff, within _ _ days, serve a copy of the complaint in this action and of the order on claimant or _ _[*his/her/its*]_ _ attorney.

5. Claimant be allowed to appear and plead to the complaint or make any motion that _ _[*he/she/it*]_ _ desires within _ _ days after service.

6. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party and each named nonparty claimant); ___ office copies.

Comment: See §§28.32-28.34.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§28.48 D. Form: Complaint in Interpleader

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	
	)	**COMPLAINT IN**
vs	)	**INTERPLEADER**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	[*In limited civil case, add:*
	)	**Amount demanded**
	)	_ _[*exceeds/does not*
_____	)	*exceed*]_ _ **$10,000**]

Plaintiff, _ _[*name*]_ _**, alleges:**

1. Plaintiff is now, and at all times mentioned in this complaint has been, _ _[*describe status*]_ _**.**

2. Defendants, _ _[*names*]_ _**, are now, and at all times mentioned in this complaint have been,** _ _[*describe status*]_ _**.**

3. Complainant, _ _[*name*]_ _**, is informed, believes, and alleges that defendants claim some right, title, or interest in** _ _[*describe subject matter of action*]_ _**.**

4. _ _[*Allege in logical sequence facts giving rise to conflicting claims, beginning with facts establishing relations of parties*]_ _**.**

5. _ _[*Allege facts out of which alleged liability arises*]_ _**.**

6. _ _[*Allege nature of conflicting demands*]_ _**.**

7. These claims are adverse and conflicting, and plaintiff is unable to determine which is valid. They are made without plaintiff's collusion,

[*Add if appropriate*]

and plaintiff claims _ _[*no interest in the subject matter of the action/an interest in the amount of $*_ _ _ _ _ _]_ _**.**
Plaintiff cannot safely determine to whom _ _[*e.g., the property should be deeded, the proceeds should be paid*]_ _**.**

[*Add if appropriate*]

8. Plaintiff has deposited the _ _[*describe subject matter of action, e.g., the deed in question, the amount of $*_ _ _ _ _ _]_ _ **with the court clerk on filing this complaint.**

[*Continue*]

[9.] Plaintiff has incurred costs and attorney fees as a result of these proceedings.

WHEREFORE, plaintiff prays that:

1. Defendants be ordered to interplead and litigate their rights to the _ _[*describe subject matter of action*]**_ _.**

2. Plaintiff be discharged from all liability on account of the _ _[*e.g., terms of the escrow/insurance contract*]**_ _ to any of the defendants.**

3. Each of the defendants be restrained from instituting or further prosecuting any other proceeding against plaintiff in any court in this state affecting the rights and obligations between the parties to this action.

4. Plaintiff be awarded costs and reasonable attorney fees to be determined by the Court from the sum deposited with the clerk.

5. Other just relief be granted.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]**_ _**

Copies: Original (file with court clerk); ___ copies for service (one for each other party and each named nonparty claimant); ___ office copies.

Comment: See §28.36.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§28.49 E. Form: Interlocutory Order in Interpleader by Cross-Complaint

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**INTERLOCUTORY ORDER IN INTERPLEADER BY CROSS-COMPLAINT**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

This matter was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, the Court finds:

[*Option 1: If sum is not disputed*]

1. Cross-complainant, _ _[*name*]_ _**, held the** _ _[*describe subject matter of interpleader action*]_ _ **mentioned in the complaint without claiming any right or interest in it. Cross-complainant has deposited the** _ _[*disputed sum/property/document*]_ _ **with the court clerk to be** _ _[*e.g., delivered to*]_ _ **whichever cross-defendant establishes** _ _[*his/her/its*]_ _ **right in it.**

[*Option 2: If part of sum is disputed*]

1. Cross-complainant, _ _[*name*]_ _**, disputes liability for the amount of $**_ _ _ _ _ _ **claimed by cross-defendant,** _ _[*name*]_ _**.**

[*Option 3: If whole sum is disputed*]

1. Cross-complainant, _ _[*name*]_ _**, disputes all liability to cross-defendant(s),** _ _[*name(s)*]_ _**.**

[*Continue*]

2. Conflicting claims and demands have been or may be made on cross-complainant by cross-defendants, _ _[*names*]_ _**. Cross-defendants' claims are such that they may give rise to multiple liability. Cross-complainant cannot safely determine among them, and this is a proper cause for interpleader.**

3. Cross-complainant has incurred costs of $_ _ _ _ _ _ **and attorney fees of $**_ _ _ _ _ _ **to prosecute this cross-complaint in interpleader.**

It appearing that the cross-complaint was properly brought by cross-complainant,

IT IS ORDERED that:

1. Cross-defendants in interpleader, _ _[*names*]_ _**, appear in this action and litigate their several claims.**

[*Add if appropriate*]

2. _ _[*Name*]**_ _ and _ _**[*name*]**_ _ be joined as defendants in this action.**

[*Add if claim is not disputed*]

[3.] The complaint of _ _[*plaintiff's name*]**_ _ be dismissed, with prejudice, as to cross-complainant.**

[4.] Cross-complainant be discharged from this case and from all liability on or arising out of _ _[*describe subject matter of the action, e.g., insurance policy or escrow number*]**_ _.**

[*If all or part of claim is disputed by stakeholder, order should be tailored to show whether liability issues have been determined, or are to be adjudicated after resolution of claimant's claims*]

[*Continue*]

[5.] All parties to this action be restrained from instituting or further prosecuting any other proceeding in any court in this state affecting the rights and obligations between the parties to this interpleader until further order of this Court.

[6.] Cross-complainant be awarded $_ _ _ _ _ _ costs and $_ _ _ _ _ _ attorney fees _ _[*e.g., out of the proceeds/deposited with the clerk*]**_ _, and the clerk _ _**[*e.g., deposit the remainder of proceeds at interest*]**_ _ pending the outcome of this litigation, to be _ _**[*e.g., disbursed*]**_ _ on further order of the Court.**

[7.]**_ _**[*State any additional orders*]**_ _.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]**_ _**

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §28.35. This form may be modified for use by a plaintiff in interpleader. The interlocutory order in interpleader may be separate or part of an interlocutory order covering other aspects of the case. The order should contain a finding of the pleader's right to interplead and, if applicable, (1) an order discharging the stakeholder from further liability to claimants and enjoining claimants from bringing further proceedings against the stakeholder and (2) an order awarding attorney fees or providing for their determination in the final judgment. See CCP §386.6. The most significant aspect of the interlocutory order is its direction to claimants to interplead and litigate among themselves. The order is not appealable.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§28.50 F. Form: Final Judgment in Interpleader

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**FINAL JUDGMENT IN INTERPLEADER**
_ _[*Name(s)*]_ _, **Defendant(s)**	

This action was regularly heard on _ _[*date*]_ _**, before this Court, sitting without a jury, on the issue presented by the complaint. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**. The Court has heard the testimony of each party, has examined the proofs offered by them, and has filed its findings of fact and conclusions of law.**

IT IS ORDERED that:

1. Defendant, _ _[*name*]_ _**, is the** _ _[*e.g., owner/beneficiary*]_ _ **and is entitled to possession of the** _ _[*describe subject matter of action*]_ _**, described in the complaint and deposited with the court clerk, and defendant,** _ _[*name*]_ _**, has no right, title, or interest in the subject matter of the action.**

[*Add if fund is deposited in court*]

2. The court clerk pay the fund now in _ _[*his/her*]_ _ **custody to defendant,** _ _[*name of prevailing claimant*]_ _**.**

[*Add if costs are awarded*]

[3.] Defendant, _ _[*name of prevailing complainant*]_ _**, recover from defendant,** _ _[*name of rival claimant*]_ _**, costs of $**_ _ _ _ _ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party and each named nonparty claimant); ___ office copies.

Comment: If the interpleading party disputed all or part of the claim and was not discharged at the interlocutory stage, the judgment may contain provisions concerning the determination of his or her liability.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form at §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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29

Security for Costs

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I. INTRODUCTION

§29.1 A. Scope of Chapter

This chapter discusses the various statutes that authorize the court to require a plaintiff to make a deposit or post bond to ensure that a defendant's costs of suit will be paid if the defendant prevails in the action. See chart in §29.11. The plaintiff may oppose the motion or argue that a lesser amount of security should be posted than the defendant has requested. In some instances, the proceedings are stayed until the court rules on the motion.

This chapter talks about description and use (see §§29.3-29.11), security with regard to nonresident or foreign corporation plaintiffs (see §§29.12-29.25), shareholder derivative actions (see §§29.26-29.43), actions against architects and engineers (see §§29.44-29.48), actions against doctors and other medical professionals (see §§29.49-29.54), and vexatious litigants (see §§29.55-29.61). It includes a checklist (see §29.62) and forms (see §§29.63-29.66).

A plaintiff's failure to post bond after the court grants a defendant's motion for security for costs is grounds for mandatory dismissal. The procedures for dismissing an action are discussed in chap 39.

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§29.2 B. Governing Law

These governing statutes are CCP §1030 (actions in which the plaintiff is a nonresident or foreign corporation); Corp C §800(c) (shareholder derivative actions); CCP §1029.5 (actions against architects, engineers, and related professionals); CCP §1029.6 (actions against doctors, nurses, and other medical professionals); CCP §§391-391.7 (actions in which the plaintiff can be shown to be "vexatious" as defined by statute).

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II. DESCRIPTION AND USE

§29.3 A. Rationale; Definitions

In certain civil actions and special proceedings, a defendant may seek a court order requiring a plaintiff to secure costs and sometimes attorney fees that will be incurred by, and later may be awarded to, the defendant. The chart in §29.11 lists the statutes that authorize the court to order a plaintiff to post a bond with the court as a security (or undertaking) to ensure payment of the defendant's costs. Generally, the defendant must make a showing that there is a reasonable possibility of obtaining judgment in the action or special proceeding. The rationale for requiring this deposit is twofold:

- To ensure that nonresidents using the courts of California to sue California residents are responsible for their costs if the suits are unsuccessful; and
- To discourage frivolous or unmeritorious litigation.

Code of Civil Procedure §1030 cannot be applied to require an out-of-state defendant who brings a cross-complaint against a California resident to file an undertaking in order to continue prosecution of the cross-complaint. *Yao v Superior Court* (2002) 104 CA4th 327, 329, 127 CR2d 912.

The Bond and Undertaking Law (CCP §§995.010-996.560), enacted in 1982, defines essential terms that govern provisions for security, unless a particular provision otherwise requires. CCP §995.110. Some of these definitions include:

- **Undertaking.** An undertaking must be made in writing signed by the sureties under oath. CCP §995.320.
- **Bond.** A bond includes a surety, indemnity, or fiduciary. CCP §995.140. Statutory bonds and statutory undertakings generally are interchangeable. CCP §995.210. A bond must be executed by two or more sufficient personal sureties, by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers. CCP §995.310. See Cal Rules of Ct 3.1130(a) (corporation cannot be accepted or approved as surety on bond or undertaking unless certain conditions are met).
- **Surety.** Under CCP §995.185, "surety" has the same meaning as set out in CC §2787: "A surety … is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." Officers of the court and members of the bar are prohibited from acting as sureties. Cal Rules of Ct 3.1130(b). For further discussion of bonds, undertakings, or deposits, see 6 Witkin, California Procedure, *Provisional Remedies* §§6-45 (5th ed 2008).

NOTE: Many technical differences existed among these terms at common law, but the modern tendency has been to permit various forms of security to become statutorily interchangeable.

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§29.4 1. Failure to Post Security: Grounds for Mandatory Dismissal

If the motion is granted, the plaintiff's failure to file timely the appropriate bond with the court is grounds for mandatory dismissal of the action or special proceeding against the moving defendant. See chart in §29.11.

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§29.5 2. Order Requiring Security: No Effect on Merits of Case

Security for costs statutes that provide for a hearing before the court can order the posting of security also provide that a court's determination of whether security will be furnished is not a determination on the merits of any issue in the action. CCP §§391.2, 1029.5(a), 1029.6(a), 1030(f); Corp C §800(d); *Ensher v Ensher, Alexander & Barsoom, Inc.* (1960) 187 CA2d 407, 9 CR 732 (shareholder derivative action).

Code of Civil Procedure §1030(f) also provides that court rulings under that section may not be given in evidence or referred to at trial.

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§29.6 3. Plaintiff's Indigency: Court's Discretion to Waive Security

Some of the security for costs statutes (see chart in §29.11) specifically provide that security will not be ordered unless the defendant shows that the "plaintiff would not suffer undue economic hardship in filing the undertaking...." CCP §§1029.5(a) (services by architects, engineers, building designers, or land surveyors); 1029.6(a) (professional medical or paramedical services).

The court has common law power to waive security for costs and to protect indigents' access to the courts. *Bank of America v Superior Court* (1967) 255 CA2d 575, 63 CR 366 (costs denied in suit by indigent nonresident); *County of Sutter v Superior Court* (1966) 244 CA2d 770, 53 CR 424 (costs denied in suit by indigent against governmental entity). See also *Buechold v Ortiz* (9th Cir 1968) 401 F2d 371.

The right of the plaintiff to sue in forma pauperis has been held not inconsistent with CCP §§391-391.7 (vexatious litigants), because any showing of merit by the plaintiff would preclude the statutes' application. If any conflict between a plaintiff's right to sue and these statutes were shown, the plaintiff's constitutional right to proceed as an indigent would prevail. *Muller v Tanner* (1969) 2 CA3d 445, 454, 82 CR 738.

This same reasoning applies to proceedings in which security for costs may be requested under CCP §1030 (nonresident or foreign corporations). See *Alshafie v Lallande* (2009) 171 CA4th 421, 89 CR3d 788 (no rigid standard for requisite showing of indigency to obtain waiver). It may also apply to Corp C §800(c) (shareholder derivative actions), although the statute does not specifically provide for relief for the indigent plaintiff.

In deciding whether to grant a waiver, the court must review the plaintiff's showing of indigency, identify deficiencies, and give the plaintiff time to supply additional information to establish entitlement to the waiver. *Alshafie v Lallande, supra.*

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§29.7 4. Demand for Judgment (CCP §998) Compared With Security for Costs Statutes

Code of Civil Procedure §998 provides a means by which costs in an action may be withheld or increased. One purpose of security for costs statutes is to discourage unmeritorious litigation. See §29.3. The demand for judgment procedure under CCP §998 does not serve the same purpose. Although it may discourage trial, it does not discourage litigation.

Another purpose of security for costs statutes is to help the secured party recover the costs expended in the litigation. An offer to allow judgment under CCP §998 also provides a powerful tool to that end. See chap 47.

NOTE: In actions in which security for costs is statutorily permitted, the offer under CCP §998 is also permissible and provides another opportunity for a defendant to recover costs if a motion for security for costs has been unsuccessful.

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B. Constitutionality

§29.8 1. Due Process Requirements

Security for costs statutes have been held to be subject to these due process requirements: notice, hearing, and the imposition of some standard by which the validity of securing costs can be judged. *Gonzales v Fox* (1977) 68 CA3d Supp 16, 137 CR 312. Statutes authorizing security for costs have generally been held constitutionally invalid when they have failed to provide these due process safeguards. *Gonzales v Fox, supra* (former CCP §1030 held unconstitutional on due process grounds).

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2. California Security for Costs Statutes Repealed

§29.9 a. Public Entities and Employees

Former Govt C §§947 and 951 required plaintiffs suing public entities and their employees to post security for costs. These two sections were held unconstitutional in *Beaudreau v Superior Court* (1975) 14 C3d 448, 121 CR 585. Former Ed C §92650, which required security for costs in actions against the Regents of the University of California, was repealed for similar reasons.

In *Beaudreau,* the California Supreme Court held that due process requires notice and a hearing before dismissal of an action for failure to file an undertaking. The hearing is considered necessary to determine whether the statutory purpose of deterring unmeritorious litigation is promoted by imposition of an undertaking requirement in a particular case. Such a hearing must necessarily inquire into the merits of the plaintiff's action as well as into the reasonableness of the amount of the undertaking in light of the defendant's probable expenses. *Beaudreau v Superior Court* (1975) 14 C3d 448, 460, 121 CR 585.

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§29.10 b. Defamation and Other Actions

Former CCP §830, which required a bond in defamation actions before summons would issue, was repealed in 1980 after being struck down as unconstitutional in *Allen v Jordanos' Inc.* (1975) 52 CA3d 160, 125 CR 31. This decision was based on *Beaudreau v Superior Court* (1975) 14 C3d 448, 121 CR 585. See also *Skelly v State Personnel Bd.* (1975) 15 C3d 194, 124 CR 14 (permanent civil service employees entitled to notice before punitive action; former Govt C §19574 violated due process provisions); *Mitchell v W.T. Grant Co.* (1974) 416 US 600, 40 L Ed 2d 406, 94 S Ct 1895 (sequestration writ can issue without notice of hearing if state adequately protected debtor's property interest); *Arnett v Kennedy* (1974) 416 US 134, 40 L Ed 2d 15, 94 S Ct 1633 (trial-type hearing not required before removal of federal employee).

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§29.11 C. Chart: California Actions That May Require Security

Action that may require security	*Applicable statute*	*Procedure*	*Time for demand or motion*	*Supporting affidavit or declaration*	*Showing required*	*Amount of security permitted*	*Effect of noncompliance*	*Effect of motion*	*Effect of ruling*
Plaintiff is nonresident or foreign corporation.	CCP §1030.	Noticed motion and hearing.	At any time before trial.	Must specify nature and amount of costs and attorney fees incurred and to be incurred.	Allegation of nonresidency and reasonable possibility of obtaining judgment.	Amount at court's discretion for "costs and attorney's fees."	Grounds for mandatory dismissal as to moving defendant.	If motion made within 30 days of service of summons, can also move to stay proceedings.	No effect on merits of action (cannot be used as evidence or referred to in trial); not appealable.
Shareholder derivative action.	Corp C §800(c).	Noticed motion and hearing.	Within 30 days after service of summons on defendant (60-day extension possible).		Establish a probability of: 1. No reasonable possibility of benefit to corporation or shareholders; or 2. No participation by moving party in transaction.	Not exceeding $50,000 for reasonable expenses, including attorney fees and corporate liability to indemnify corporate agents (Corp C §317).	Mandatory dismissal.	Motion automatically stays proceeding.	No effect on merits of action.
Defendant is architect, engineer, or related professional.	CCP §1029.5.	Noticed motion and hearing.	Within 30 days after service of summons.		1. No undue economic hardship on plaintiff. 2. No reasonable possibility of cause of action.	$500 plus $500 for each additional defendant of specified class up to $3000 for "costs of defense."	Mandatory dismissal.	Motion does not stay proceedings.	No effect on merits of action.
Defendant is doctor, nurse, or related professional.	CCP §1029.6.	Noticed motion and hearing.	Within 6 months after service of summons.		Same as CCP §1029.5 (architects and engineers; see above).	For costs of defense, but not to exceed the lesser of $500 per defendant or a total of $1000.	Mandatory dismissal.	Motion does not stay proceeding.	No effect on merits of action.
Plaintiff is vexatious litigant.	CCP §§391-391.7.	Noticed motion and hearing.	Any time until final judgment is entered.		1. Plaintiff is vexatious litigant. 2. No reasonable probability plaintiff will prevail.	"Reasonable expenses, including attorney's fees and not limited to taxable costs."	Mandatory dismissal.	Motion automatically stays proceedings.	No effect on merits of action.

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III. NONRESIDENT OR FOREIGN CORPORATION PLAINTIFFS

§29.12 A. Scope of Statute

Security for costs applicable to nonresident or foreign corporation plaintiffs is governed by CCP §1030. A defendant may at any time file a noticed motion seeking an order requiring a nonresident or foreign corporation plaintiff to furnish an undertaking to secure an award of costs and attorney fees. CCP §1030.

Joinder of a resident California plaintiff to a nonresident plaintiff does not render the resident plaintiff subject to liability for security under this statute. *Taylor v Powell* (1962) 200 CA2d 780, 19 CR 536.

Code of Civil Procedure §1030 applies to actions in all California courts. *Classroom Teacher, Inc. v Superior Court* (1933) 129 CA 261, 18 P2d 746.

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§29.13 B. Constitutionality

In *Gonzales v Fox* (1977) 68 CA3d Supp 16, 137 CR 312, the appellate department of the Imperial County Superior Court held that former CCP §1030 was unconstitutional on due process grounds. In 1980, CCP §1030 was amended to conform to the constitutional standards enunciated in *Gonzales* and *Beaudreau v Superior Court* (1975) 14 C3d 448, 121 CR 585. The statute, which now provides for notice and a hearing, sets a standard for determining whether security is necessary. For further discussion of constitutional due process requirements, see §§29.8-29.10.

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C. Defendant's Procedures

1. Motion for Security

§29.14 a. Grounds; Papers

The grounds for a motion under CCP §1030 are:

- The plaintiff resides out of state or is a foreign corporation.
- There is a reasonable possibility that the moving defendant will obtain judgment.

The motion must be accompanied by an affidavit (or declaration) in support of the grounds for the motion, setting forth the nature and amount of costs and attorney fees that the moving defendant has incurred and expects to incur by the time the action is concluded. CCP §1030(b). See forms of motion and declaration in §§29.65-29.66.

A memorandum in support of the motion must accompany the motion. CCP §1030(b); Cal Rules of Ct 3.1112(a), 3.1113(a).

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§29.15 b. Timing: Any Time Before Trial

The motion may be made "at any time" before trial. See CCP §1030(a); *Shannon v Sims Serv. Ctr.* (1985) 164 CA3d 907, 915, 210 CR 861. On staying proceedings, if motion for security is made no later than 30 days after the defendant was served with summons, see §29.18.

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§29.16 c. Amount: Costs and Attorney Fees Not Limited by Statute

The Code of Civil Procedure does not limit the amount of costs and attorney fees that the court may award. See CCP §1030(a).

Attorney fees are defined as "reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract." CCP §1030(a).

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§29.17 d. Service

A minimum of 16 court days notice before the hearing is required. CCP §1005(b). If notice is made by mail, the 16-day notice period is increased according to the requirements of CCP §1005(b). On procedures for noticed motions generally, see chap 12.

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§29.18 2. Motion to Stay Proceedings; Timing

The defendant may notice a motion to stay further proceedings in the action if the motion for security was filed no later than 30 days after the defendant was served with the summons. CCP §1030(e).

The court in its discretion may order the proceedings stayed until (CCP §1030(e)):

- Ten days after the motion for security is denied; or
- If the motion for security is granted, 10 days after the required undertaking has been filed and the defendant has been served with a copy of the undertaking.

The hearing on the motion to stay must be held no later than 60 days after service of the summons. CCP §1030(e).

NOTE: Formerly, CCP §1030 provided for an automatic stay of the proceedings if the defendant made a motion for security no later than 30 days after service of the summons. In 1988, §1030(e) was amended to provide for a discretionary stay on the defendant's noticed motion.

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D. Plaintiff's Procedures

§29.19 1. Opposition to Motion; Grounds

A plaintiff may resist the defendant's motion for an order requiring security. Opposition papers should be served and filed at least 9 court days before the hearing. CCP §1005(b). Opposition papers must be served by personal delivery, fax, express mail, or other method reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c). On procedures for opposing noticed motions generally, see chap 12.

The motion may be challenged on the following grounds:

- **Individual's residency.** The plaintiff may contend that, because he or she is a California resident, CCP §1030 does not apply. The Code of Civil Procedure does not indicate how nonresidency must be proved or by what standards. Determination of nonresidency is a question of fact for the trial court. *Wall v Hunter* (1922) 57 CA 759, 207 P 934. It may be determined by evidence presented either by affidavit (see, *e.g., Myers v Carter* (1960) 178 CA2d 622, 3 CR 205) or by oral testimony (see, *e.g., Larson v Blue & White Cab Co.* (1938) 24 CA2d 576, 75 P2d 612). Nonresidency of an individual plaintiff has been held to be best determined for purposes of CCP §1030 by examining the plaintiff's legal domicile, actual residence, and place of employment. See *Myers v Carter, supra*. A corporation is "foreign" if it is incorporated outside California, regardless of whether it is qualified to do business, or is doing substantial business, in California. Corp C §171.

PRACTICE TIP: Counsel who anticipates presenting oral testimony at the hearing should review the restrictions on oral testimony in Cal Rules of Ct 3.1306. On law and motion hearings generally, see chap 12.

- **Indigency.** The plaintiff may contend that he or she is indigent and request that the court waive security for costs. CCP §§995.240, 1030. See *Alshafie v Lallande* (2009) 171 CA4th 421, 89 CR3d 788; *Bank of America v Superior Court* (1967) 255 CA2d 575, 63 CR 366. See discussion in §29.6.
- **Defendant's failure to make required showing.** The defendant must show that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding. CCP §1030(b). See §29.14.
- **Defendant's estimated costs and attorney fees.** The plaintiff should study the nature and amount of costs and attorney fees that the defendant in the affidavit or declaration supporting the motion. See §29.16. Attorney fees are "reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract." CCP §1030(a).

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2. Posting Security

§29.20 a. Amount May Be Modified During Proceedings

Code of Civil Procedure §1030 no longer specifies the amount of the undertaking. The undertaking now secures an award of costs and attorney fees. CCP §1030(a). The amount may be increased or decreased during the course of the proceedings. CCP §§996.010-996.030. On defendant's motion for additional security, see §29.24.

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§29.21 b. Timing: Undertaking Must Be Filed No Later Than 30 Days After Service of Court's Order

The plaintiff may request additional time for posting the security at the hearing. Unless the court allows additional time, the plaintiff must file an undertaking no later than 30 days after service of the court's order. CCP §1030(d).

The court may also shorten the time for filing an undertaking if there is good cause for doing so. In *Shannon v Sims Serv. Ctr.* (1985) 164 CA3d 907, 210 CR 861, the court of appeal upheld an order requiring the plaintiff to post a $1000 undertaking within 13 days after service of the court's order when the trial was set to begin on the final date for filing.

Failure to file the undertaking in a timely fashion may result in a mandatory dismissal of the plaintiff's action against the defendant seeking the security. CCP §1030(d); *Shannon v Sims Serv. Ctr., supra*.

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§29.22 c. Filing Undertaking; Service

If the court grants the motion, the plaintiff must file a surety bond or undertaking with the court. CCP §995.340. The court clerk must enter the date and amount of the bond and the names of the sureties on the bond in the register of actions. CCP §995.350. A form of bond or undertaking appears in CCP §995.330. See sample form in §29.64.

The plaintiff must serve a copy on the defendant for whose benefit the security is given. CCP §995.370. An affidavit or declaration of service on the defendant must be filed with the undertaking. CCP §995.370. Copies should also be served on other parties in the action. On service in pending actions generally, see chap 18.

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§29.23 3. Failure to Post Security; Effect of Dismissal of Action

If the plaintiff fails to file the undertaking within the time allotted (see §29.21), the court must dismiss the action or proceeding as to the defendant in whose favor the order was made. CCP §1030(d).

Although failure to post timely security requires the court to order dismissal, it does not deprive the court of jurisdiction. *Carter v Superior Court* (1917) 176 C 752, 755, 169 P 667; *Estate of Baker* (1917) 176 C 430, 434, 168 P 881. If the period of limitations has not yet expired, dismissal for failure to post a bond does not bar a subsequent action on the same cause. *Rosenthal v McMann* (1892) 93 C 505, 509, 19 P 121.

PRACTICE TIP: In a case with multiple defendants, counsel for one defendant must be careful not to rely on a noticed motion made by another defendant. An action may be dismissed only against defendants who moved for the order requiring the undertaking. CCP §1030(d); *Taylor v Powell* (1962) 200 CA2d 780, 786, 19 CR 536.

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E. Defendant's Subsequent Procedures

§29.24 1. Motion for Additional Security

Code of Civil Procedure §1030 does not specify whether a defendant may seek an order to increase the bond. Under CCP §996.010, however, the court may determine on a noticed motion supported by affidavit or on the court's own motion that the undertaking is, or has for any reason become, insufficient. The defendant may also challenge the sufficiency of the sureties by noticed motion within 10 days under CCP §§995.910-995.960.

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§29.25 2. Motion to Dismiss for Failure to File Undertaking; Sample Language

Unless the court has allowed a greater time, the plaintiff's failure to file an undertaking within 30 days after service of the court order requiring it is a ground for mandatory dismissal. CCP §1030(d). The ground for a motion to dismiss for failure to file an undertaking should be stated as follows:

This motion is made on the ground that security for costs has not been filed in this action within 30 days after service of the court's order requiring such security.

For discussion of motions to dismiss, see chap 39. On noticed motions generally, see chap 12.

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IV. SHAREHOLDER DERIVATIVE ACTIONS

§29.26 A. Scope of Statute

California authorizes security for costs and attorney fees incurred by a defendant that is an unincorporated association, foreign or domestic corporation, or officer or director, in defense of an action brought by a shareholder or association member for the benefit of the corporation or association. See Corp C §800. See also Fin C §6052(c), which makes Corp C §800(c) applicable to derivative actions by shareholders of savings and loans associations.

Although shareholder derivative actions provide a remedy at law against faithless directors and management, these actions have been occasionally brought by minority shareholders, not to redress real wrongs, but to take advantage of their nuisance value. Some legislatures (*e.g.,* New York, New Jersey, Pennsylvania, Wisconsin, and California) approved security for costs legislation to discourage such suits, known as "strike suits." See *Cohen v Beneficial Indus. Loan Corp.* (1949) 337 US 541, 93 L Ed 1528, 69 S Ct 1221. See also *Kaiser v Easton* (1957) 151 CA2d 307, 313, 311 P2d 108. In California, former Corp C §834 was interpreted to apply not only to "strike suits" but also to derivative actions brought by shareholders with a substantial interest in the corporation. *Suburban Water Sys. v Superior Court* (1968) 264 CA2d 956, 71 CR 45 (plaintiffs owned more than 5 percent of stock; court held that number and amounts of plaintiffs' shares is immaterial to security posting requirement).

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§29.27 B. Constitutionality

The constitutionality of former Corp C §834(b) (now Corp C §800(c)-(d)) was upheld by the California Supreme Court in *Beyerbach v Juno Oil Co.* (1954) 42 C2d 11, 265 P2d 1, against a challenge that the statute deprived the plaintiff of equal protection under the law in violation of the federal and state constitutions. The supreme court relied on *Cohen v Beneficial Indus. Loan Corp.* (1949) 337 US 541, 93 L Ed 1528, 69 S Ct 1221, in which the United States Supreme Court held a similar but harsher New Jersey statute constitutional and declared that a state has plenary power to provide the terms on which it will permit litigation in its courts. See also *Melancon v Superior Court* (1954) 42 C2d 698, 268 P2d 1050.

The constitutional requirement of procedural due process is fully satisfied by Corp C §800. In *Beaudreau v Superior Court* (1975) 14 C3d 448, 462, 121 CR 585, the California Supreme Court expressly approved the notice and hearing procedures of these sections, noting the court of appeal's approval of former Corp C §834. See *Nork v Superior Court* (1973) 33 CA3d 997, 109 CR 428.

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C. Procedures

1. Motion to Require Security

§29.28 a. Who May Move: Corporation, Association, Individually Named Officer or Director

The right to seek security is available to a corporation or unincorporated association (see Corp C §800(a)) and to any named defendant who was an officer or director when the disputed acts occurred or when the suit was filed. Corp C §800(c).

NOTE: Although this right is broader than that provided by any other California statute, it is narrower than under former Corp C §834 as originally enacted, which permitted any third party defendant (whether or not associated with the corporation) to demand security in derivative actions. See, *e.g., Toboni v Pennington Millinery Co.* (1959) 172 CA2d 47, 341 P2d 845.

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§29.29 b. Against Whom Motion May Be Made: Plaintiffs Pleading Derivative Causes of Action (Corp C §800(b))

Under Corp C §800(c), a motion for security is not authorized in every lawsuit against a corporation, but only in derivative actions in which the plaintiff has pleaded the allegations in Corp C §800(b), *e.g.,* that the plaintiff:

- Was a member, registered shareholder, or holder of a voting trust certificate (or holder by operation of law from a holder) when all or part of the disputed transaction occurred (or a shareholder not meeting those requirements but permitted to bring suit in the court's discretion); and
- (1) Made specified efforts to get action from the board of directors or the reasons for not making such effort and (2) informed the board or the corporation of the ultimate facts of each cause of action.

The defendants may not require the plaintiff to furnish security when the plaintiff-shareholder is vindicating his or her personal rights as a shareholder and not seeking redress for injury to the corporation. If the plaintiff's suit is for personal rights, and seeking relief that would inure to his or her personal benefit, it is immaterial that the facts might also permit an action by the corporation. *Hagan v Superior Court* (1960) 53 C2d 498, 2 CR 288 (decided under former Corp C §834). The court in *Hagan,* however, recognized that the complaint might contain separate counts, some seeking individual relief and some seeking derivative relief for the corporation; a motion for security is appropriate on the derivative counts. 53 C2d at 503.

EXAMPLE: Security may be sought not only from the original plaintiff but also from an intervening complainant. For example, when an officer sues a corporation, which he or she controls, for money allegedly owed to him or her, a shareholder may intervene and complain that the corporation is being defrauded by a collusive suit. The intervening complainant, however, may be required to post security. See *Shively v Eureka Tellurium Gold Mining Co.* (1900) 129 C 293, 61 P 939; *Thorman v Dome Producing & Developing Co.* (1942) 50 CA2d 201, 122 P2d 927.

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§29.30 c. Effect of Motion: Automatically Stays Proceedings

The proceedings in a derivative action are automatically stayed by the filing of a motion requesting security from the time the motion is filed until 10 days after disposition of the motion. Corp C §800(f). If the motion is granted, the stay is not lifted until the plaintiff complies with the court order and posts the required security. *Melancon v Superior Court* (1954) 42 C2d 698, 707, 268 P2d 1050; *Barber v Lewis & Kaufman, Inc.* (1954) 125 CA2d 95, 98, 269 P2d 929.

The stay is a complete bar to the proceedings, and the plaintiff is not entitled to conduct depositions in preparation for trial. *Barber v Lewis & Kaufman, Inc., supra*.

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§29.31 d. Motion Preserves Right to Recover Attorney Fees

Defendants in shareholder derivative actions may seek security from plaintiffs under Corp C §800 as a means of preserving their right to recover attorney fees, up to the amount of the posted security, if they ultimately prevail in the action. Compare *Russo v Running Springs Country Club, Inc.* (1991) 228 CA3d 92, 278 CR 758 (Corp C §800 does not provide exclusive statutory grounds for recovering attorney fee) with *Alcott v M.E.V. Corp.* (1987) 193 CA3d 797, 238 CR 520 (defendants not entitled to attorney fee because no security for fees was ever sought from or posted by the plaintiffs).

Corp C §800 is a bond or security statute, not an attorney fee liability statute. *West Hills Farms, Inc. v RCO Ag Credit, Inc.* (2009) 170 CA4th 710, 88 CR3d 458 (under Corp C §800, prevailing defendant entitled to recover only amount of bond posted by plaintiffs as compensation for litigation expenses, not full amount of attorney fees).

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Source: Civil Litigation/California Civil Procedure Before Trial/29 Security for Costs/§29.32 e. Grounds

§29.32 e. Grounds

Corporations Code §800(c) lists two alternative grounds for the motion for security:

- "There is no reasonable *possibility* that the prosecution of the cause of action alleged … against the moving party will benefit the corporation or its shareholders." (Emphasis added.)
- The moving party did not participate in the disputed transaction in any capacity.

The motion may be made on either or both grounds specified in the statute. Corp C §800(c).

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§29.33 f. Timing: Motion for Security Must Be Made Within 30 Days After Service of Summons

Within 30 days after the service of summons on the corporation or any defendant officer or director, the defendant may notice a motion for an order requiring the plaintiff to furnish security. Corp C §800(c). On a showing of good cause, however, any defendant may apply to the trial court to extend the 30-day period for an additional period not exceeding 60 days. Corp C §800(c).

Without a showing of excuse, a motion for security is generally considered waived if not filed within the prescribed period. Even without a court-ordered extension, however, the court in *Consolidated Dock & Storage Co. v Superior Court* (1971) 18 CA3d 949, 96 CR 254, held that a trial court could properly entertain a motion for security filed 83 days after service of summons. In *Consolidated,* a series of stipulations between counsel extended the defendant's time to move, answer, or otherwise plead to the complaint without explicitly mentioning an extension of the time within which to file a motion for security.

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2. Hearing

§29.34 a. Burden of Proof on Defendant to Show Grounds

The burden is on the moving defendant to establish a probability in support of one or more of the statutory grounds. Corp C §800(d); *Beyerbach v Juno Oil Co.* (1954) 42 C2d 11, 24, 265 P2d 1; *Burt v Irvine Co.* (1965) 237 CA2d 828, 868, 47 CR 392; *Wood v Gordon* (1952) 112 CA2d 374, 246 P2d 84. On grounds, see §29.32.

The defendant is required to make a sufficient showing on one statutory ground with respect to one cause of action within the complaint. *Bailey v Fosca Oil Co.* (1960) 180 CA2d 289, 4 CR 474. In determining whether the defendant has met this burden, the trial court must evaluate the possible defenses that the plaintiff would have to overcome to prevail at trial. It is sufficient that the trial court evaluate the defenses and find them formidable; the trial court need not determine the merits of the complaint, because there would be insufficient evidence for it to do so. *Marble v Latchford Glass Co.* (1962) 205 CA2d 171, 176, 22 CR 789.

Appropriate sources of evidence for the plaintiff or defendant include corporate bylaws, board of director meeting minutes, oral testimony and affidavits of directors, management, and experts the directors consulted to make a particular decision.

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§29.35 b. Defendant's "Business Judgment" Argument

The argument most frequently made by defendants seeking security in a shareholder suit is that the corporation (or its board of directors) has used good faith and proper "business judgment." See *Marble v Latchford Glass Co.* (1962) 205 CA2d 171, 178, 22 CR 789. See also *Thomas v Summers Gyroscope Co.* (1958) 160 CA2d 234, 245, 324 P2d 893; *Olson v Basin Oil Co.* (1955) 136 CA2d 543, 559, 288 P2d 952.

Both the *Thomas* and *Olson* courts noted *Findley v Garrett* (1952) 109 CA2d 166, 174, 240 P2d 421, in which the court held that a shareholder may not interfere with the board of directors' discretion by initiating an action on behalf of the corporation when an independent and disinterested majority of the board acted in good faith within the scope of its discretionary powers to manage the corporation and reasonably believed that its refusal to bring litigation, as demanded by the plaintiff, was a proper business judgment in the best interests of the corporation.

In motions made under Corp C §800(c)(1), defendant directors should seek to present evidence that (1) they have acted within the guidelines established in *Findley* and (2) there is no reasonable possibility that prosecution of the suit would benefit the corporation.

The decision in *Findley* gives substantial latitude to the judgment of a corporate board of directors. For instance, the court stated (109 CA2d at 178):

> A mistake of judgment on the part of a board of directors does not justify taking the control of corporate affairs from the board of directors and placing it with the stockholders. The board of directors may make incorrect decisions, as well as correct ones so long as it is faithful to the corporation and uses its best business judgment.

See also *Burt v Irvine Co.* (1965) 237 CA2d 828, 869, 47 CR 392 (sale at less than market value may have been in corporation's best interest; security required).

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§29.36 c. Plaintiff's Responses to "Business Judgment" Argument

The plaintiff may respond to the "business judgment" argument by challenging the good faith of members of the board of directors, *e.g.,* by presenting evidence that a majority of the board was not "disinterested" but was actively engaged in fraud or constructive fraud against the corporation.

Alternatively, the plaintiff may show that contrary expert opinions were available to the board, but were not considered, when it made its decision.

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d. Presentation of Evidence on Appropriate Amount of Security

§29.37 (1) Expenses to Be Considered; $50,000 Limit

At the hearing, the parties must present evidence by which the court can determine an appropriate amount of security, including court costs and attorney fees for the corporation and moving defendant. Security greater than the statutory ceiling of $50,000 will not be allowed. Corp C §800(d).

The largest element of corporate expense is attorney fees. It has been held appropriate for defense attorneys to offer testimony based on their professional experience of the amount of time and effort necessary to defend the corporation in the pending litigation. *Olson v Basin Oil Co.* (1955) 136 CA2d 543, 562, 288 P2d 952.

The court may also consider the number of causes of action involved, the number of different defendants represented by different counsel, and the complexity of the issues to be resolved. See *Koster v Warren* (9th Cir 1961) 297 F2d 418.

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§29.38 (2) Expenses Arising From Indemnification of Corporation's Agents (Corp C §317)

In 1987, Corp C §317 was amended to increase the indemnification permitted for agents sued by or on behalf of the corporation. If an agent of a corporation is successful on the merits in the defense of a derivative action (or in the defense of any claim, issue, or matter in the derivative action), the corporation must reimburse its agent for expenses actually and reasonably incurred in connection with the agent's defense if the agent acted in good faith and in a manner he or she believed to be in the best interests of the corporation and its shareholders. Corp C §317(c)-(d).

Formerly, the corporation could not indemnify amounts paid in settling a threatened or pending action but could pay expenses incurred in settling or otherwise disposing of the claim with court approval. Under the amended law, court approval is not required for indemnification unless there is a pending action. With court approval, both expenses and amounts paid in settling a pending action may be reimbursed. Corp C §317(c). The articles of incorporation may also provide for indemnification of corporate agents in excess of that otherwise permitted by Corp C §317. Corp C §§204(a)(11), 317(g).

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3. Court Ruling

§29.39 a. Decision Is Discretionary

After hearing the motion, the court may:

- Fix the nature and amount of security, not to exceed $50,000, setting a reasonable time within which the security ordered must be furnished (Corp C §800(d)); or
- Refuse to order security to be furnished.

The court's decision is within its sound discretion; its balancing of substantial and conflicting evidence will not be reversed except for an abuse of discretion. *Oser v Wilcox* (9th Cir 1964) 338 F2d 886, 893.

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§29.40 b. Effect of Noncompliance With Order: Mandatory Dismissal

Dismissal is mandatory for failure to comply with an order for security within the time fixed by the court. If bond is not posted, the action must be dismissed against any defendant who moved for security. Corp C §800(d). The plaintiff, however, may request the court on a noticed motion to extend his or her time to post bond. CCP §1054. See *Beyerbach v Juno Oil Co.* (1954) 42 C2d 11, 28, 265 P2d 1.

There is some authority that if dismissal is ordered for failure to provide security, attorney fees may not be awarded against the plaintiff. See *Freeman v Goldberg* (1961) 55 C2d 622, 12 CR 668 (legislature intended that defendant's attorney fees be reimbursed only from security); *Alcott v M.E.V. Corp.* (1987) 193 CA3d 797, 238 CR 520 (because no security posted, defendants not entitled to attorney fees). But see §29.31.

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Source: Civil Litigation/California Civil Procedure Before Trial/29 Security for Costs/§29.41 c. Alternative to Compliance With Order: Voluntarily Posting $50,000 Bond

§29.41 c. Alternative to Compliance With Order: Voluntarily Posting $50,000 Bond

The plaintiff may anticipate a motion for security by posting a $50,000 bond on filing the complaint or by posting that security any time before or after a motion or order is made. Such an action is considered to comply with Corp C §800, and no further bond or security can be required. Corp C §800(e).

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§29.42 d. Modification of Order

After the plaintiff has posted the required security, the court may order the security increased or decreased on a showing that it is inadequate or excessive. CCP §§996.010-996.030. See also *Melancon v Superior Court* (1954) 42 C2d 698, 708, 268 P2d 1050; *Beyerbach v Juno Oil Co.* (1954) 42 C2d 11, 29, 265 P2d 1.

The plaintiff may be required to furnish security for the defendant's expenses at trial and on appeal. After a judgment for the defendant, the trial court does not lose its jurisdiction to increase (or decrease) security for costs pending appeal. No distinction is made between expenses incident to trial and those incurred in defending the judgment on appeal. *Kaiser v Easton* (1957) 151 CA2d 307, 314, 311 P2d 108.

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§29.43 e. Appealability

A court's order requiring the plaintiff to furnish security is not appealable. However, a judgment of dismissal for failure to furnish security is appealable. *Woodman v Ackerman* (1967) 249 CA2d 644, 57 CR 687.

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V. ACTIONS AGAINST ARCHITECTS AND ENGINEERS

§29.44 A. Scope of Statute

Any licensed architect, landscape architect, engineer, building designer, or land surveyor who is a defendant in an action for damages for "error, omission, or professional negligence in the creation and preparation of plans, specifications, designs, reports or surveys which are the basis for work performed or agreed to be performed on real property" may demand security for costs from the plaintiff. CCP §1029.5(a).

This provision does not apply to actions for wrongful death or bodily injury or to actions brought in small claims court. CCP §1029.5(b).

NOTE: There are no recorded decisions interpreting this statute. On constitutionality, see §29.50.

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B. Procedures

§29.45 1. Noticed Motion; Showing Required

Within 30 days after service of summons, a defendant architect or engineer may notice a motion for an order requiring the plaintiff to furnish security not exceeding $500. CCP §1029.5(a).

The motion must be accompanied by an affidavit or declaration with facts showing that the claim against the moving defendant is "frivolous." CCP §1029.5(a).

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§29.46 2. Hearing

At the hearing, the court must grant the motion if the defendant demonstrates that (CCP §1029.5(a)):

- The plaintiff will not suffer undue hardship in furnishing the undertaking; and
- There is no reasonable possibility that the plaintiff has a cause of action against the moving defendant.

If the court finds that security is appropriate, it will set a reasonable time within which the bond must be filed. CCP §1029.5(a). If more than one defendant moves for security, the undertaking must not exceed $500 for each defendant, up to a maximum of $3000. CCP §1029.5(c). The court's determination on the furnishing of security is not a determination of the merits of the action and therefore does not create a collateral estoppel effect. See CCP §1029.5(a).

Although any court order determining whether security is required and the amount of the security is not appealable (CCP §1029.5(a)), presumably an appeal may be taken from a judgment dismissing the action. See §29.48.

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§29.47 C. Failure to File Undertaking: Mandatory Dismissal

If the court orders posting of security and the plaintiff does not file a bond within the time set by the court, dismissal of the action is mandatory. CCP §1029.5(a). The court will not lose its jurisdiction over the case by the plaintiff's failure to post bond by the court-ordered date; if the statute of limitations has not run, a subsequent action may be filed on the same cause. See §29.23.

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§29.48 D. Effect of Final Judgment or Dismissal; Costs

In actions requiring a written undertaking under CCP §1029.5, if judgment is later awarded to the defendant or the action is dismissed, the trial court must require the plaintiff to pay the defendant's "costs of defense" up to the amount of the undertaking. CCP §1029.5(d). No case law indicates whether attorney fees are part of the "costs of defense" within the meaning of this statute. However, CCP §1030 provides that the undertaking secures costs and attorney fees, and CCP §391(c) provides that "security" includes amounts sufficient to cover the defendant's attorney fees.

NOTE: The provision of CCP §1029.6(d) requiring doctors and other health practitioners to pay the plaintiff's costs in defending a motion to dismiss is not included in CCP §1029.5(d). See §29.54.

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VI. ACTIONS AGAINST DOCTORS AND OTHER MEDICAL PROFESSIONALS

§29.49 A. Scope of Statute

Security for costs has been available in actions for "error, omission, or negligence in the performance of professional services, or performance of professional services without consent" that may be filed against a licensed "physician and surgeon, dentist, registered nurse, dispensing optician, optometrist, pharmacist, registered physical therapist, podiatrist, … psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or veterinarian," and hospitals employing those persons. CCP §1029.6(a).

The security for costs requirement does not apply in small claims court actions. CCP §1029.6(b). Unlike the security provision for architects and engineers discussed in §§29.44-29.48, the security for costs requirement is available in wrongful death and bodily injury actions.

WARNING: Code of Civil Procedure §1029.6(e)-(f) provides that a defendant who files or joins a motion for security for costs is precluded from later filing a motion for summary judgment and vice versa. The section dealing with security in actions against architects and engineers does not prevent the defendant from making a motion for summary judgment if a motion for security for costs is made. See CCP §1029.5.

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§29.50 B. Constitutionality

The provisions providing for notice and hearing in CCP §1029.6(a), together with the standard of showing required (see §29.52), appear to satisfy the requirements of due process dictated by *Beaudreau v Superior Court* (1975) 14 C3d 448, 121 CR 585.

A constitutional challenge might be made, however, that singling out a group as limited as health care practitioners for special statutory treatment violates the equal protection provisions of the federal and state constitutions. The court in *Nork v Superior Court* (1973) 33 CA3d 997, 1000, 109 CR 428, explicitly avoided determining this issue.

To the extent that this statute may be vulnerable to constitutional challenge for impermissibly discriminating in favor of a selected class, CCP §1029.5 (applicable to architects and engineers; see §§29.44-29.48) may also be vulnerable.

NOTE: A former provision of CCP §1029.6, providing for additional security to be posted if the plaintiff sought exemplary damages and permitting an ex parte application for such, was held unconstitutional for failure to provide appropriate due process safeguards. *Nork v Superior Court, supra.*

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C. Procedures

§29.51 1. Noticed Motion; Timing

Within 6 months after service of summons, a medical professional defendant may move the court for an order requiring the plaintiff to post bond. CCP §1029.6(a). Counsel for other defendants who have appeared have 30 days from notice of the motion to join in that motion, or they will be precluded from bringing any separate security motion. CCP §1029.6(a).

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§29.52 2. Hearing; Showing Required

The motion must be supported by an affidavit or declaration showing that the claim against the defendant is frivolous. CCP §1029.6(a).

At the hearing, the court must grant the motion if the moving defendant demonstrates that:

- The plaintiff will not suffer undue economic hardship in posting security; and
- There is no reasonable possibility that the plaintiff has a cause of action against the defendant.

Each defendant seeking security must make his or her own showing concerning the cause of action. CCP §1029.6(a).

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§29.53 3. Maximum Amount; No Effect on Merits

If the court determines that security is appropriate and establishes the amount required, it will also set a reasonable time in which the bond must be filed. CCP §1029.6(a).

The amount of security cannot exceed $500 against a single defendant (CCP §1029.6(a)) and $1000 against multiple defendants (CCP §1029.6(c)). The court's determination on the motion is not a determination on the merits of any issue in the action. CCP §1029.6(a).

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§29.54 D. Mandatory Dismissal If Security Not Posted; Costs

The action must be dismissed for each moving defendant if security is not posted by the plaintiff within the time set by the court. CCP §1029.6(a).

If the action is dismissed, or if the defendant prevails, the court must require the plaintiff to bear the defendant's "court costs." CCP §1029.6(d). Compare CCP §1029.5(d), which uses the term "costs of defense." See §29.48. No reported opinions have interpreted these terms.

If the plaintiff prevails after filing the required security, the defendant who moved for security must pay the plaintiff's costs incurred in defending the motion authorized by CCP §1029.6(d). This obligation is not included in the section on architects and engineers. See CCP §1029.5(d).

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VII. VEXATIOUS LITIGANTS

§29.55 A. Scope of Statute; Rationale

In 1963, the legislature, concerned about repeated actions brought in propria persona by persons whose claims had been fully litigated, determined that a security for costs provision similar to that used in connection with shareholder derivative suits would curb the abuse of vexatious litigation.

Under CCP §391(b)(1)-(4), a "vexatious litigant" is a person who:

- Has brought at least five actions in propria persona in the past seven years (outside small claims court) that have been adversely determined or unjustifiably permitted to remain pending for at least two years without being brought to trial or hearing;
- Repeatedly relitigates or attempts to relitigate against the same defendant in propria persona any cause of action already finally determined against him or her;
- Repeatedly, while acting in propria persona, files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in frivolous or delaying tactics; or
- Has previously been declared by a state or federal court to be a vexatious litigant.

NOTE: Code of Civil Procedure §391(b)(1), (4) may be applied even if security for costs are sought in a later lawsuit in which the litigant is represented by an attorney. *Camerado Ins. Agency, Inc. v Superior Court* (1993) 12 CA4th 838, 16 CR2d 42.

In any type of action, a defendant may move the court for an order requiring a plaintiff to furnish security to cover the defendant's reasonable expenses, including attorney fees. CCP §§391(c), 391.3. A court may also enter an order prohibiting a vexatious litigant from filing any new litigation. CCP §391.7. See *In re R.H.* (2009) 170 CA4th 678, 88 CR3d 650 (plaintiff who in propia persona filed thirteen unsuccessful appeals and writ petitions within seven years, challenging dependency court decisions, deemed vexatious litigant subject to prefiling order).

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§29.56 B. Constitutionality

The vexatious litigant statutes have been upheld against constitutional attacks on due process and equal protection grounds and have been held not arbitrary, unreasonably vague, or discriminatory against indigents, or unreasonably burdensome. *Muller v Tanner* (1969) 2 CA3d 445, 82 CR 738; *Taliaferro v Hoogs* (1965) 236 CA2d 521, 46 CR 147.

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C. Procedures

§29.57 1. Noticed Motion; Timing

At any time until final judgment is entered, the defendant may move for an order requiring the plaintiff to post security. CCP §391.1.

A noticed motion and hearing are needed to satisfy constitutional due process. See *Beaudreau v Superior Court* (1975) 14 C3d 448, 121 CR 585; *Nork v Superior Court* (1973) 33 CA3d 997, 109 CR 428.

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§29.58 2. Proceedings Automatically Stayed

Filing a motion for security before the trial under CCP §391.1 automatically stays the proceedings and relieves the moving defendants from pleading to the complaint until 10 days after the motion has been denied or, if it is granted, until 10 days after the plaintiff has served the defendant with notice of filing the required security. CCP §391.6.

When the motion is made at any time after trial, the litigation is stayed for any period decided by the court after the motion is denied or the security is furnished. CCP §391.6.

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§29.59 3. Grounds; Hearing

A motion for security must be based on the following grounds (CCP §391.1), which may be shown by declarations or exhibits:

- The plaintiff meets the statutory definition of a vexatious litigant (see §29.55).
- There is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant.

At the hearing, the trial court may consider evidence by oral testimony or affidavit. CCP §391.2; *Moran v Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 C4th 780, 55 CR3d 112. On limitations in presentation of oral testimony at hearing generally, see Cal Rules of Ct 3.1306.

The burden of establishing the statutory conditions rests on the moving party. *Muller v Tanner* (1969) 2 CA3d 445, 464, 82 CR 738.

PRACTICE TIP: Counsel should be sure that the record reflects evidence in support of both grounds for the motion as well as some showing of the costs and attorney fees that would be necessary to defend the lawsuit. See *Muller v Tanner* (1969) 2 CA3d 445, 464, 82 CR 738, in which the trial court determined plaintiff to be a vexatious litigant, required him to post security, and dismissed the action on his failure to do so. On appeal, the reviewing court overturned the dismissal, finding that no evidence had been presented in the trial court to sustain a finding that there was no reasonable probability that the plaintiff would prevail in the litigation. On amount of security, see §29.60.

The court's determination on the motion is not a determination on the merits. CCP §391.2.

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§29.60 4. Court Ruling; Amount of Security

If the court determines from the evidence that the plaintiff is a vexatious litigant and there is no reasonable probability that he or she will prevail in the litigation, the court must order the plaintiff to furnish security for the benefit of the moving defendant. CCP §391.3. The statute does not limit the amount of the security. The amount and the time within which the security must be furnished is in the court's discretion. CCP §391.3. However, the amount should be supported by evidence of what the costs and attorney fees to defend the action are likely to be. *Muller v Tanner* (1969) 2 CA3d 445, 465, 82 CR 738 (court's order will not be sustained as reasonable and nonarbitrary when record indicates that amount of security for attorney fees specified by trial court was pulled out of "thin air").

The security may cover the defendant's reasonable expenses, including attorney fees, incurred in connection with the litigation; it is not limited to taxable costs. CCP §391(c). The amount of the bond may be adjusted as insufficient or excessive during the proceedings. See CCP §§996.010-996.030.

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§29.60A 5. Court Lifting of Prefiling Order

Under CCP §391.7, the court has the authority to lift a prefiling order entered against a person determined to be a vexatious litigant. *Luckett v Panos* (2008) 161 CA4th 77, 73 CR3d 745. The vexatious litigant must show a change in facts indicating a mending of ways or conduct to support a reversal of the original determination. *PBA, LLC v KPOD, Ltd.* (2003) 112 CA4th 965, 976, 5 CR3d 532. The litigant must give up suing others as a way of life, and show (*Luckett,* 161 CA4th at 93):

- A propensity for honesty;
- Genuine remorse for the cost of the litigation on previous defendants; and
- Genuine effort at restitution towards the victims of previous litigation.

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§29.61 D. Failure to Furnish Security: Mandatory Dismissal

If a plaintiff ordered to provide security fails to do so, the court must dismiss the action against the moving defendant. CCP §391.4; *Taliaferro v Hoogs* (1965) 236 CA2d 521, 46 CR 147.

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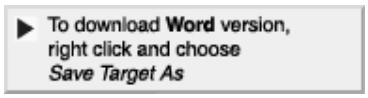
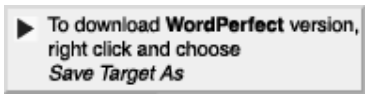
Source: Civil Litigation/California Civil Procedure Before Trial/29 Security for Costs/§29.62 VIII. CHECKLIST: PROCEDURE FOR MOTION FOR SECURITY FOR COSTS

§29.62 VIII. CHECKLIST: PROCEDURE FOR MOTION FOR SECURITY FOR COSTS





1. Nonresident or Foreign Corporation Plaintiffs (CCP §1030)

a. Defendant

- Notice motion for security
- Attach declaration specifying nature and amount of costs and attorney fees incurred or expected to be incurred

If motion for security made no later than 30 days after service of summons

- Notice motion to stay proceedings until 10 days after motion for security denied or 10 days after undertaking has been filed and defendant receives a copy
- Set hearing for no later than 60 days after service of summons

b. Plaintiff

If motion for security granted

- File undertaking no later than 30 days after service of court order
- Serve copy of undertaking on defendant

c. Defendant

If motion granted and defendant objects to undertaking

- Move to stay proceedings until 10 days after sufficient undertaking has been filed and defendant receives copy
- Notice motion for additional security

2. Shareholder Derivative Actions (Corp C §800)

a. Defendant (Corporation, Association, or Individually Named Officer or Director)

- Within 30 days of service of summons, notice motion for security on grounds that:
- There is no reasonable possibility that plaintiff shareholder's derivative cause of action will benefit corporation or its shareholders; and/or
- Defendant did not participate in transaction complained of
- Request in motion that bond for costs and attorney fees not exceeding $50,000 be posted

All proceedings automatically stayed until 10 days after motion disposed of, and, if granted, bond has been posted.

b. Plaintiff

- Present evidence by written declaration in opposing papers or by oral testimony at hearing:
- Refute defendant's "business judgment" argument by evidence of bad faith
- Show defendant has not met burden of proof regarding grounds

If motion for security granted

- Post security in amount and within time ordered by court

c. Defendant

If bond not posted as ordered

- Move for mandatory dismissal of action

Note: Motion preserves prevailing defendant's right to recover attorney fees.

3. Actions Against Architects and Engineers (CCP §1029.5)

a. Defendant

- Within 30 days after service of summons, notice motion for security for costs not exceeding $500 ($3000 if multiple defendants)

- Attach supporting declaration showing plaintiff's claim to be frivolous
- Prove at hearing that:
- There is no reasonable possibility that plaintiff has cause of action against moving defendant
- Plaintiff would not suffer undue economic hardship in filing undertaking

b. Plaintiff

If motion for security granted

- File undertaking in amount and within time ordered by court
- Pay defendant's defense costs up to amount of undertaking if defendant prevails

c. Defendant

If plaintiff fails to file undertaking

- Move for mandatory dismissal of action

4. Actions Against Doctors and Other Medical Professionals (CCP §1029.6)

a. Defendant

- Within 6 months after service of summons, notice motion for security for costs not exceeding $500 ($1000 if multiple defendants)
- Attach supporting declaration showing plaintiff's claim to be frivolous
- Prove at hearing that:
- There is no reasonable possibility that plaintiff has cause of action against moving defendant
- Plaintiff would not suffer undue economic hardship in filing undertaking

Note: Within 30 days after receipt of notice of motion, any defendant may join with moving defendant; failure to join precludes subsequent motion for security under CCP §1029.6.

b. Plaintiff

- File opposing papers and supporting declarations demonstrating viability of cause of action against each moving defendant

If motion for security granted

- File undertaking in amount and within time ordered by court
- Pay defendant's court costs up to amount of undertaking if defendant prevails

c. Defendant

If plaintiff fails to file undertaking

- Move for mandatory dismissal of action
- Request that plaintiff pay defendant's court costs up to amount of undertaking ordered by court

d. Plaintiff

If plaintiff prevails in action

- Request that defendant pay plaintiff's court costs in defending motion for dismissal authorized by CCP §1029.6(d)

Note: Any defendant moving for security is subsequently precluded from moving for summary judgment; any defendant moving for summary judgment may not later file or join a motion for security under CCP §1029.

5. Vexatious Litigants (CCP §§391-391.7)

a. Defendant

- Notice motion for security under CCP §391.1 at any time until final judgment is entered and show that:
- There is no reasonable probability that plaintiff will prevail in litigation; and
- Plaintiff is vexatious litigant as defined by CCP §391(b).
- Support motion with evidence of defendant's costs and attorney fees so court may fix appropriate amount of security

b. Plaintiff

If court grants motion

- Furnish security in amount and within time ordered by court

c. Defendant

If plaintiff fails to furnish security

- Move for mandatory dismissal of action

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IX. FORMS

§29.63 A. Form: Notice of Motion for Order Requiring Security

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER**
	)	**REQUIRING SECURITY** _ _[*;*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*SUPPORTING*
	)	*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court for an order requiring plaintiff,** _ _[*name*]_ _**, to furnish security in the amount of $**_ _ _ _ _ _ **to ensure payment of costs to be incurred in defense of the action under** _[*e.g., Code of Civil Procedure §1029.5*]_ _**. The grounds for issuance of this order are that** _ _[*e.g., plaintiff will not suffer undue financial hardship in filing such a written undertaking, and there is no reasonable possibility that plaintiff has a cause of action against this moving party*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: A memorandum supporting the motion must be attached. It may also be appropriate to attach a declaration. For discussion of noticed motions generally, see chap 12.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§29.64 B. Form: Undertaking (CCP §995.330)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**UNDERTAKING UNDER CCP**
vs	)	**§995.330**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	

Whereas _ _[*name*]_ _ **desires to give an undertaking for security for costs as provided by** _ _[*insert code sections requiring undertaking*]_ _**, we the undersigned sureties obligate ourselves jointly and severally to** _ _[*name*]_ _ **under those statutory obligations in the amount of $**_ _ _ _ _ _**.**

Date: _ _ _ _ _ _ __[*Signatures*]__
_ _[*Typed names of sureties*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: This statutory form of undertaking is authorized by CCP §995.330. If the sureties are individuals, the undertaking must be accompanied by a declaration made under penalty of perjury stating the qualifications of each surety. CCP §995.520. The plaintiff must serve a copy on the defendant for whose benefit the security is given. CCP §§995.340, 995.370. An affidavit (or declaration) of service on the defendant must be filed with the undertaking. CCP §995.370.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/29 Security for Costs/ C. Motion for Security for Costs and Attorney Fees Under CCP §1030/§29.65 1. Form: Notice of Motion for Security for Costs and Attorney Fees (CCP §1030)

C. Motion for Security for Costs and Attorney Fees Under CCP §1030

§29.65 1. Form: Notice of Motion for Security for Costs and Attorney Fees (CCP §1030)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER**
	)	**REQUIRING SECURITY** _ _[;
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*SUPPORTING*
	)	*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, moves the Court under Code of Civil Procedure §1030 for an order that** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, furnish a written undertaking to secure an award of costs and attorney fees that may be awarded in this** _ _[*action/special proceeding*]_ _**. The grounds for issuance of this order are that (1)** _ _[*e.g., plaintiff*]_ _ **has been** _ _[*an out-of-state resident/a foreign corporation*]_ _ **since commencement of the above action, and (2) there is a reasonable possibility that the moving party will prevail in this action.**

The hearing will take place on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: A memorandum supporting the motion must be attached. For discussion of motion, see §§29.14-29.17.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§29.66 2. Form: Declaration Supporting Motion for Order Requiring Security (CCP §1030)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**ORDER REQUIRING**
	)	**SECURITY (CCP §1030)**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the attorney for _ _[*e.g., defendant*]_ _**,** _ _[*name*]_ _**, in this action.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.

[*Option 1*]

3. _ _[*E.g., Plaintiff*]_ _**,** _ _[*name*]_ _**, resides at** _ _[*address*]_ _**.**

[*Option 2*]

3. _ _[*E.g., Plaintiff*]_ _**,** _ _[*name*]_ _**, is incorporated in the State of** _ _[*specify*]_ _**.**

[*Continue*]

4. _ _[*State facts sufficient to establish that* _ _[*e.g., defendant*]_ _ *has a reasonable possibility of obtaining judgment*]_ _**.**

5. _ _[*E.g., Defendant*]_ _ **has incurred the following costs** _ _[*and attorney fees*]_ _**:** _ _[*List*]_ _**.**

6. _ _[*E.g., Defendant*]_ _ **expects to incur the following costs** _ _[*and attorney fees*]_ _**:** _ _[*List*]_ _**.**

7. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The declaration must set forth the nature and amount of the costs and attorney fees the defendant incurred and expects to incur before the action is concluded. For discussion, see §29.14.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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30

Bill of Particulars

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I. INTRODUCTION

§30.1 A. Scope of Chapter

This chapter discusses the method that a defendant or cross-defendant may use to demand an itemization (bill of particulars) of the total amount alleged to be owed in the complaint or cross-complaint. The plaintiff or cross-complainant must provide documents, *i.e.,* an actual "copy of the account" in response to the demand. See CCP §454. If the demand is made early, the bill of particulars provided may be used both to frame a responsive pleading and as a starting point in planning formal discovery.

This chapter sets forth description and uses (see §§30.3-30.13), procedures (see §§30.14-30.19), enforcing demand (see §§30.20-30.28), relief from noncompliance (see §§30.29-30.31). It includes a diagnostic questions (see §30.32) and a checklist (see §30.33). Forms for demanding or responding to a bill of particulars appear at the end of the chapter (see §§30.34-30.43).

NOTE: Unless otherwise specified in this chapter, the words "plaintiff," "defendant," and "complaint" include "cross-defendant," "cross-complainant," and "cross-complaint."

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.2 B. Governing Law

§30.2 B. Governing Law

A bill of particulars is governed by CCP §454.

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§30.3 II. DESCRIPTION AND USES

A bill of particulars is a device that a defendant or cross-defendant may use to clarify the pleadings. Statutory authority in California for the common law right to demand the items of an account is found in CCP §454 under the general rules of pleading. See 5 Witkin, California Procedure, *Pleading* §499 (5th ed 2008).

A demand for a bill of particulars (see §§30.14-30.15) forces a plaintiff or cross-complainant who sues on an account in an action in contract or quasi-contract to itemize the total sum alleged in the complaint or cross-complaint. In practice, the bill of particulars frequently serves important discovery functions, *e.g.,* clarifying issues or obtaining documents, thereby guarding against surprise at trial. On discovery generally, see California Civil Discovery Practice (4th ed Cal CEB 2006).

Once filed, the bill of particulars is considered incorporated into the particular cause of action pleaded in the complaint, thus limiting the plaintiff's (or cross-complainant's) proof at trial to those matters set forth in the bill and complaint (or cross-complaint). See §30.12.

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A. Advantages; Limitations

§30.4 1. Right to Itemization of Total Sum Alleged

A party served with a complaint or cross-complaint on an account pleaded in general terms is entitled to a copy of the account within 10 days after serving a written demand. CCP §454.

The bill of particulars permits the party demanding it to prepare a defense by protecting him or her from potential surprise when a cause of action is stated on an account without specifying the particular items of the account. See *Long Beach City Sch. Dist. v Dodge* (1902) 135 C 401, 407, 67 P 499; *McCarthy v Mt. Tecarte Land & Water Co.* (1896) 110 C 687, 692, 43 P 391; *Dobbins v Hardister* (1966) 242 CA2d 787, 794, 51 CR 866.

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§30.5 2. Applies to Contract and Quasi-Contract Actions Only

The major disadvantage of a bill of particulars is that it may be demanded only in actions on account and cannot be used in cases seeking general damages (*e.g.,* for negligence or in most personal injury cases). The demand can be made only in contract or quasi-contract actions (*e.g.,* to recover value of services or materials promised by agreement or claimed in quantum meruit). See §30.9.

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§30.6 3. Using Bill for Discovery Purposes

Demanding a bill of particulars can be an inexpensive way for a defendant or cross-defendant to achieve certain discovery objectives. Because a bill of particulars is limited to contract and quasi-contract cases (see §30.5), and because statutory authority for it is located in the general rules of pleading, many California attorneys seem unfamiliar with its advantages, among which are:

- **Costs less than discovery methods.** A demand for a bill of particulars requires less attorney time than that needed to frame appropriate interrogatories or ask deposition questions to obtain the same information.
- **Allows prompt discovery of case facts.** A demand for a bill of particulars can be served early in a case (even before answer to complaint is filed). See §30.15.
- **Provides efficient method of obtaining documentation.** The party suing on an account must furnish an actual "copy of the account" (CCP §454) if available and may be compelled to gather documents and other items to meet this requirement. See §30.18.
- **Limits amount of damages.** When the bill of particulars shows that the claim is for an amount less than that demanded in the complaint, recovery is limited to the lesser amount itemized in the bill. See §30.12.
- **Aids settlement negotiations.** An early demand for a bill can lead to effective settlement discussions, particularly if the complaint overstated the amount of damages and the bill documents a lesser sum. See §30.12.
- **Constitutes conclusive evidence.** Unless the court allows a bill of particulars to be amended, a party is precluded from giving conflicting or additional evidence at trial on the items and amounts claimed. Unlike answers to interrogatories or deposition questions, a party cannot admit additional items or explain why amounts on a bill of particulars are no longer viewed as accurate. See §30.12.

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B. Other Procedures Compared

§30.7 1. Demurrer for Uncertainty

The demurrer for uncertainty (see chap 23) and the demand for a bill of particulars can perform the same function, *i.e.,* each requires a party to state a cause of action more specifically. A demurrer, however, ordinarily lies only when the defect appears on the face of the pleading. CCP §430.30.

Because CCP §454 expressly authorizes pleading an action on an account in general language, a demurrer for uncertainty is not available when the only objection is that the account items are not specified. *McFarland v Holcomb* (1898) 123 C 84, 55 P 761. The proper remedy in this situation is to demand a bill of particulars. *Gaddis v Grant* (1919) 39 CA 437, 179 P 410.

If the bill of particulars is served before the answer to the complaint is filed, defense counsel may use the bill to frame a responsive pleading. Unlike a demurrer, a demand for a bill of particulars does not automatically extend the time for answering the complaint; counsel must seek a stipulation or court order to file a pleading after the bill of particulars has been delivered. See §30.17.

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§30.8 2. Discovery Methods

The demand for a bill of particulars (when available; see §30.5) is an inexpensive and effective tool for clarifying issues and obtaining documents, without resort to more costly and time-consuming discovery methods, and should be considered whenever a relatively small sum is at stake. On using the bill for discovery purposes, see §30.6.

Discovery methods, such as depositions, interrogatories, and inspection of documents, serve the same purpose as a demand for a bill of particulars in that they protect a party against surprise at trial. These methods, however, are designed largely for use after the pleadings have been filed; a demand for a bill of particulars, when served before filing an answer to the complaint, can be used to prepare a responsive pleading.

A bill of particulars can often be more effectively used in subsequent pretrial motions and the trial itself than many discovery methods. Deposition testimony, for example, is not absolutely binding in subsequent proceedings, and a party may, at the risk of being impeached, contradict his or her earlier testimony. But because a bill of particulars is viewed as incorporated into the pleading itself, many courts take the position that the pleader may not, in later testimony, materially contradict or modify the statements in the bill unless granted leave to amend by court order. See §§30.12, 30.29.

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C. When Available

§30.9 1. Actions on Account; Examples

Although a party need not set forth in the complaint "the items of an account therein alleged," the party must deliver to the opposing party, on demand, a "copy of the account," commonly known as a bill of particulars. CCP §454. Although an argument can be made that §454 was not intended to restrict a court's inherent power to order a party to furnish a bill of particulars, the tendency is to use a bill only in actions on account in which items of the account were not specified in the pleading. See 5 Witkin, California Procedure, *Pleading* §499 (5th ed 2008).

However, the language "on account" has been broadly interpreted to include, in addition to actual book accounts (as defined in CCP §337a), almost any type of contract or quasi-contract action consisting of more than one item. See *Long Beach City Sch. Dist. v Dodge* (1902) 135 C 401, 407, 67 P 499. For a form of bill of particulars when there is no account to copy (*i.e.,* an action on a common count), see §30.36. For further discussion, see §30.18. Thus a demand for a bill of particulars would be appropriate in actions to recover for:

- Work and materials furnished to defendant under contract (*Jensen v Dorr* (1911) 159 C 742, 116 P 553);
- Services rendered and traveling expenses incurred under contract between plaintiff and defendant (*Jewell v Colonial Theater Co.* (1910) 12 CA 681, 108 P 527);
- Money lent and advanced by plaintiff to defendant at defendant's request (*Pleasant v Samuels* (1896) 114 C 34, 45 P 998);
- Money had and received by defendant (*Firpo v Pacific Mut. Life Ins. Co.* (1926) 80 CA 122, 251 P 657);
- Money paid to correct work improperly performed under construction contract (*Long Beach City Sch. Dist. v Dodge, supra*);
- Reasonable or agreed-on value of legal services (*Burns v Cushing* (1892) 96 C 669, 31 P 1124; *Baroni v Musick* (1934) 3 CA2d 419, 39 P2d 435), but not if action is on an account stated (see §30.10); or
- Breach of lease agreement (*Sentney v Heidingsfelder* (1932) 120 CA 499, 7 P2d 1106).

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§30.10 2. Actions on Account Stated; Compared

California courts have taken the position that a demand for a bill of particulars is improper in an action on an account stated (the agreed settlement of an account between the parties). *Ahlbin v Crescent Commercial Corp.* (1950) 100 CA2d 646, 224 P2d 131. But see dictum in *Coffee v Williams* (1894) 103 C 550, 562, 37 P 504. The reasoning for this view is that an account stated is a new contract that supersedes the original contract (*Jones v Wilton* (1938) 10 C2d 493, 75 P2d 593), and an action on an account stated is based not on the original items but on the final balance established by the parties' mutual consent (*Hallford v Baird* (1938) 27 CA2d 384, 80 P2d 1040), making a bill of particulars inappropriate.

EXAMPLE: In *Auzerais v Naglee* (1887) 74 C 60, 15 P 371, the court held that, because an account stated supersedes the original contract, the party alleging it need not, in response to a demand for a bill of particulars, specify the items furnished under the original contract. This reasoning has been applied to other actions based on agreements in which the original contractual obligations have been superseded. See, *e.g., Henning v Clark* (1920) 46 CA 551, 189 P 714 (attorney need not specify particulars in action against client based on settlement agreement); *Vassere v Joerger* (1938) 10 C2d 689, 76 P2d 656 (particulars need not be supplied in action based on "compromise agreement" in which defendant acknowledged preexisting debt).

The anomaly of *Auzerais v Naglee, supra* (as stated in a dissenting opinion), is that a party defending an action on an account stated may disprove the amount owing on the account by proving fraud, error, or mistake, yet may not demand a bill of particulars that would make it possible to defend against these contentions. Because fraud, error, or mistake are essentially defensive matters, they must be alleged in the answer. CCP §431.30(b)(2). *Auzerais* requires, however, a party who suspects fraud, error, or mistake to conduct discovery before filing an answer, or else move to file an amended answer after discovery has revealed facts supporting this defense.

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D. Effect on Pleading and Proof

§30.11 1. Amplifies Pleading

A bill of particulars is considered an amplification of the pleading and is incorporated into it for purposes of determining a plaintiff's right of recovery as well as the admissibility of any evidence supporting the claim. *Millet v Bradbury* (1895) 109 C 170, 41 P 865; *Kurokawa v Saroyan* (1928) 95 CA 772, 273 P 613. However, because the bill is not a pleading and cannot be answered (*Chamberlain v Loewenthal* (1902) 138 C 47, 70 P 932), statements made in it, if not denied by the defendant, are not considered admitted (*Weiner v Davies* (1967) 248 CA2d 387, 56 CR 546).

Because the bill amplifies the pleading in which it is incorporated, it may be used to correct defects or omissions in the original pleading. For example, if the complaint alleges services rendered by the plaintiff as an attorney, but the bill shows that they were rendered by the plaintiff as a broker, the services rendered are within the issues framed by the complaint and bill when read together. See *Gage v Billing* (1910) 12 CA 688, 108 P 664.

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§30.12 2. Limits Evidence and Recovery

A bill of particulars fixes the legal position of the party giving it in several respects:

- When the bill shows that the claim is for an amount less than that demanded in the pleading, recovery is limited to the lesser amount. For example, in *Abbott v Limited Mut. Compensation Ins. Co.* (1938) 30 CA2d 157, 85 P2d 961, the complaint demanded $5000 for service rendered, but the items in the bill came only to $3055, and recovery was limited to $3055.
- Evidence offered at trial beyond the scope of items covered in the bill may be excluded. For example, a party omitting reference to credits on an account in the party's bill of particulars may be barred from testifying about the credits at trial. *Robertson v Bonelli* (1944) 65 CA2d 704, 151 P2d 307. See also *Banchero v Coffis* (1950) 96 CA2d 717, 722, 216 P2d 151 (trial court erred in denying defendant's motion to exclude evidence on value of services rendered when plaintiff had not furnished bill of particulars on defendant's demand).

A party may, however, introduce evidence at trial that varies from the items set forth in the party's bill when the variance is immaterial. See *Weaver v Fickett* (1927) 82 CA 116, 255 P 257. Then the party may move for an order at the close of evidence to amend the pleading to conform to proof. See, *e.g., Shanklin v Scribner* (1923) 62 CA 487, 492, 217 P 130 (corporation's rights were not prejudiced by allowing plaintiff to amend complaint to conform to proof by alleging sum was balance due on an open book account). On amending pleading to conform to proof generally, see California Trial Practice: Civil Procedure During Trial §§18.103-18.123 (3d ed Cal CEB 1995). A party may also move to amend a bill that omitted items or stated them incorrectly. On correcting bill, see §30.29.

When evidence is offered at trial that is beyond the scope of items covered in the bill, the party against whom the evidence is offered must object to its introduction; a party may not do so for the first time on appeal. *Campbell v Hanford* (1924) 67 CA 155, 164, 227 P 234, 238 (objection on ground item not included in bill of particulars must be made at proper time).

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§30.13 3. Bill and Evidence Distinguished

Although a party's evidence is limited to the items specified in the bill of particulars (see §30.12), the bill itself is not competent evidence of the items. Like allegations in a complaint, proof is required of items set forth in the bill. A party's failure to introduce evidence of these items is a failure to meet the burden of proof and will result in an adverse judgment. See *Silva v Linneman* (1946) 73 CA2d 971, 167 P2d 794 (bill of particulars is not competent evidence of expenditures alleged in it).

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III. PROCEDURES

A. Defendant's Demand

§30.14 1. Who May Make Demand

Any party from whom recovery is sought on a cause of action based on an account (except on an account stated; see §30.10) may demand a bill of particulars. CCP §454. Thus, a defendant who files a cross-complaint based on an account may be required by the plaintiff or another cross-defendant to deliver a bill. See, *e.g., Elmore v Tingley* (1926) 78 CA 460, 467, 248 P 706.

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§30.15 2. Statutory Requirements; Timing

The statutory authority for demanding a bill of particulars requires no particular form. CCP §454; *Elmore v Tingley* (1926) 78 CA 460, 468, 248 P 706. However, the demand must be in writing. CCP §454. It should be signed by the party making it and should indicate that the demanding party is the party against whom the account is pleaded. *Elmore v Tingley, supra*. See form in §30.34.

The statute prescribes no time within which the demand for a bill of particulars must be made. CCP §454. The demand may be made after an answer to the complaint has been filed. A party is not required to obtain a court order before demanding a bill of particulars. See CCP §454. When the demanding party needs the bill to assist in preparing a responsive pleading, however, the demand should be made immediately after service of the complaint.

NOTE: Because the demand does not automatically extend the demanding party's time to file a responsive pleading, an extension of time in which to plead may be necessary. See §30.17.

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§30.16 3. Service; Not Filed With Court

The demand for a bill of particulars may not be filed with the court unless the bill pertains to an issue to be determined in a subsequent law and motion proceeding or is ordered filed by the court for good cause. Cal Rules of Ct 3.250(a)(19).

The demanding party should serve a copy on the responding party and each other party, keeping the original demand, with the original proof of service affixed, to be presented to the court if a later controversy arises. See Cal Rules of Ct 3.250(b).

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§30.17 4. Effect on Time to Respond to Complaint

Serving a demand for a bill of particulars does not extend defendant's time to answer or otherwise plead to the complaint. *Svistunoff v Svistunoff* (1952) 108 CA2d 638, 239 P2d 650; *Butler v Robinson* (1926) 76 CA 223, 244 P 162.

WARNING: In *Svistunoff,* a default judgment was taken after the defendant's attorney failed to file a responsive pleading as a result of his mistaken belief that the time to do so was automatically extended when a plaintiff was served with a demand for a bill of particulars. The court affirmed the trial court's decision to set aside the default, stating that "a mistake of law does not bar a party, under proper circumstances, from being relieved of a default caused by that mistake." *Svistunoff,* 108 CA2d at 645. But see *Steineck v Coleman* (1925) 72 CA 244, 236 P 962, which held that the defendant's motion to vacate judgment was properly denied: the trial court was entitled to determine that the defendant's mistake of law (the belief that time to answer complaint was extended until plaintiff delivered bill of particulars) was not excusable delay but was part of the defendant's policy of intentional delay.

To prevent a default from being taken before the bill of particulars has been examined, the defendant should obtain an extension of time to respond to the complaint, either by stipulation with opposing counsel or by court order (see CCP §1054). Some attorneys enter into reciprocal stipulations, agreeing that the plaintiff has longer than the statutory 10-day period to provide the bill, and the defendant's time to plead to the complaint does not begin to run until after the bill has been delivered. For a stipulation that may be adapted for this purpose, see California Civil Litigation Forms Manual §11.5 (Cal CEB 1980).

PRACTICE TIP: A court will usually grant an extension to a defendant who has demanded a bill of particulars. *Dobbins v Hardister* (1966) 242 CA2d 787, 795, 51 CR 866. If the court denies an extension, however, the defendant should file a timely answer, denying, on information and belief, the allegations in the complaint and, in support of this denial, pleading facts showing that a demand was made and a request for an extension of time in which to answer was denied. The defendant who has demanded a bill of particulars should also indicate actual ignorance of facts, when true, that a defendant would otherwise be expected to know. *Dobbins v Hardister, supra*.

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B. Plaintiff's Response

§30.18 1. Contents of Bill; Detail Required

Code of Civil Procedure §454 requires that the plaintiff deliver to the demanding party "a copy of the account." If the complaint is verified, the bill must be verified. CCP §454. When the underlying cause of action is based on a book or ledger account, the bill of particulars should simply incorporate by reference a copy of the account. See form in §30.35. When there is no account to copy (*i.e.,* an action on a common count), the bill of particulars should list the items or services for which the plaintiff claims payment is due. See form in §30.36. See discussion in §§30.9-30.10.

No court decision has precisely fixed the standard of detail required in the bill; however, because its purpose is to give reasonable notice of the items constituting the claim in order to enable the defendant to prepare for trial (see §30.3), the bill should set forth those items with particularity. The courts appear to measure adequate compliance according to whether the bill is reasonably detailed and has been prepared in good faith. In *Banchero v Coffis* (1950) 96 CA2d 717, 216 P2d 151, the response to the defendant's demand for a bill of particulars was held deficient because the plaintiff stated only that four types of services had been performed and made no attempt to itemize the amount claimed for each service. The court found the bill to be "a total and unqualified noncompliance with the demand." 96 CA2d at 721.

In *Gilmore v Hill* (1957) 152 CA2d 881, 313 P2d 898, the sufficiency of the bill was upheld on appeal because the court found it "difficult to see how more detail could be given." See also *Butler Bros. v Connolly* (1962) 204 CA2d 22, 25, 22 CR 175 (bill of particulars was as explicit as it could reasonably be made).

A party may not willfully avoid providing a bill of particulars merely because the facts are not within the party's personal knowledge. In such situations a court may require the party to conduct the discovery necessary to obtain and deliver a proper itemization to the demanding party. See *Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 55 CR 529 (plaintiff failed to make reasonable efforts to take oral depositions as ordered by trial court to locate records from which bill of particulars could be made).

PRACTICE TIP: In preparing the bill of particulars, counsel should consider its use in encouraging prompt settlement of a claim. Some attorneys voluntarily supply more detailed information in the bill than might be required. For example, in an action based on a book account, the attorney may include a copy of the ledger account as well as each invoice supporting charges to the account. This approach gives the defendant information that may, when verified by the defendant, result in prompt payment of the claim.

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§30.19 2. Timing; Service

Although CCP §454 provides only that the bill be delivered to the adverse party, it is good practice for the plaintiff to serve copies on all parties of record, not just the party demanding it. The plaintiff should serve the original (with the original proof of service affixed) on the demanding party, for filing with the court only if a later controversy arises. See §30.16.

The plaintiff must deliver a bill of particulars to the defendant within 10 days after service of the demand. CCP §454; 4 Witkin, California Procedure, *Pleading* §504 (5th ed 2008). When the plaintiff served the demand by mail, the 10-day period for delivering the bill is extended for five calendar days if the place of address and place of mailing is in California, 10 calendar days if either the place of mailing or place of address is outside California but in the United States, or 20 calendar days if either the place of mailing or place of address is outside the United States. CCP §1013(a). See chap 18.

Failure to deliver a timely bill may result in the plaintiff's being precluded from offering evidence of the account pleaded in the complaint. See §30.24.

PRACTICE TIP: A plaintiff who has failed to deliver a bill of particulars on time should deliver the bill as soon as possible and if necessary file a motion for relief under CCP §473. See §30.31. A late bill satisfies the requirements of CCP §454 if the demanding party receives it in time to prepare for trial. See §30.30.

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IV. ENFORCING DEMAND AND PRECLUDING EVIDENCE

A. Motion for Further Bill

§30.20 1. Waiver of Defects When Motion Not Made

The court may order a further bill of particulars when the bill delivered is too general or is otherwise defective. CCP §454. The permissive language of CCP §454 has been judicially expanded into a rule that the demanding party's normal remedy is a noticed motion for a further bill. See, *e.g., Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 433, 55 CR 529.

A party who fails to make a timely motion for a further bill is considered to have waived any defects in the bill provided. *Union Lumber Co. v Morgan* (1912) 162 C 722, 124 P 228; *Ames v Bell* (1907) 5 CA 1, 89 P 619. See also 5 Witkin, California Procedure, *Pleading* §§507-508 (5th ed 2008). This is true even if the bill is wholly defective in form and useless for its intended purpose. *Burton v Santa Barbara Nat'l Bank, supra.* But see *Banchero v Coffis* (1950) 96 CA2d 717, 721, 216 P2d 151. On the time in which to move for a further bill, see §30.21.

When the motion has been granted but the plaintiff fails to provide a further bill, defense counsel can then file a motion to preclude the plaintiff from introducing evidence at trial of the account on which the claim is based. CCP §454; *Burton v Santa Barbara Nat'l Bank, supra*. See §30.24. On combining motion for further bill and motion to preclude evidence, see §30.22.

PRACTICE TIP: Although CCP §454 does not require it, the cases suggest that a defense attorney who receives a defective bill immediately return it to the plaintiff, demanding further particulars. See §30.21. For sample demand in letter form, see §30.37. A demand letter notifies the plaintiff that the defendant intends to obtain a more specific bill and eliminates the need for a motion and a court appearance if the defendant receives a satisfactory bill in response. A demand letter should be sent promptly after receipt of a deficient bill. It is advisable to specify the deficiencies in the bill and advise the opposing party that, unless further particulars are delivered within a stated time, a motion for a further bill will be made. A copy of this letter may be attached as an exhibit to declarations supporting any court motion made later.

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§30.21 2. Timing

Although CCP §454 does not specify the time within which a motion for a further bill of particulars must be made, the courts have repeatedly said that a party who is dissatisfied with a defective bill of particulars should return it immediately or move for a further bill. *Dennison v Smith* (1851) 1 C 437; *Storm & Butts v Lipscomb* (1931) 117 CA 6, 21, 3 P2d 567, 573. On waiver of defects, see §30.20.

The grant or denial of a motion for a further bill of particulars is a matter within the trial court's discretion. *Meredith v Marks* (1963) 212 CA2d 265, 220, 27 CR 737. The court may properly deny an untimely or belated motion. *Ames v Bell* (1907) 5 CA 1, 89 P 619 (court properly denied defendant's motion for further bill made on day of trial and more than five months after plaintiff's bill was served).

PRACTICE TIP: If counsel decides not to pursue informal procedures (see §30.20), the motion for a further bill should be made promptly on receipt of a bill that the defendant considers insufficient. If a letter demanding a further bill has been sent (see sample in §30.37), the defendant should notice a motion soon after expiration of the time stated in the letter.

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§30.22 3. Procedure

The originals of the demand and the bill of particulars itself should be filed with or attached to the motion for a further bill. See Cal Rules of Ct 3.250 (documents relevant to determination of law and motion issue may be filed separately or attached to other documents).

The declaration accompanying the motion for a further bill should explain why the plaintiff's failure to supply complete information will prejudice the demanding party's ability to prepare a defense. Ordinarily, prejudice cannot be shown when the information is already in the defendant's possession (*Storm & Butts v Lipscomb* (1931) 117 CA 6, 3 P2d 567), unless the information is unintelligible (*Sadik v Wallberg Mining Corp.* (1936) 11 CA2d 379, 53 P2d 981).

The declaration should also specify the additional information that the plaintiff should be required to supply, *e.g.,* alleged dates and places of services listed in deficient bill, dates goods were delivered or materials furnished, and cost of goods, materials, or labor. See form in §30.40.

Drafting a proposed order that specifies the further particulars that the plaintiff is required to furnish will, if the motion is granted, provide a sufficient basis for a later ruling precluding evidence for failure to comply. See *Connor v Hutchinson* (1861) 17 C 279. On notice requirements for motions generally, see chap 12.

PRACTICE TIP: Counsel may consider combining a motion for a further bill with a motion to preclude evidence (see §30.24), *i.e.,* a request that, unless the plaintiff furnishes a more complete bill within a stated period of time, an order precluding evidence of the items of account will be granted on the defendant's ex parte motion. Such an order saves time and money by eliminating the need for a noticed motion to preclude evidence and is probably within the court's discretion under CCP §454. See §30.4.

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§30.23 4. Plaintiff's Failure to Comply With Order for Further Bill

A party who fails to comply with an order for a further bill of particulars within the time set by the court may, in the court's discretion, be barred from introducing evidence at trial in support of the alleged account. CCP §454.

To preserve this remedy, the demanding party must make a motion to preclude evidence. See §30.24. If the defendant delays in making such a motion until the trial, it may be denied. *Connor v Hutchinson* (1861) 17 C 279; *Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 55 CR 529. See §30.25.

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B. Motion to Preclude Evidence

§30.24 1. Statutory Penalty

A party to whom a demand for bill of particulars has been made must deliver the bill to the adverse party within 10 days "or be precluded from giving evidence thereof." CCP §454. Because of the potential harshness of this penalty, reluctance to impose it has resulted in judicial qualification of the statute's mandatory language.

It has been held that, when there has been a failure to deliver a bill because of complete refusal or gross neglect, imposition of the penalty is in the trial court's discretion. *McManus v Larson* (1932) 122 CA 716, 10 P2d 523 (plaintiff completely ignored demand; trial court granted defendant's motion to preclude evidence). But see *Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 55 CR 529 (mandatory penalty must be imposed on plaintiff's complete refusal to deliver bill as was the case here; only in cases involving mere delay in providing adequate bill can courts exercise discretion not to impose statutory penalty). The court in *McManus* relied on the reasoning in *McCarthy v Mt. Tecarte Land & Water Co.* (1896) 110 C 687, 43 P 391, in which an adequate bill was delivered one day late, the defendant was not prejudiced by the delay, and the trial court's denial of the defendant's motion to preclude evidence was affirmed.

In exercising its discretion, a trial court is less likely to be reversed on appeal when evidence has been precluded (see, *e.g., Elmore v Tingley* (1926) 78 CA 460, 248 P 706) than when it has not (see, *e.g., Banchero v Coffis* (1950) 96 CA2d 717, 216 P2d 151). Generally, however, the courts have enforced the statutory penalty only when the plaintiff utterly refused to comply (*i.e.,* by failing to deliver a bill or furnishing a wholly inadequate document). See §§30.18, 30.24. If the bill delivered is objectionable, the burden is on the defendant to move for a further bill. When the plaintiff refuses to comply with an order for a further bill, or never furnished a bill in the first place, the defendant must then move to preclude evidence. See §30.25.

PRACTICE TIP: When a bill of particulars has not been provided within the statutory period, it is good practice for the demanding attorney to write to the plaintiff's counsel, advising that the time to respond has elapsed and that a motion to preclude evidence will be made if the bill is not delivered promptly. Such a letter often eliminates the need for a motion by causing a bill to be delivered. It is also helpful in persuading a court that the evidence should be excluded because the refusal to supply a bill was willful. A copy of the demand letter should be attached to the moving papers and marked as an exhibit if a later motion to preclude evidence becomes necessary. For sample letter demanding bill after plaintiff's failure to deliver, see §30.41.

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§30.25 2. Timing

Case law is not uniform on whether, when a party ignores or refuses to comply with a demand for a bill of particulars, the penalty prescribed by CCP §454 requires that a motion to preclude evidence must be made before trial.

In *Elmore v Tingley* (1926) 78 CA 460, 248 P 706, the plaintiff's demand for a bill of particulars to the defendant's cross-complaint was wholly ignored. No pretrial motion to preclude evidence was made, but at trial the plaintiff objected to the defendant's offered evidence in support of the alleged account. The objection was sustained, and the ruling was affirmed on appeal as a proper exercise of the trial court's discretion. In *Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 433, 55 CR 529, the court implied that complete refusal or gross neglect in failing to supply a bill of particulars requires that the evidence be precluded under CCP §454 even if no pretrial motion was made.

However, in *Banchero v Coffis* (1950) 96 CA2d 717, 721, 216 P2d 151, 154, in which a pretrial motion to preclude evidence made six months before trial was held to have been erroneously denied, the court suggested that the motion must be timely and that a trial court may properly deny "eleventh-hour motions," *i.e.,* a motion made at the beginning of the trial. See also *St. John v Consolidated Constr. Co.* (1920) 182 C 25, 189 P 276 (demand for bill of particulars ignored for over a year and a half but no motion made to preclude evidence; court permitted bill to be delivered on day of trial and offered five-day continuance to give demanding party time to examine it and prepare for trial); *Storm & Butts v Lipscomb* (1931) 117 CA 6, 3 P2d 567 (defendant may not wait until trial, but must move for and obtain an order precluding evidence beforehand).

It is clear that CCP §454 on its face does not require a pretrial motion to preclude evidence when a party has refused or ignored a demand for a bill of particulars. However, the cases seem to reflect judicial concern in applying the penalty of precluding evidence under §454, particularly for bills delivered late. See §30.30. Unless the party against whom the order is to be imposed had ample notice that it would be sought, particularly with defective bills, the demanding party should file both the motion for a further bill and a motion to preclude evidence before trial promptly or risk waiving the right to have the evidence precluded at trial (see §30.20).

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§30.26 3. Procedures

A motion to preclude evidence for failure to comply with the original demand or with an order for a further bill should show in a supporting declaration how the demanding party has been prejudiced in preparing a defense by the plaintiff's failure. A court may deny the motion unless prejudice has been shown. See *Sadik v Wallberg Mining Corp.* (1936) 11 CA2d 379, 53 P2d 981; *Storm & Butts v Lipscomb* (1931) 117 CA 6, 3 P2d 567.

The supporting declaration should also show any facts evidencing the plaintiff's complete refusal to respond to the original demand or to comply adequately with a court order for a further bill. Any informal demand letters requesting the plaintiff's compliance should be attached as exhibits. See forms in §§30.37, 30.41.

If an order for a further bill provides for it, the motion may be made ex parte. See §30.22. Normally, however, a motion to preclude evidence is a noticed motion. See generally chap 12. For forms, see §§30.42-30.43.

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§30.27 4. When Motion Granted; Effect

A court order precluding the introduction of evidence of an account alleged in a complaint often signals the end of the litigation because the plaintiff is precluded from offering evidence on what may be the only cause of action. In such a case, the order is a final determination of the parties' rights and is therefore an appealable order. *Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 55 CR 529.

However, if the party against whom the order is made has alleged another cause of action in the pleadings that is not affected by the order, an appeal cannot be taken until the remaining cause of action has been resolved. *Caruso v Snap-Tite, Inc.* (1969) 275 CA2d 211, 79 CR 642.

Relief from an order precluding introduction of evidence is sometimes available under CCP §473 when the failure to deliver a bill was due to mistake, inadvertence, surprise, or excusable neglect. See §30.31.

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§30.28 5. If Motion Denied

A trial court's denial of a motion to preclude evidence is not an appealable order. See CCP §§904.1-904.2. To preserve the issue for appellate review, the defendant must promptly object to the plaintiff's introduction of evidence at trial. Failure to object results in a waiver of the defendant's right to raise the propriety of the trial court's order on appeal. *Glogau v Hagan* (1951) 107 CA2d 313, 321, 237 P2d 329.

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V. RELIEF FROM NONCOMPLIANCE

§30.29 A. Amending Erroneous or Incomplete Bill

A bill of particulars may be prepared from an accounting in which one or more items are missing or erroneous, *e.g.,* when an invoice is misplaced or entered incorrectly. A plaintiff who learns of any errors after the bill has been delivered should immediately notify the defendant by letter and request a stipulation permitting amendment of the bill. If a stipulation cannot be obtained, the plaintiff should file a motion to amend the bill on the grounds of mistake, inadvertence, surprise, or excusable neglect under CCP §473. See §30.31.

The plaintiff should attach a copy of the bill to the motion as an exhibit and should state in a supporting declaration that the defendant was notified of the errors or omissions by letter but has refused to stipulate to amending the bill. See Cal Rules of Ct 3.250(a)(19).

PRACTICE TIP: Although a party may be able to introduce evidence at trial that does not vary materially from the items set forth in the bill (see §30.12), there is no assurance that a court will consider the variance immaterial. The better practice is for plaintiff to move promptly to amend the bill. The motion will ordinarily be granted, especially when the defendant cannot show prejudice because there has been ample notice of the error. See §30.31.

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§30.30 B. Bill Delivered Late

Although CCP §454 requires a plaintiff to deliver the bill to the adverse party within 10 days "or be precluded from giving evidence," the courts have been reluctant to impose this extreme penalty when the defendant has not been prejudiced by an otherwise adequate bill delivered late. See §30.24.

In *McCarthy v Mt. Tecarte Land & Water Co.* (1896) 110 C 687, 43 P 391, the court held that imposition of the §454 penalty when a bill is late is a matter of court discretion. Thus, a court may admit the evidence and refuse to apply the penalty because the purpose of the statute has been fulfilled if the bill, even though technically late, is delivered in time for the demanding party to prepare a defense. *McCarthy v Mt. Tecarte Land & Water Co., supra* (bill delivered one day late). See also *Silva v Bair* (1904) 141 C 599, 75 P 162; *Cromer v Strieby* (1942) 54 CA2d 405, 128 P2d 916.

The cases make it clear that evidence of the account will not be precluded because of a technical violation of CCP §454, when the bill in other respects has met the statutory requirements, unless the defendant has been prejudiced by the delay. Prejudice is frequently difficult for the defendant to show, particularly when the court grants a continuance if, after receipt of a late bill, the defendant needs more time to prepare for trial. See, *e.g., St. John v Consolidated Constr. Co.* (1920) 182 C 25, 189 P 276.

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§30.31 C. Motion Under CCP §473

A party who has failed to comply properly with a demand for a bill of particulars or against whom an order precluding introduction of evidence of the account has issued under CCP §454 for failure to deliver a bill may, because of that party's mistake, inadvertence, surprise, or excusable neglect, sometimes obtain relief by court order. See CCP §473. Under this section, a court may, "in furtherance of justice and on such terms as may be proper," permit a party to amend a defective or erroneous bill, to deliver a bill when no bill has yet been delivered, or to vacate an order precluding introduction of evidence.

A mistake of law or the fact that the attorney was too busy with other matters to prepare a bill of particulars has been held not to warrant relief under CCP §473. See, *e.g., McManus v Larson* (1932) 122 CA 716, 10 P2d 523. But see *Svistunoff v Svistunoff* (1952) 108 CA2d 638, 239 P2d 650, in which the court confirmed the trial court's vacating a default when the defense attorney's mistake of law led him to believe that serving a demand for a bill of particulars extended the time in which to answer the complaint; see further discussion of this case in §30.17. On showing that defendant was not prejudiced by plaintiff's actions, see §30.30.

A motion for relief under CCP §473 must be timely; undue delay may result in its denial. See *St. John v Consolidated Constr. Co.* (1920) 182 C 25, 189 P 276, explained in *Fisher v Brotherton* (1927) 82 CA 532, 540, 255 P 854.

An order under CCP §473 is within the trial court's discretion, and its decision will not be disturbed unless an abuse of discretion is shown. The fact that an appellate court might have reached a different result is not indicative of an abuse of discretion. *McManus v Larson, supra.*

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§30.32 VI. DIAGNOSTIC QUESTIONS

Answers to the following questions may assist defense counsel in determining whether to demand a bill of particulars (a bill of particulars cannot be used in cases seeking damages for negligence (i.e., most personal injury cases):

1. **Is the demanding party a defendant or cross-defendant?**
2. **Can a bill of particulars be demanded?**
3. **Is the case one in which it is appropriate to ask for the "items of an account," *i.e.,* when a *total amount only* was alleged in the complaint or cross-complaint?**
4. **Does the action sound in contract or quasi-contract (*e.g.,* services rendered and expenses incurred under agreement of the parties)?**
5. **Does the account consist of more than one item?**
6. **If provided, will the bill contain information useful to the demanding party?**
7. **If the demand is served within 30 days after receipt of the complaint or cross-complaint, and the bill will be used to frame the response, is an extension of time needed to answer or otherwise respond to the complaint?**

On circumstances under which a bill of particulars may be demanded, see §§30.4-30.5. On who may make demand, see §30.14.

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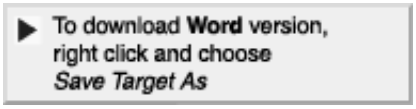
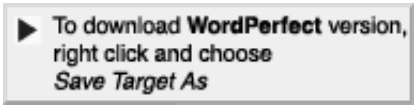
Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.33 VII. CHECKLIST: PROCEDURE FOR DEMAND FOR BILL OF PARTICULARS (CCP §454)

§30.33 VII. CHECKLIST: PROCEDURE FOR DEMAND FOR BILL OF PARTICULARS (CCP §454)





Party Demanding Bill

- Serve written demand at any time after complaint (or cross-complaint) in action on account is served

If original pleading verified

- Have demand verified

If responsive pleading not yet served

- Seek extension by stipulation or court order

Party Providing Bill

- Serve copy of items of account within 10 days after service of demand
- Retain original for filing with court if defective bill delivered

If action is on book or ledger account

- Attach copy of account to bill

If action is on common count

- Specify items on which claim is based

Party Demanding Bill

If bill delivered is defective

- Move for further bill

If no bill has been delivered

- Move to preclude introduction of evidence at trial

Party Providing Bill

If bill is erroneous or incomplete

- Move to amend bill

If relief from noncompliance or order precluding evidence needed

- Move for relief or order to amend on grounds of the moving party's mistake, inadvertence, surprise, or excusable neglect under CCP §473

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VIII. FORMS

§30.34 A. Form: Demand for Bill of Particulars

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DEMAND FOR BILL OF PARTICULARS (CCP §454)**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

_ _[*E.g., Defendant*]_ _, _ _[*name*]_ _**, demands a bill of particulars under Code of Civil Procedure §454 setting forth the items and description of the account(s) on which the** _ _[*e.g., complaint, cross-complaint, first cause of action of the complaint*]_ _ **is based, in particular the date, nature of the transaction, and location of the** _ _[*e.g., services rendered, materials or goods supplied, sale*]_ _ **alleged in the** _ _[*e.g., complaint, cross-complaint, first cause of action of the complaint*]_ _**, to be delivered to** _ _[*e.g., defendant*]_ _ **within ten days after service of this demand.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (retain with original proof of service affixed); ___ copies for service (one for each other party); ___ office copies.

Comment: On duty of party served with demand for bill of particulars to respond within 10 days, see §30.19.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.35 B. Form: Bill of Particulars (Book or Ledger Account)

§30.35 B. Form: Bill of Particulars (Book or Ledger Account)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**BILL OF PARTICULARS (CCP §454)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

PLEASE TAKE NOTICE that the account attached, marked Exhibit _ _ and incorporated by reference, is a copy of the account demanded by you on _ _[*date*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Attach as exhibit a copy of ledger or book account showing, e.g., items sold or services performed with dates, amounts, and place of performance*]

[*Add if appropriate; see Comment*]

VERIFICATION

I am the _ _[*e.g., plaintiff*]_ _ in this action. The above document is true of my own knowledge, except the matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (retain with original proof of service affixed); ___ copies for service (one for each other party); ___ office copies.

Comment: When the underlying cause of action is based on a book or ledger account, the bill of particulars should simply incorporate by reference a copy of the account. For a bill of particulars when there is no account to copy (*i.e.,* an action on a common count), see §30.36. If the complaint or cross-complaint is verified, the bill must also be verified. CCP §454. See §30.18.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.36 C. Form: Bill of Particulars (Common Counts)

§30.36 C. Form: Bill of Particulars (Common Counts)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	**BILL OF PARTICULARS (CCP §454)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

PLEASE TAKE NOTICE that the following is a bill of particulars under the common counts pleaded in the _ _[*e.g., complaint, cross-complaint, first cause of action of the complaint*]_ _ **in this action:**

[*Describe each item of account for which recovery is sought, e.g.*]

1. April 25, 2004, money loaned to defendant, $2500.

2. May 2, 2004, merchandise consisting of 60 widgets sold to defendant on account, $3000.

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Add verification if appropriate; see §30.35*]

Copies: Original (retain with original proof of service affixed); ___ copies for service (one for each other party); ___ office copies.

Comment: When there is no account to copy (*i.e.,* an action on a common count), the bill should specify the items on which the claim is based. For a bill of particulars based on a book account, see §30.35.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.37 D. Form: Letter Demanding Further Bill of Particulars

§30.37 D. Form: Letter Demanding Further Bill of Particulars

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[*Letterhead*]

_ _[*Date*]_ _
_ _[*Name and address of attorney or unrepresented party*]_ _

Re: _ _[*Case name*]_ _

Dear _ _[*name of, e.g., attorney for plaintiff*]_ _**:**

This letter is to inform you that we consider the papers you served on _ _[*date*]_ _**, in response to our demand for a bill of particulars in the above action to be inadequate and defective because** _ _[*state reason(s), e.g., you have failed to itemize each alleged service, its date, and its location*]_ _**.**

Please correct the bill by adding the necessary detail and resubmitting it to this office by _ _[*date*]_ _**.**

If we have not been served with a bill containing the additional information by that date, we intend to notice a motion for a court order requiring you to furnish a further bill containing the additional information to which our client is entitled.

We look forward to your cooperation in this matter.

Very truly yours,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

Comment: Courtesy copies of the letter may be mailed to attorneys for any other parties. For discussion of informal demand letter before moving for a further bill, see §30.20.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/ E. Motion for Further Bill of Particulars/§30.38 1. Form: Notice of Motion for Further Bill of Particulars

E. Motion for Further Bill of Particulars

§30.38 1. Form: Notice of Motion for Further Bill of Particulars

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR FURTHER BILL**
	)	**OF PARTICULARS (CCP**
_ _[*Name(s)*]_ _,	)	**§454); SUPPORTING**
Defendant(s)	)	**MEMORANDUM**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court for an order requiring** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, to furnish a further bill of particulars specifying the items on which the** _ _[*e.g., complaint, cross-complaint, first cause of action of the complaint*]_ _ **is based under CCP §454. The grounds for issuance of this order are that the bill furnished is defective in that** _ _[*specify defects*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

MEMORANDUM IN SUPPORT OF MOTION

FACTS: _ _[*Succinctly state facts underlying motion*]_ _**.**

ARGUMENT:

The Court may order a further account if the one delivered is too general or is defective in any particular. Code of Civil Procedure §445.

Each defect of the bill of particulars delivered is specified in the declaration of _ _[*name*]_ _ filed with this notice of motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See chap 12 (formal requirements for notices of motion). On combining motion for further bill of particulars with motion to preclude introduction of evidence at trial, see §30.22.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.39 2. Form: Declaration Supporting Motion for Further Bill of Particulars

§30.39 2. Form: Declaration Supporting Motion for Further Bill of Particulars

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	__[*NAME*]_ _ **SUPPORTING**
	)	__[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FURTHER BILL OF PARTICULARS**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am an attorney in the firm of _ _[*name*]_ _**, attorneys of record for** _ _[*name*]_ _**,** _ _[*e.g., defendant*]_ _ **in this action.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.

3. On _ _[*date*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, in response to my demand, served on me a bill of particulars, a copy of which is attached as Exhibit _ _ to this declaration.**

4. The bill is defective in that _ _[*specify defect(s), e.g., it does not give the date of purchase of the items set forth or the type of goods purchased*]_ _**. A more specific bill is necessary to enable** _ _[*e.g., defendant*]_ _ **to prepare a defense because** _ _[*state why more specific bill is required*]_ _**.**

[*Add if informal demand for further bill has been made; see §30.20*]

5. On _ _[*date*]_ _**, I sent a letter to** _ _[*name*]_ _ **demanding a further bill of particulars, a copy of which is** _ _[*attached to this declaration as Exhibit _ _*]_ _**. No response has been received.**

[*Continue*]

[6.]_ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See chap 12 (formal requirements for declarations). For discussion, see §§30.20-30.23.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.40 3. Form: Order for Further Bill of Particulars

§30.40 3. Form: Order for Further Bill of Particulars

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER FOR FURTHER BILL**
vs	)	**OF PARTICULARS**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, for an order for a further bill of particulars was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*E.g., Plaintiff*]_ _, _ _[*name*]_ _**, deliver to** _ _[*e.g., defendant*]_ _ **on or before** _ _[*date*]_ _**, a further bill of particulars setting forth the following information:** _ _[*Specify information to be given, e.g., date and place of services itemized in bill of particulars, cost of each item listed in bill, copies of each invoice*]_ _**.**

2. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See chap 12 (use of proposed orders; formal requirements). If the further bill of particulars is not delivered within the time ordered, the order can be used as an exhibit to a later motion to preclude the introduction of evidence of the account at trial. See §30.24.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.41 F. Form: Letter Demanding Bill of Particulars After Party's Failure to Deliver

§30.41 F. Form: Letter Demanding Bill of Particulars After Party's Failure to Deliver

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[*Letterhead*]

_ _[*Date*]_ _
_ _[*Name and address of attorney or unrepresented party*]_ _

Re: _ _[*Case name*]_ _

Dear _ _[*name of, e.g., attorney for plaintiff*]_ _**:**

This letter is to inform you that you have not complied with our demand for a bill of particulars in the above action within the ten days prescribed by Code of Civil Procedure §454. A copy of that demand, dated _ _[*specify*]_ _**, is enclosed.**

If you have not delivered a bill in this matter by _ _[*date*]_ _**, we intend to notice a motion for a court order precluding the introduction of evidence of the items of account at trial.**

Very truly yours,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

Comment: Courtesy copies of the letter may be mailed to attorneys for any other parties. For discussion, see §30.24.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/ G. Motion to Preclude Evidence/ §30.42 1. Form: Notice of Motion to Preclude Introduction of Evidence at Trial

G. Motion to Preclude Evidence

§30.42 1. Form: Notice of Motion to Preclude Introduction of Evidence at Trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION TO PRECLUDE INTRODUCTION OF EVIDENCE AT TRIAL; SUPPORTING MEMORANDUM** _ _[; *DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court for an order precluding the introduction of evidence at trial supporting the account(s) alleged in the** _ _[*e.g., complaint, cross-complaint, first cause of action of the complaint*]_ _ **in this action under Code of Civil Procedure §454. The grounds for issuance of this order are that**

[*Option 1: If no bill was delivered*]

_ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, failed to deliver a bill of particulars in response to** _ _[*e.g., defendant's*]_ _ **written demand, attached as Exhibit** _ _ **to the declaration of** _ _[*name*]_ _**.**

[*Option 2: If further bill was not delivered*]

the original bill delivered by _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, was ruled to be** _ _[*incomplete/defective*]_ _ **by the Court and** _ _[*e.g., plaintiff*]_ _ **failed to deliver a further bill of particulars as ordered. The Court's order, dated** _ _[*specify*]_ _**, is attached as Exhibit** _ _ **to the declaration of** _ _[*name*]_ _**.**

[*Continue*]

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _, _ _[*and*]_ _ **on all papers filed and records in this action**

_ _[*, and on any evidence received at the hearing*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

SUPPORTING MEMORANDUM

FACTS: _ _[*Succinctly state facts underlying motion*]_ _.

ARGUMENT:

I. PARTY SERVED WITH WRITTEN DEMAND MUST DELIVER COPY OF ACCOUNT.

A party who has been served with a written demand for a bill of particulars must deliver a copy of the account to the demanding party within ten days after the demand "or be precluded from giving evidence thereof." Code of Civil Procedure §454.

II. COURT MAY PRECLUDE INTRODUCTION OF EVIDENCE OF ACCOUNT.

When a demand for a bill of particulars of an alleged account has been refused or ignored (see facts in accompanying declaration of __[*name*]_ _), an order precluding introduction of evidence of the account is appropriate. *Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 55 CR 529; *McManus v Larson* (1932) 122 CA 716, 10 P2d 523.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See chap 12 (formal requirements for notices of motion). On motion to preclude evidence if plaintiff fails to comply with previous court order for further bill, see §30.26.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.43 2. Form: Declaration Supporting Motion to Preclude Introduction of Evidence at Trial

§30.43 2. Form: Declaration Supporting Motion to Preclude Introduction of Evidence at Trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**PRECLUDE INTRODUCTION**
	)	**OF EVIDENCE AT TRIAL**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am an attorney in the firm of _ _[*name*]_ _**, attorneys of record for** _ _[*name*]_ _**,** _ _[*e.g., defendant*]_ _ **in this action.**

2. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.

3. On _ _[*date*]_ _**, I served on** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, a written demand for a bill of particulars, a copy of which is attached as Exhibit _ _ to this declaration.**

[*Option 1: If no bill was delivered*]

4. To date, _ _[*e.g., plaintiff*]_ _ **has failed to deliver a bill of particulars as required by law.**

[*Option 2: If defective or incomplete bill was delivered, and party failed to comply with court order for further bill; see §30.25*]

4. On _ _[*date*]_ _**, the Court found the bill of particulars, attached as Exhibit _ _, that** _ _[*e.g., plaintiff*]_ _ **delivered in response to the written demand to have been** _ _[*defective/incomplete*]_ _ **and ordered** _ _[*e.g., plaintiff*]_ _ **to furnish a further bill. That Court order is attached as Exhibit _ _.**

[*Add if letter was sent to opposing counsel on expiration of time period; see §30.24*]

5. After the expiration of ten days after service of the demand for a _ _[*bill/further bill*]_ _ **of particulars, I sent**

written notification to _ _[*name of attorney for* _ _[*e.g., plaintiff*]_ _]_ _ of the failure to respond to my demand for a bill, a copy of which is attached as Exhibit _ _. I have received no response to this exhibit.

[*Continue*]

[6.]_ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See chap 12 (use of proposed orders; formal requirements). On effect of order precluding evidence, see §30.27.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/30 Bill of Particulars/§30.44 3. Form: Order Precluding Introduction of Evidence at Trial

§30.44 3. Form: Order Precluding Introduction of Evidence at Trial

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER PRECLUDING INTRODUCTION OF EVIDENCE AT TRIAL (CCP §454)**
_ _[*Name(s)*]_ _, **Defendant(s)**	
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, for an order precluding introduction of evidence in support of the account(s) alleged in the _ _[*e.g., complaint, cross-complaint, first cause of action of the complaint*]_ _ was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*E.g., Plaintiff*]_ _, _ _[*name*]_ _, be precluded from introducing at trial evidence of the account(s) alleged in the _ _[*e.g., complaint, cross-complaint, first cause of action of the complaint*]_ _.

2. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See chap 12 (use of proposed orders; formal requirements). On effect of order precluding evidence, see §30.27.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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31

Intervention

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- B. Governing Law §31.2

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I. INTRODUCTION

§31.1 A. Scope of Chapter

This chapter discusses intervention, a procedure by which a person who was not named as a plaintiff or defendant in a complaint or cross-complaint may become a party in the lawsuit. It discusses the nature of intervention (see §§31.3-31.36), applying for and opposing intervention (see §§31.37-31.50), and procedures once intervention is granted (see §§31.51-31.57). It also contains a checklist (see §31.59), diagnostic questions (see §31.58), and forms (see §§31.60-31.66).

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§31.2 B. Governing Law

In addition to CCP §387, which provides the most frequently invoked authority for intervention, other more specific intervention statutes authorize intervention in specific circumstances (see §31.3-31.5); still other statutes provide procedures similar to intervention for particular situations (see §§31.7-31.13).

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II. NATURE OF INTERVENTION

§31.3 A. Description of Intervention; General Statute (CCP §387)

Intervention is a procedure by which a person becomes a party in a pending action or proceeding between other parties. CCP §387.

NOTE: Code of Civil Procedure §387 was amended to more closely resemble Fed R Civ P 24. Code of Civil Procedure §387(b) is a nearly verbatim adoption of Fed R Civ P 24(a), but CCP §387(a) differs substantially from its counterpart, Fed R Civ P 24(b).

Under the precursor to CCP §387, trial court judges had discretion to determine whether to permit a party to intervene. See, *e.g., In re Yokohama Specie Bank* (1948) 86 CA2d 545, 555, 195 P2d 555. Present CCP §387 states requirements for both mandatory and discretionary intervention. Mandatory intervention is discussed in §31.5, and discretionary intervention in §31.4.

In addition to adding the federal mandatory intervention rule (subdivision (b)), the 1978 amendment of CCP §387 substituted the federal criterion that an application to intervene must be "timely" for the prior requirement that it be made "before trial." See §31.37.

NOTE: Analysis of cases decided under former CCP §387 must take into account the changes in the statute.

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.4 B. Discretionary Intervention

§31.4 B. Discretionary Intervention

A prospective intervenor trying to persuade a judge to permit intervention in a pending action under the discretionary provisions of CCP §387(a) should show by allegations in a timely ex parte application or noticed motion (see §§31.43-31.44), and in statements in the supporting declarations, that he or she has:

- An interest in the matter in litigation;
- An interest in the success of either of the parties; or
- An interest against both parties.

Whether intervention is permissive or mandatory, a petition for leave to intervene is required; without permission from the court, a party lacks any standing to intervene in the action. *Lohnes v Astron Computer Prods.* (2001) 94 CA4th 1150, 1153, 115 CR2d 34.

Courts require the intervenor's interest to be "direct and immediate" (see *Olson v Hopkins* (1969) 269 CA2d 638, 641, 75 CR 33), rather than "remote and consequential" (see *City of Burlingame v County of San Mateo* (1951) 103 CA2d 885, 890, 230 P2d 375) or "purely speculative" (see *Royal Indem. Co. v United Enters., Inc.* (2008) 162 CA4th 194, 212, 75 CR3d 481). The intervenor's interest also must be properly determinable in the action (*Continental Vinyl Prods. Corp. v Mead Corp.* (1972) 27 CA3d 543, 103 CR 806). The intervenor should be in a position to gain or lose by the direct operation of the judgment in the action as it exists, without reference to issues not involved in the action. See, *e.g., Olson v Hopkins, supra*.

If intervention will introduce new issues, the court may refuse to grant leave to intervene in cases in which intervention is discretionary. *Fireman's Fund Ins. Co. v Gerlach* (1976) 56 CA3d 299, 303, 128 CR 396.

Once the trial court is satisfied that the proposed intervenor has met the requirements of CCP §387, it will balance the objectives of intervention—such as the avoidance of delay or multiplicity of actions, or prejudice to the intervenor—against the likelihood of delay, inconvenience, or prejudice to the original parties if intervention is permitted. See generally *Continental Vinyl Prods. Corp. v Mead Corp., supra,* and the cases cited in 27 CA3d at 552.

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C. Mandatory Intervention

§31.5 1. Description

A prospective intervenor trying to persuade a judge that leave to intervene must be granted under the mandatory provisions of CCP §387(b) must show by allegations in a timely ex parte application or notice of motion for intervention that (see *Lohnes v Astron Computer Prods.* (2001) 94 CA4th 1150, 1153, 115 CR2d 34):

- A provision of law confers on the prospective intervenor an unconditional right to intervene (see the list in §31.6); or
- The prospective intervenor claims an interest relating to the property or transaction that is the subject of the action; his or her ability to protect that interest may be impaired or impeded by the disposition of the pending case; and his or her interest is not adequately represented by existing parties.

A judge who decides that one of the elements listed in CCP §387(b) is absent (or has not been shown by the applicant) appears to be free to exercise the discretion to permit intervention traditionally held to reside in CCP §387(a). Guidance in interpreting CCP §387(b) may be sought from cases decided under Fed R Civ P 24(a) and the statutes or rules of states that have previously adopted the federal rule.

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§31.6 2. Statutes That Grant Unconditional Right to Intervene

Some of the specific statutes that authorize intervention in particular situations and appear to grant an unconditional right to intervene under CCP §387(b) include:

- CCP §1250.230: All persons claiming legal or equitable interests in real property subject to condemnation proceedings (see also §31.10).
- Corp C §1800(c): Any shareholder or creditor, at any time before trial, in proceedings for involuntary dissolution of a corporation.
- Corp C §414(b): Any creditor of a corporation in an action against a shareholder based on an unpaid subscription for its shares.
- Corp C §1304(a): Any dissenting shareholder demanding the purchase of his or her shares as a result of a corporate reorganization or any interested corporation in an action to determine whether the shareholder's shares are dissenting shares or to determine the fair market value of dissenting shares (6-month time limit to file may make this statute conditional).
- Lab C §3853: Either an employer or an employee in an action commenced by the other against a third party for damages for an industrial injury (see discussion in California Workers' Damages Practice §§3.30-3.32, 7.32-7.45 (2d ed Cal CEB 2001)).
- CC §1781(e)(3): Any member of a consumer class who learns of the existence of a consumer class action affecting the class may, through counsel, enter an appearance as a party to the action. See Fed R Civ P 23(d)(1), governing intervention in certain class actions.

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D. Related Procedures Similar to Intervention

1. Indispensable Party's Application for Joinder (CCP §389)

§31.7 a. Requirements for Joinder Under CCP §389

Code of Civil Procedure §389(a) provides that a person who is subject to service of process, and whose joinder would not deprive the court of jurisdiction over the subject matter of the action, must be joined as a party in the action if:

- The applicant's joinder is necessary to secure complete relief among existing parties; or
- The applicant claims an interest related to the subject of the action, and the disposition of the action in his or her absence either might make it difficult for the applicant to protect that interest or might leave an existing party subject to a substantial risk of incurring inconsistent obligations.

Although persons who wish to be joined may themselves apply to the court for an order joining them as parties under CCP §389, that statute is more frequently invoked by one of the existing parties who wishes to join a nonparty. See *Cuneo v Superior Court* (1963) 213 CA2d 452, 28 CR 791; *Muller v Robinson* (1959) 174 CA2d 511, 345 P2d 25. See generally chap 14.

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§31.8 b. Comparison of CCP §389 and CCP §387

Normally, any person who must be made a party under CCP §389 also has a sufficient interest in the matter in litigation to justify intervention under CCP §387 and may base an application to become a party on both statutes. *Crofton v Young* (1941) 48 CA2d 452, 119 P2d 1003.

PRACTICE TIP: Under CCP §389, the court orders the nonparty to be joined as a party within the existing pleadings, whereas CCP §387 offers the omitted person an opportunity to set forth a position in a complaint in intervention in his or her own terms. Thus, seeking intervention may have an advantage over applying for joinder even if the more rigorous requirements of CCP §389 can be satisfied. In *Crofton v Young, supra,* the omitted person was permitted to be joined as a party under both statutes and to file both an answer and a cross-complaint setting forth his interest.

In limited circumstances, the CCP §389 motion to be joined as a party may be available when the CCP §387 motion to intervene is not. One may not be able to intervene under CCP §387 after trial has commenced (see §31.37), but an indispensable person can seek an order under CCP §389 joining him or her as a party at any time. In *Abbot Kinney Co. v City of Los Angeles* (1959) 53 C2d 52, 346 P2d 385, the state first asserted its indispensability in a brief filed after the rendering of an opinion by the court of appeal. The supreme court held that the state was indispensable and should be joined as a party for the purposes of a new trial.

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.9 c. Effect on Case If Indispensable Person Cannot Be Made a Party

§31.9 c. Effect on Case If Indispensable Person Cannot Be Made a Party

Under CCP §389(b), if a person described in CCP §389(a) cannot be made a party, the court must determine whether the action should proceed or be dismissed without prejudice, "the absent person being thus regarded as indispensable." The factors to be considered by the court in making this determination include:

- The extent to which the judgment, if the person is not joined, might be prejudicial to him or her or the existing parties;
- The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
- Whether a judgment in his or her absence will be adequate; and
- Whether plaintiff or cross-complainant will have an adequate remedy if the action is dismissed.

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§31.10 2. Application for Joinder by Person Claiming Interest in Real or Personal Property (CCP §389.5)

A person who claims an interest in real or personal property may apply to the court to be made a party to an action for the recovery of or to determine conflicting claims to that property. CCP §389.5. See *Allen v Pitchess* (1973) 36 CA3d 321, 111 CR 658. The court in its discretion may order the parties to bring such a claimant into the action by proper amendment of the pleadings. Both CCP §389.5 and CCP §387(a) call for an exercise of the court's discretion, and it appears that any person whose interest is such that the court would order him or her made a party under CCP §389.5 would also be permitted to intervene under CCP §387(a).

PRACTICE TIP: As in the case of an indispensable party's application for joinder (see §31.7), a nonparty property claimant is brought in by means of an amendment to the existing pleadings. An intervenor enters the action by filing a complaint in intervention, choosing his or her own issues and causes of action and the way in which they are presented. This difference may explain why CCP §389.5 is infrequently used.

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§31.11 3. Judgment Creditor's Lien on Cause of Action and Judgment

A judgment creditor of a party to an action may, in the court's discretion, be granted a lien on that party's cause of action and on any judgment subsequently obtained. CCP §§708.410-708.480. After such a lien is granted, the judgment debtor may not agree to any compromise or settlement of his or her cause of action, or any satisfaction of judgment, without the judgment creditor's consent. CCP §708.440.

A judgment creditor may also be permitted to intervene in the action. CCP §708.430. However, intervention is not required and, in most instances, the lien provides adequate protection to the creditor. See *McClearen v Superior Court* (1955) 45 C2d 852, 219 P2d 449. For some purposes, the lienor is treated as a party to the action. See CCP §708.430(b).

A judgment creditor obtains a lien by filing in the pending action or proceeding a notice of lien together with an abstract, or certified copy of the creditor's money judgment (CCP §708.410(b)), serving a copy of the notice and a statement of the date the notice of lien was filed (CCP §708.410(c)).

For discussion of this lien procedure, see Debt Collection Practice in California §§11.12-11.20 (2d ed Cal CEB 1999).

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§31.12 4. Third Party Claim Against Levied-on Property

A nonparty who claims an interest in property levied on under a writ of attachment, execution, possession, or sale may file a claim with the levying officer. See CCP §§488.110, 720.010-720.800.

Nonparty claimants may also intervene. See §31.19.

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.13 5. Petitioning for Coordination of Actions Sharing Common Question

§31.13 5. Petitioning for Coordination of Actions Sharing Common Question

Code of Civil Procedure §§403-404.9 and Cal Rules of Ct 3.501-3.550 set up procedures whereby any party to an action that shares a common question of fact or law with any other civil action pending in California may file a motion in noncomplex cases or petition in complex cases to have those actions coordinated. See generally chap 44.

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§31.14 6. Applying to Appear as Amicus Curiae

Persons interested in an action solely because of its potential consequences as a legal precedent have not been considered to have an interest sufficient to permit them to intervene (see §31.33), but may frequently accomplish their objectives by applying to the court for permission to file amicus curiae briefs. See *Jersey Maid Milk Prods. Co. v Brock* (1939) 13 C2d 661, 91 P2d 599; Cal Rules of Ct 8.200. An amicus is not a party, is limited to arguing questions of law, and cannot plead or offer evidence. See 4 Witkin, California Procedure, *Pleading* §236 (5th ed 2008).

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E. Examples of Persons Permitted to Intervene

§31.15 1. Real Parties in Interest

One who is or has become the real party in interest in an action may intervene. *Robinson v Crescent City Mill & Transp. Co.* (1892) 93 C 316, 28 P 950; *Cohn v County Bd. of Supervisors* (1955) 135 CA2d 180, 286 P2d 836.

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§31.16 2. Successors in Interest

On any party's death or disability or the transfer of the party's interest, there may be a substitution of parties on motion under CCP §§377.20, 377.40-377.43. Under this statute, executors, administrators, heirs, transferees, and other such successors in interest may become substitute parties. In addition, such successors in interest may intervene under CCP §387(a). *Marc Bellaire, Inc. v Fleischman* (1960) 185 CA2d 591, 8 CR 650; *Keyes v Hurlbert* (1941) 43 CA2d 497, 111 P2d 447. Availability of intervention may be of particular significance to successors, such as assignees of fractional interests. See *Dabney v Philleo* (1951) 38 C2d 60, 237 P2d 648.

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§31.17 3. Insurers and Sureties

An insurer or surety may intervene in an action in which the insured or the principal debtor is not defending in good faith or has defaulted. *Johnson v Hayes Cal. Builders, Inc.* (1963) 60 C2d 572, 35 CR 618; *Coburn v Smart* (1879) 53 C 742. See also *Truck Ins. Exch. v Superior Court* (1997) 60 CA4th 342, 70 CR2d 255, which permitted a third insurer to intervene in an action brought by two other insurers against an insured. An exception to this right to intervene exists, however, for an insurer who has denied coverage or has offered to defend only with a reservation of rights. In such cases the courts have denied the insurer permission to intervene, stating that the insurer has no interest under such circumstances to justify intervention in an action against the insured as required by CCP §387. *Corridan v Rose* (1955) 137 CA2d 524, 529, 290 P2d 939. See also *Hinton v Beck* (2009) 176 CA4th 1378, 98 CR3d 612 (no abuse of discretion to strike insurer's complaint in intervention, because its denial of coverage and refusal to defend insured left it with no direct and immediate interest in litigation, even though it ultimately might be required to pay judgment); *Noya v A.W. Coulter Trucking* (2006) 143 CA4th 838, 49 CR3d 584.

The courts have denied the insurer the right to intervene because it would interject insurance issues into an action for damages that could prejudice the insured. See *Corridan v Rose, supra.* Similarly, an insurer that is a prospective subrogee of a party to an action has been denied permission to intervene. See *Hausmann v Farmers Ins. Exch.* (1963) 213 CA2d 611, 29 CR 75.

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§31.18 4. Judgment Creditors

A judgment creditor may intervene under CCP §387(a) in an action by a judgment debtor's insurer against the judgment debtor to rescind an insurance policy or to declare it canceled. *Belt Cas. Co. v Furman* (1933) 218 C 359, 23 P2d 293; *Fireman's Fund Ins. Co. v Gerlach* (1976) 56 CA3d 299, 128 CR 396.

A judgment creditor who has obtained a lien against a judgment debtor may intervene under CCP §708.430 in an action against the debtor. See §31.11 on judgment creditors' liens and intervention.

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§31.19 5. Owners of Property Levied on

Specific statutes enable persons claiming ownership of personal property levied on, attached, or subjected to claim and delivery proceedings to assert claims to the property. See discussion in §31.12. In addition, such persons may intervene under CCP §387. *Berghauser v Golden State Orchards* (1929) 208 C 550, 282 P 950; *Hi-Valley Dev. Corp. v Walters* (1963) 223 CA2d 778, 784, 36 CR 140. Similarly, an attaching creditor may intervene to litigate priority of attachment in an action in which the property has been attached by another creditor. *Kimball v Richardson-Kimball Co.* (1896) 111 C 386, 43 P 1111.

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§31.20 6. Limited Partners

A limited partner may intervene in an action against the partnership if the general partner fails to provide a defense or permits entry of a default. See *Linder v Vogue Invs., Inc.* (1966) 239 CA2d 338, 48 CR 633, in which the court analogized to *Eggers v National Radio Co.* (1929) 208 C 308, 281 P 58 (see §31.31), and other cases in which shareholders were allowed to intervene in actions against corporations, and noted that the limited partner had withdrawn its contribution to the limited partnership and might have been subject to individual liability to the plaintiff.

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§31.21 7. Husband or Wife

A wife or husband, like any other person, may intervene in a lawsuit to protect his or her interest in property that is the subject matter of the action or that has been attached. See *Bonfiglio v Bonfiglio* (1928) 203 C 409, 264 P 747; *Carter v Garetson* (1922) 56 CA 238, 204 P 1090. See, however, *Bechtel v Axelrod* (1942) 20 C2d 390, 125 P2d 836, in which defendant's wife sought to intervene on the theory that the plaintiff might attempt to subject community property to payment of the husband's obligation; the wife's interest in the action was termed "remote and contingent," and she was denied leave to intervene because plaintiff had not as yet threatened to seize the community property.

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§31.22 8. Claimant to Property in Marital Dissolution

A person claiming an interest in specific property may intervene in marriage dissolution proceedings. *Elms v Elms* (1935) 4 C2d 681, 52 P2d 223. However, the person will not be heard with respect to the dissolution itself or any matter other than the claimed interest in the specific property. *Bernheimer v Bernheimer* (1948) 87 CA2d 242, 196 P2d 813.

Intervention in marital dissolution proceedings is governed by Fam C §§2021, 2060-2074 and Cal Rules of Ct 5.150-5.160.

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9. Person Claiming Interest in Real Property

§31.23 a. Foreclosure

One claiming an interest in property subject to foreclosure proceedings may intervene. *Mabury v Ruiz* (1881) 58 C 11 (wife claiming homestead right); *Stich v Dickinson* (1869) 38 C 608 (claimant to note and mortgage).

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§31.24 b. Quiet Title

Claimants to property that is the subject of a quiet title action may intervene. *Townsend v Driver* (1907) 5 CA 581, 90 P 1071 (claimants to ownership of portions of property). However, in *Stockwell v McAlvay* (1929) 97 CA 609, 275 P 960, a former owner of property sought to intervene, claiming she was defrauded when she conveyed the property to a third party who, she alleged, was the undisclosed agent of plaintiff's husband. In denying intervention, the court emphasized that the would-be intervenor was not in a position to return the consideration she received in the transaction of which she complained. See also *Muller v Robinson* (1959) 174 CA2d 511, 345 P2d 25 (intervention denied when title as between intervenor and plaintiff had been previously litigated to conclusion).

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§31.25 c. Action for Possession

In actions to recover possession of property, claimants to interests in the property may intervene. *Goes v Perry* (1941) 18 C2d 373, 115 P2d 441 (person seeking to impose trust on property based on claim that funds with which property was purchased belonged to her); *Bogue v Roeth* (1929) 98 CA 257, 276 P 1071 (holder of contract to purchase property).

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§31.26 d. Condemnation

Persons not named in the complaint may intervene to assert their interests in property that is the subject of condemnation proceedings. CCP §1250.230; *San Bernardino Valley Mun. Water Dist. v Gage Canal Co.* (1964) 226 CA2d 206, 209, 37 CR 856. See *Stratford Irrig. Dist. v Empire Water Co.* (1941) 44 CA2d 61, 70, 111 P2d 957.

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§31.27 e. Action to Impress a Trust

Claimants to interests in property subject to an action for the impression of a trust may intervene. *Dabney v Philleo* (1951) 38 C2d 60, 237 P2d 648 (assignees of interests in property); *Coffey v Greenfield* (1880) 55 C 382 (purchaser at foreclosure sale).

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§31.28 10. Will Contests and Heirship Proceedings

Any interested person may intervene in a will contest initiated by another interested person and may do so at any time before trial, so long as the original contest was timely commenced. *Estate of Harootenian* (1951) 38 C2d 242, 245, 238 P2d 992; *Voyce v Superior Court* (1942) 20 C2d 479, 485, 127 P2d 536. See *Estate of Collins* (1968) 268 CA2d 86, 90, 73 CR 599. Similarly, interested persons may intervene in heirship proceedings initiated by an appropriate person. *Estate of Quinn* (1955) 43 C2d 785, 278 P2d 692.

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§31.29 11. Adjoining Property Owners: Zoning and Trespass Actions

Neighboring property owners may intervene in actions involving the enforcement of zoning laws. *Weiner v City of Los Angeles* (1968) 68 C2d 697, 706, 68 CR 733. See *Alphonzo E. Bell Corp. v Bell View Oil Syndicate* (1938) 24 CA2d 587, 76 P2d 167, in which adjoining landowners, who claimed that their property also had been trespassed on by the slant-drilling of oil wells, were permitted to intervene in an action for subsurface trespass.

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§31.30 12. Voters

The court in *Baroldi v Denni* (1961) 197 CA2d 472, 17 CR 647, saw a need to resolve election questions promptly and permitted a voter who had signed a petition to recall certain members of a city council to intervene in their action to restrain the council from conducting a recall election, the council having adopted a position of neutrality.

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F. Examples of Persons Denied Permission to Intervene

§31.31 1. Shareholders

Shareholders have been denied permission to intervene in actions by or against the corporation on the ground that their interest in the corporation's success was consequential and indirect. See, *e.g., Continental Vinyl Prods. Corp. v Mead Corp.* (1972) 27 CA3d 543, 103 CR 806. However, a shareholder may intervene if the corporation is not defending or prosecuting in good faith. See *Eggers v National Radio Co.* (1929) 208 C 308, 281 P 58; *Thorman v Dome Producing & Developing Co.* (1942) 50 CA2d 201, 122 P2d 927.

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§31.32 2. Attorneys

Attorneys have been denied permission to intervene in order to collect fees or protect fee arrangements. See *Meadow v Superior Court* (1963) 59 C2d 610, 30 CR 824. See also *Fields v Potts* (1956) 140 CA2d 697, 295 P2d 965 (attorney with contingent fee arrangement with respect to "amount collected" denied leave to intervene); *Kelly v Smith* (1928) 204 C 496, 268 P 1057 (attorney who was to receive interest in land that was subject of quiet title action not permitted to intervene because he had no "present" interest).

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§31.33 3. Taxpayers; Persons Interested in Legal Precedent

Taxpayers, property owners, and other persons interested in the potential precedential effect of a judgment have been denied leave to intervene in actions involving the validity or interpretation of legislation or the validity of bond issues because their only interest is in the precedential value. See *Jersey Maid Milk Prods. Co. v Brock* (1939) 13 C2d 661, 91 P2d 599; *La Mesa Lemon Grove & Spring Valley Irrig. Dist. v Halley* (1925) 195 C 739, 235 P 999; *Squire v City & County of San Francisco* (1970) 12 CA3d 974, 91 CR 347; *Kenney v Wolff* (1948) 88 CA2d 163, 198 P2d 582.

On the other hand, an environmental organization was allowed to intervene in a lawsuit concerning a county ordinance on the use of herbicides when it demonstrated a specific interest directly affected in a substantial way by the outcome of the litigation. *People ex rel Rominger v County of Trinity* (1983) 147 CA3d 655, 195 CR 186. What distinguished the intervenors from those who were merely interested in establishing legal precedent was that the intervenors themselves were among those whom the controlling statute was designed to protect and were threatened by a potential harm.

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§31.34 4. Adjoining Property Owners: Actions Other Than Zoning

The California courts have refused to permit the owners of adjoining or neighboring property to intervene in:

- Construction defect actions (*Siena Court Homeowners Ass'n v Green Valley Corp.* (2008) 164 CA4th 1416, 1429, 79 CR3d 915);
- Actions to quiet title (*People ex rel State Lands Comm'n v City of Long Beach* (1960) 183 CA2d 271, 6 CR 658);
- Proceedings for incorporation of cities (*City of Burlingame v County of San Mateo* (1951) 103 CA2d 885, 230 P2d 375); and
- Condemnation proceedings (*City of Alhambra v Jacob Bean Realty Co.* (1934) 138 CA 251, 31 P2d 1052).

Additionally, owners of and claimants to riparian rights other than those in suit have been denied permission to intervene. See *San Joaquin & Kings River Canal & Irrig. Co. v Stevinson* (1912) 164 C 221, 128 P 924; *Lindsay-Strathmore Irrig. Dist. v Wutchumna Water Co.* (1931) 111 CA 707, 296 P 942. But see *Alphonzo E. Bell Corp. v Bell View Oil Syndicate* (1938) 24 CA2d 587, 76 P2d 167 (subsurface trespass; see §31.29).

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§31.35 5. General Creditors

General creditors of a plaintiff or a defendant have been denied leave to intervene even though the outcome of the action might cause the debtor to become insolvent. See *Continental Vinyl Prods. Corp. v Mead Corp.* (1972) 27 CA3d 543, 103 CR 806; *Olson v Hopkins* (1969) 269 CA2d 638, 75 CR 33.

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§31.36 6. Owners of Property Used as Evidence

In *Mylan Labs., Inc. v Soon-Shiong* (1999) 76 CA4th 71, 79, 90 CR2d 111, the court of appeal ruled that property that constitutes evidence in a civil matter is not "property … which is the subject of the action" within the meaning of CCP §387(b). Thus, an individual claiming ownership of an allegedly privileged document did not have a right to intervene for the purpose of obtaining an order precluding its evidentiary use at trial. 76 CA4th at 79. Note, however, that the court also ruled that the holder of a privilege has standing to assert the privilege in the action without intervening in the litigation. 76 CA4th at 80.

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III. APPLYING FOR AND OPPOSING INTERVENTION

A. Applying for Leave to Intervene

§31.37 1. Timing

An application to intervene must be "timely." CCP §387(a)-(b). Thus it appears that some applications may be denied as untimely even though made before trial commences (see §§31.41-31.42), while some applications made after commencement of trial will be granted. See generally cases decided under Fed R Civ P 24, which also calls for timely application, and similar state statutes. Even under the pre-1978 law (which required the application to be made "before trial"), it was argued that intervention might be permitted while a trial was in progress if the resultant delay and inconvenience to the original parties could be kept to a minimum. See 4 Witkin, California Procedure, *Pleading* §223 (5th ed 2008). It is unwise, however, to wait until trial to seek leave to intervene; courts are much less likely to find the application "timely" at that late date. See also §31.42 on unreasonable delay.

NOTE: A person who qualifies as "indispensable" under CCP §389 may apply to be made a party under that statute, which contains no time limitation (see §31.7).

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§31.38 a. Motions to Set Aside Default and to Set Aside Judgment Under CCP §473

Motions to set aside default. Under CCP §473(b), a party may move to set aside a default within 6 months after its entry, and an appropriate nonparty may intervene to do so. *Linder v Vogue Invs., Inc.* (1966) 239 CA2d 338, 48 CR 633. See *Fireman's Fund Ins. Co. v Gerlach* (1976) 56 CA3d 299, 128 CR 396. Several cases suggest that one who is merely the successor in interest of a party who defaulted should not be permitted to intervene under such circumstances. See *Stern & Goodman Inv. Co. v Danziger* (1929) 206 C 456, 274 P 748; *Martin v Lawrence* (1909) 156 C 191, 103 P 913. But see *Linder v Vogue Invs., Inc., supra.* Even after the expiration of 6 months, a nonparty may intervene to set aside a default judgment if the judgment is void on its face. *Johnson v Hayes Cal. Builders, Inc.* (1963) 60 C2d 572, 35 CR 618.

Motions to set aside judgment. Under pre-1978 law, intervention was not generally available under CCP §387 after entry of judgment. See, *e.g., Allen v California Water & Tel. Co.* (1947) 31 C2d 104, 187 P2d 393; *Leonard Corp. v City of San Diego* (1962) 210 CA2d 547, 26 CR 730. However, in *Gardner v Trevaskis* (1958) 158 CA2d 410, 322 P2d 545, nonparties who claimed interests in the fund that was the subject of the action were permitted to move to set aside a judgment decreeing that the fund belonged to plaintiff. The motions were made under CCP §473 within 6 months after entry of judgment, apparently on the theory that, although defendant did not default, he made no effort to defend. In affirming, the court stated that a "motion to set aside the judgment is the recognized method for one not a party to the action to become such in order to assert his rights." 158 CA2d at 413. The opinion also relied on a court's inherent power to vacate a judgment obtained through extrinsic fraud.

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§31.39 b. No Intervention After Action Dismissed

Intervention cannot take place after an action has been dismissed. Pendency of an application for leave to intervene cannot defeat the original parties' rights to dismiss. *City of Burlingame v County of San Mateo* (1951) 103 CA2d 885, 230 P2d 375. Even after leave to intervene has been granted, the original parties are free to dismiss the action at any time before filing of the complaint in intervention. *Klinghoffer v Barasch* (1970) 4 CA3d 258, 84 CR 350.

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§31.40 c. Intervention Before New Trial or Retrial

When intervention was permitted at any time "before trial" (*i.e.,* before 1978), if a motion for a new trial had been granted, application by a nonparty to intervene before the commencement of the new trial was considered timely. *Eggers v National Radio Co.* (1929) 208 C 308, 281 P 58. This appears to still be the case. Similarly, it appears that after a general reversal on appeal and before commencement of the retrial, intervention could properly have been sought under the former statute. Although this was not the case if the appellate court had merely modified the judgment, permitting a further hearing in the trial court limited to specific issues. *Allen v California Water & Tel. Co.* (1947) 31 C2d 104, 187 P2d 393. Intervention appears to be available before retrial under the present statute as well.

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§31.41 d. Effect of Intervenor's Delay After Learning of Action

Even before CCP §387 was amended in 1978, an application to intervene was denied if the would-be intervenor delayed unreasonably in applying for leave to intervene after learning of the pendency of the action. *Allen v California Water & Tel. Co.* (1947) 31 C2d 104, 187 P2d 393; *In re Yokohama Specie Bank* (1948) 86 CA2d 545, 195 P2d 555. Witkin suggests, however, that mere delay or lack of diligence in the absence of some form of prejudice to the original parties should not prevent an otherwise proper intervention. 4 Witkin, California Procedure, *Pleading* §225 (5th ed 2008). If prejudice must be shown, as a practical matter, it is difficult to imagine a situation in which the original parties could not demonstrate that an unreasonably delayed intervention was prejudicial if any new issues were presented.

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§31.42 e. Statute of Limitations

A complaint in intervention, like any other complaint, is subject to an affirmative defense based on an applicable statute of limitations and, if it asserts a new cause of action, the application for leave to intervene must be filed within the pertinent limitations period. *Alphonzo E. Bell Corp. v Bell View Oil Syndicate* (1938) 24 CA2d 587, 76 P2d 167.

If the complaint in intervention raises no new issues, it is timely whenever filed if the original action was commenced in a timely manner. *State Compensation Ins. Fund v Matulich* (1942) 55 CA2d 528, 131 P2d 21; *State Compensation Ins. Fund v Allen* (1930) 104 CA 400, 285 P 1053. Similarly, an "interested" person (see §31.4) may intervene in a will contest if the contest was originally commenced within the statutory period. *Voyce v Superior Court* (1942) 20 C2d 479, 127 P2d 536; *Estate of Harootenian* (1951) 38 C2d 242, 238 P2d 992.

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2. Application: Ex Parte or Noticed Motion

§31.43 a. Ex Parte Application

A nonparty may proceed ex parte to obtain the court's permission to intervene. See *Allen v California Water & Tel. Co.* (1947) 31 C2d 104, 187 P2d 393; *Marc Bellaire, Inc. v Fleischman* (1960) 185 CA2d 591, 8 CR 650. To do so, the better practice is to submit a written application for leave to intervene, setting forth the facts showing the applicant's interest in a properly verified proposed complaint in intervention or in an affidavit or declaration made under penalty of perjury.

If the intervenor is concerned that the existing parties might dismiss the action during the pendency of a noticed motion for leave to intervene, an ex parte application is clearly preferable. Specific facts supporting that concern should be set forth in an affidavit, declaration, or verified pleading. See Cal Rules of Ct 3.1200-3.1207. If the court is in doubt whether to grant an ex parte application to intervene and believes that a fuller exposition of the issues would be helpful, it can order a hearing. See *In re Yokohama Specie Bank* (1948) 86 CA2d 545, 195 P2d 555. If such a hearing is ordered, the intervenor should ask the court to stay all proceedings in the action, including any attempts to dismiss, pending the hearing.

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§31.44 b. Noticed Motion

If the intervenor is not concerned that the action may be dismissed by the original parties before a noticed motion may be heard, he or she may give each of the existing parties written notice of a motion for leave to intervene. See *Muller v Robinson* (1959) 174 CA2d 511, 345 P2d 25. On noticed motion procedures generally, see chap 12.

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§31.45 3. Meeting Intervenor's Burden of Proof

The intervenor has the burden of demonstrating that he or she satisfies the requirements of either CCP §387(a) or §387(b) and that leave to intervene should be granted. If an insufficient showing is made, the court may deny the application to intervene even in the absence of objections by existing parties. *Fields v Potts* (1956) 140 CA2d 697, 295 P2d 965. Thus, to obtain leave to intervene under the discretionary provisions of CCP §387(a), the intervenor's papers should set forth the intervenor's:

- Interest in the matter in litigation;
- Interest in the success of either of the parties; or
- Interest against both parties.

Further, the intervenor must take a position with respect to the pleadings as contemplated by the statute, *i.e.,* must state explicitly that he or she joins plaintiff in claiming what is sought by the complaint, unites with defendant in resisting plaintiff's claims, or demands something adverse to both plaintiff and defendant. On the showing required under CCP §387(b), see §31.5.

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B. Opposing Leave to Intervene

§31.46 1. Procedure for Presenting Opposition

If the intervenor has used a noticed motion for leave to intervene or an ex parte motion, any party to the action may submit an affidavit or declaration and a memorandum in opposition to the proposed intervention.

If the intervenor has obtained leave to intervene by an ex parte application (see §31.43), the existing parties' first opportunity to object to the intervention will occur after the filing and service of the complaint in intervention. At that time, any party may:

- Move to strike the complaint in intervention on the ground that intervention is improper under the circumstances (*Jersey Maid Milk Prods. Co. v Brock* (1939) 13 C2d 661, 91 P2d 599);
- Demur to the complaint in intervention on the ground that it fails to state facts sufficient to constitute a ground for intervention (see *People v Brophy* (1942) 49 CA2d 15, 34, 120 P2d 946);
- Move to strike and demur; or
- Otherwise plead to the complaint in intervention in the same manner as to an original complaint (CCP §387(a)).

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§31.47 2. Grounds for Opposition

The most common ground for objection to an application for intervention made under CCP §387(a) is that the intervenor lacks the requisite interest in the action, *i.e.,* that the intervenor's interest is "remote" or "consequential." See §31.4. A party may submit an affidavit or declaration to show that the inconvenience or prejudice to the existing parties, or either of them, that would result if intervention were permitted far outweighs the intervenor's interest in the action.

An existing party may also argue that the application to intervene was untimely, and show, *e.g.,* that the intervenor delayed unreasonably in seeking intervention after learning of the existence of the action, thereby prejudicing the objecting party. See §§31.37, 31.41.

The words of CCP §387(b) suggest several grounds for opposing an application made under subdivision (b).

EXAMPLE: An opposing party could argue or show that (1) the applicant's claimed interest does not in fact relate to the property or transaction that is the subject of the action; (2) the applicant has adequate means other than intervention to protect his or her claimed interest; (3) the applicant's interest is adequately represented by existing parties; or (4) the application was not timely made (see §31.37). See generally §31.4.

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§31.48 3. Waiver of Objections

A party who fails to object to the intervention at the first opportunity (using one of the appropriate methods discussed in §31.46) has effectively waived any objections he or she might have had and may not raise such objections on appeal. *Watson v Collins* (1962) 204 CA2d 27, 21 CR 832; *Bloom v Waxman* (1941) 48 CA2d 646, 120 P2d 509. Thus, if a party answers the complaint in intervention, or demurs to it on the ground that it fails to state a cause of action (as distinguished from a failure to state grounds for intervention; see §31.46), all objections to the intervention are waived. *Traweek v Draper* (1956) 143 CA2d 119, 299 P2d 391.

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C. Appellate Review

§31.49 1. When Leave to Intervene Denied

An unsuccessful intervenor may immediately appeal denial of the application for leave to intervene because denial operates as a final determination of the action with respect to that person. *County of Alameda v Carleson* (1971) 5 C3d 730, 736, 97 CR 385; *Jun v Myers* (2001) 88 CA4th 117, 122, 105 CR2d 537. Similarly, if the intervenor obtains leave ex parte to file a complaint in intervention, and the complaint in intervention is later stricken, the intervenor may appeal immediately. *Jersey Maid Milk Prods. Co. v Brock* (1939) 13 C2d 661, 91 P2d 599. Appeal at this time is the only relief available to the unsuccessful intervenor, who has no right to appeal from the judgment ultimately rendered in the action in which he or she sought to intervene. *Braun v Brown* (1939) 13 C2d 130, 87 P2d 1009. If intervention is erroneously denied on the ground that the intervenor has no interest in the subject matter of the action, the intervenor must appeal from this determination, or a subsequent independent action based on the same theory will be barred by the doctrine of res judicata. *Berman v Aetna Cas. & Sur. Co.* (1974) 40 CA3d 908, 115 CR 566.

The pendency of an appeal from the denial of leave to intervene has no effect on the progress of the action, which may continue to trial and judgment. *Olson v Hopkins* (1969) 269 CA2d 638, 75 CR 33; *Lindsay-Strathmore Irrig. Dist. v Superior Court* (1932) 121 CA 606, 9 P2d 579.

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§31.50 2. When Leave to Intervene Granted

An order permitting intervention is not itself appealable. *Taylor v Western States Land & Mortgage Co.* (1944) 63 CA2d 401, 147 P2d 36. After intervention, any party, including the intervenor, may appeal after judgment from any order, including the order permitting intervention, that aggrieves such party. *Corridan v Rose* (1955) 137 CA2d 524, 290 P2d 939.

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IV. PROCEDURES ONCE INTERVENTION GRANTED

A. Complaint in Intervention

§31.51 1. Requirements

A complaint in intervention is filed whether the intervenor supports the plaintiff's position or the defendant's position or opposes both. See *Timberidge Enters., Inc. v City of Santa Rosa* (1978) 86 CA3d 873, 880, 150 CR 606. See also *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 513, 89 CR3d 615 (party seeking intervention must file a complaint in intervention; motion to intervene denied).

A complaint in intervention must set forth facts sufficient to constitute a cause of action or, if the intervenor resists plaintiff's claims, facts sufficient to constitute a defense. *People v Brophy* (1942) 49 CA2d 15, 34, 120 P2d 946. In addition, however, the complaint in intervention must set forth the intervenor's interest in the matter in litigation or relating to the property or transaction that is the subject of the action, his or her interest in the success of either of the parties, or his or her interest against both parties. At least in an intervention sought under CCP §387(a), the complaint must expressly state that the intervenor joins plaintiff in claiming what is sought by the complaint, that the intervenor unites with defendant in resisting plaintiff's claims, or that the intervenor demands something adverse to both plaintiff and defendant. *Bowles v Superior Court* (1955) 44 C2d 574, 589, 283 P2d 704.

NOTE: While the nature of the action and the circumstances of the intervention should be alleged, the complaint in intervention should be a fully independent pleading and should not incorporate any other pleadings by reference.

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§31.52 2. Service; Payment of Fees

After leave to intervene is granted by the court, whether ex parte or after a noticed motion, the complaint in intervention may be filed on payment of the required appearance fee.

A copy of the complaint in intervention must be served on each party (or on the attorney of a represented party who has already appeared in the action). CCP §387(a). Copies of the court's order permitting intervention and all papers supporting the application to intervene are also served, and the complaint copy is stamped to show the filing date. A summons—issued when the complaint in intervention was filed—should be served with the complaint on each party who has not yet appeared, as if the intervenor were commencing an original action. CCP §387(a). See chaps 17-18 on service.

PRACTICE TIP: Some intervenors' attorneys routinely serve summonses on all parties, even those who have already appeared in the action, although CCP §387(a) does not expressly require it. These attorneys argue that serving summons may be a prerequisite to later obtaining entry of default (see chap 38).

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§31.53 3. Intervenor's Rights and Remedies

Generally, an intervenor has all the rights and remedies afforded an original party to an action. *People ex rel Fogg v Perris Irrig. Dist.* (1901) 132 C 289, 64 P 399. An intervenor may seek any form of affirmative relief, legal or equitable (*Belt Cas. Co. v Furman* (1933) 218 C 359, 23 P2d 293; *Marc Bellaire, Inc. v Fleischman* (1960) 185 CA2d 591, 8 CR 650); object to the court's jurisdiction (*Maguire v Cunningham* (1923) 64 CA 536, 541, 222 P 838); move for a change of venue (see *City of San Diego v Andrews* (1924) 195 C 111, 231 P 726); and assert that the original complaint fails to state a cause of action (*Maguire v Cunningham, supra*) or, presumably, assert that the original answer fails to state a defense. It has been suggested that an intervenor may demand a jury trial in an appropriate action even if the original parties have waived a jury trial. See *McNeil v Morgan* (1910) 157 C 373, 377, 108 P 69. An intervenor may move to disqualify a judge. *City of San Diego v Andrews, supra.*

It is frequently stated that an intervenor takes the action as he or she finds it and is bound by the record at the time intervention is sought. *Allen v California Water & Tel. Co.* (1947) 31 C2d 104, 187 P2d 393. This statement generally is not entirely accurate; it has many exceptions (see *Hausmann v Farmers Ins. Exch.* (1963) 213 CA2d 611, 617, 29 CR 75; 4 Witkin, California Procedure, *Pleading* §227 (5th ed 2008)) and means merely that an intervenor cannot rely on irregularities that were waived by the original parties. See *Maguire v Cunningham, supra.* It has been suggested that an intervenor may be "bound by" depositions taken before intervention. See *McNeil v Morgan, supra.*

An intervening plaintiff's position is subordinate to that of the original plaintiff (and the latter's attorney), who has an absolute right to control the action, unless the original plaintiff consents or the court orders otherwise. In *Mann v Superior Court* (1942) 53 CA2d 272, 280, 127 P2d 970, a shareholder's derivative suit, the court pointed out that the general rule that the original plaintiff has the absolute right to control the action does not apply when it is shown that the action is not being prosecuted in the best interests of the shareholders on whose behalf it was instituted.

An intervenor may not bring a new party into the action in a complaint in intervention. CCP §387. See *Cobe v Crane* (1916) 173 C 116, 155 P 645. However, the compulsory joinder provisions of CCP §389 may be applicable to a complaint in intervention, in which case the court would have to order that a nonparty be made a party when the statutory requirements are met. Anticipating the possibility of having yet another nonparty to add to a lawsuit, however, might convince the court not to permit intervention in the first place.

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§31.54 B. Responses to Complaint in Intervention; Timing

The original parties may respond within 30 days of service of the complaint in intervention by answer, demurrer, or motion just as a party may respond to an original complaint. CCP §387. If the intervenor has intervened solely as a defendant, joining the original defendant in resisting plaintiff's claims, the complaint in intervention is, in effect, considered an answer, and its allegations are considered controverted; the original parties need not file any pleading in response. *Drinkhouse v Van Ness* (1927) 202 C 359, 371, 260 P 869; *People ex rel Fogg v Perris Irrig. Dist.* (1901) 132 C 289, 64 P 399. If a responsive pleading is required, it must be filed and served within 30 days after service of the complaint in intervention. CCP §387.

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§31.55 C. Cross-Complaint Against Intervenor

If the intervenor asserts any claim adverse to an existing party, that party may file a cross-complaint against the intervenor. See CCP §§428.10-428.80. See *Wall v Mines* (1900) 130 C 27, 44, 62 P 386. (Accordingly, it appears that any cross-complaint against the intervenor that is "compulsory" under CCP §§426.10-426.70 must be asserted or it will be deemed waived.)

No cross-claim may be asserted against an intervenor who has intervened solely as a defendant, joining the original defendant in resisting the plaintiff's claims. *Drinkhouse v Van Ness* (1927) 202 C 359, 372, 260 P 869.

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D. Dismissal of Action After Intervention

§31.56 1. By Original Plaintiff

If neither the defendant nor the intervenor seeks any form of affirmative relief, the original plaintiff is free to dismiss the action at any time. *Henry v Vineland Irrig. Dist.* (1903) 140 C 376, 73 P 1061. However, plaintiff may not dismiss solely as to the intervenor and purport to proceed against the other parties. *Townsend v Driver* (1907) 5 CA 581, 90 P 1071. An intervenor who asserts a claim for relief is entitled to proceed on it regardless of the dismissal of any other claims in the action. *Voyce v Superior Court* (1942) 20 C2d 479, 127 P2d 536; *Poehlmann v Kennedy* (1874) 48 C 201.

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§31.57 2. By Intervenor

If no relief is sought against the intervenor, he or she may dismiss his or her intervention at any time. *Sheldon v Gunn* (1880) 56 C 582. However, if the intervenor has intervened as a defendant, joining the original defendant in resisting plaintiff's claims, the intervenor has presumably brought about a situation in which adverse claims have been asserted against him or her and he or she may not withdraw.

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§31.58 V. DIAGNOSTIC QUESTIONS

Answers to the following questions may assist counsel in evaluating whether to intervene in a particular case:

1. **Is intervention required to protect an interest?**
2. **Are the prospective intervenor's interests adequately protected by one of the existing parties?**
3. **Are there ways of taking part in the lawsuit or of obtaining relief other than intervention?**
4. **Is joinder preferable under CCP §389 (joinder of indispensable party)?**
5. **Is joinder preferable under CCP §389.5 (joinder by person claiming interest in real or personal property)?**
6. **If the prospective intervenor is a judgment creditor, is a lien on the cause of action and judgment preferable under CCP §708.440?**
7. **If the prospective intervenor has an interest in property levied on under a writ of attachment, execution, possession, or sale, is it preferable to file a claim with the levying officer under CCP §§488.110, 720.010-720.800?**
8. **Is a petition for coordination of actions preferable under CCP §§403-404.9?**
9. **Is it preferable to appear as amicus curiae?**
10. **If intervention is desired, is an ex parte motion preferable?**
11. **Is it possible that one of the parties will dismiss the action once notified of the request for intervention?**
12. **Can intervention be brought under the mandatory CCP §387(b) rather than under the discretionary CCP §387(a)?**
13. **Will the request be made in a timely fashion?**
14. **Is there no existing party to the pending case who can adequately represent the prospective intervenor's interests?**
15. **Is there a provision of law that confers an unconditional right to intervene on the prospective intervenor in this situation, or will the disposition of the pending lawsuit impair or impede the prospective intervenor's ability to protect his or her interest?**

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.59 VI. CHECKLIST: PROCEDURE FOR INTERVENTION

§31.59 VI. CHECKLIST: PROCEDURE FOR INTERVENTION

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Intervenors

Decide whether:

- Intervention would be useful
- Alternative to intervention would be preferable
- "Mandatory" provision applies (see §§31.5-31.6)
- Request should be ex parte or on noticed motion

If proceeding by ex parte motion (see §31.43):

- Submit written application (with an affidavit, a declaration made under penalty of perjury, or a properly verified proposed complaint in intervention)
- State in the application why ex parte motion is required
- Comply with Cal Rules of Ct 3.1200-3.1207 notice requirements

If proceeding by noticed motion (see §31.44):

- Follow the standard rules for noticed motions
- If leave to intervene is denied, decide whether to appeal (see §31.49)

If leave to intervene is granted:

- File a complaint in intervention (see §§31.51-31.53)
- Serve the attorneys of record for existing parties with copies of the summons, complaint in intervention, court's order permitting intervention, and all papers filed by the intervenor in application for leave to intervene (this must be done in the same manner as a summons or responsive pleading)
- If desired, intervenor can dismiss his or her own intervention at any time

Existing Parties

- Decide whether to oppose leave to intervene (see §§31.46-31.48)
- If leave to intervene was sought through noticed motion, file an affidavit or declaration and memorandum in opposition

If leave to intervene was granted through an ex parte application or after complaint in intervention was filed following ruling on noticed motion:

- Move to strike the complaint
- Demur to the complaint on the ground that it fails to state facts sufficient to constitute a ground for intervention
- Move to strike and demur
- File cross-complaint against intervenor
- Answer
- Response must be made within 30 days of service of the complaint in intervention (CCP §387)
- If intervenor intervenes solely as a defendant, complaint in intervention is considered an answer and the original parties are not required to file any pleading in response

- Original plaintiff can dismiss action if neither defendant nor intervenor seeks any form of affirmative relief.

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/ VII. FORMS/§31.60 A. Form: Declaration for Order Granting Leave to Intervene

VII. FORMS

§31.60 A. Form: Declaration for Order Granting Leave to Intervene

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Intervenor, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **FOR ORDER**
	)	**GRANTING LEAVE TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**INTERVENE** _ _[*; ORDER*]_ _
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*intervenor/attorney for intervenor*]_ _**. I have personal knowledge of all facts stated in this declaration, and if called as a witness I could and would testify competently to them.**

2. Under Code of Civil Procedure §387, _ _[*name of intervenor*]_ _ **applies to the Court for an order granting** _ _[*him/her/it*]_ _ **leave to intervene in this action and file the attached complaint in intervention, incorporated in this application by reference. Trial of this action has not yet begun.**

3. _ _[*Set forth in numbered paragraphs facts showing (a) nature of applicant's interest in matter in litigation or relating to property or transaction that is subject of action and (b) conformance to other criteria for intervention specified in CCP §387(a) or §387(b). See §§31.4-31.5.*]_ _

[4.] I have notified all other parties that this application will be made by _ _[*describe method*]_ _**.**

[5.]_ _[*Continue declarant's statements.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §31.43 (application for leave to intervene). Such a declaration may not be necessary; a properly verified complaint in intervention, setting forth the requisite facts, may be sufficient. Use of a declaration, however, enables the intervenor to make a more detailed and therefore more persuasive evidentiary showing.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.61 B. Form: Order Granting Leave to Intervene (Ex Parte)

§31.61 B. Form: Order Granting Leave to Intervene (Ex Parte)

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER GRANTING LEAVE TO INTERVENE**
_ _[*Name(s)*]_ _, **Defendant(s)**	

The Court has reviewed the application of _ _[*name*]_ _ for leave to intervene in this action _ _[*and the proposed complaint in intervention*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that _ _[*name*]_ _ is granted leave to intervene in this action and to file _ _[*his/her/its*]_ _ complaint in intervention.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: This form may be attached to a declaration or application for order (see §31.60) or it may be a separate document.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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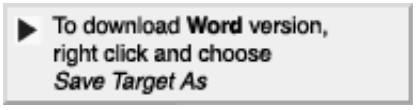
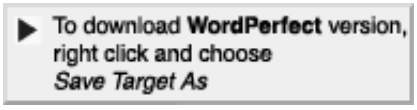
Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.62 C. Form: Declaration for Order to Show Cause re Intervention

§31.62 C. Form: Declaration for Order to Show Cause re Intervention





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Intervenor, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**DECLARATION FOR ORDER TO SHOW CAUSE RE INTERVENTION**
_ _[*Name(s)*]_ _, **Defendant(s)**	_ _[*; ORDER TO SHOW CAUSE*]_ _
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*intervenor/attorney for intervenor*]_ _**. I have personal knowledge of all facts stated in this declaration, and if called as a witness I could and would testify competently to them.**

2. Under Code of Civil Procedure §387, _ _[*name of intervenor*]_ _ **applies to the Court for an order directing the parties to this action to show cause why** _ _[*he/she/it*]_ _ **should not be granted leave to intervene and file the attached complaint in intervention, incorporated in this application by reference. Trial of this action has not yet begun.**

3. _ _[*Set forth in numbered paragraphs facts showing (a) nature of applicant's interest in matter in litigation, or relating to property or transaction that is subject of action, and (b) conformance to other criteria for intervention specified in CCP §387(a) or §387(b). See §§31.4-31.5.*]_ _

[4.] I have notified all other parties that this application will be made by _ _[*describe method*]_ _**.**

[5.]_ _[*Continue declarant's statements.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See Comment to form in §31.60. The intervenor may appear ex parte and seek an order directed to the existing parties, requiring them to show cause why the intervenor should not be granted leave to file the complaint in intervention. On order to show cause procedure generally, see chap 13; *Thorman v Dome Producing & Developing Co.* (1942) 50 CA2d 201, 122 P2d 927. If the order to show cause provides that all proceedings in the action are stayed and that the action may not be dismissed until determination of the application for leave to intervene, the intervenor will be protected and the court will have the benefit of a thorough briefing of all questions.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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§31.63 D. Form: Order to Show Cause Why Leave to Intervene Should Not Be Granted

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**ORDER TO SHOW CAUSE**
vs	)	**WHY LEAVE TO INTERVENE**
	)	**SHOULD NOT BE GRANTED**
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Good cause appearing in the declaration of _ _[*name*]_ _ _ _[*and the proposed complaint in intervention attached to the declaration*]_ _**,**

IT IS ORDERED that:

1. At the above time and place, plaintiff, _ _[*name*]_ _**, and defendant,** _ _[*name*]_ _**, show cause, if any, why leave to intervene in this action should not be granted to** _ _[*name of intervenor*]_ _**.**

[*Add if appropriate*]

2. Until the determination of this order to show cause, all proceedings in this action, including all efforts to dismiss this action, are stayed.

[*Continue*]

[3.] Copies of this order, the declaration of _ _[*name*]_ _**, the proposed complaint in intervention, and the accompanying memorandum must be served on all parties no later than** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: This form may be attached to the declaration applying for leave to intervene (if one is used; see §§31.60, 31.62) or to the proposed complaint in intervention, or the form may be a separate document.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.64 E. Form: Notice of Motion for Leave to Intervene

§31.64 E. Form: Notice of Motion for Leave to Intervene

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR LEAVE TO**
	)	**INTERVENE**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*; SUPPORTING MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _ **or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court for an order for an order granting** _ _[*him/her/it*]_ _ **leave to intervene by filing** _ _[*his/her/its*]_ _ **complaint in intervention under Code of Civil Procedure §387. The grounds for issuance of this order are that** _ _[*name of intervenor*]_ _ **has an interest** _ _[*in the matter in litigation/in the success of* _ _[*name of party*]_ _*/against both parties to this action/relating to the property or transaction that is the subject of this action*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _, _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §31.44 (motion to intervene). The form of declaration in §31.60 may be adapted for use with this motion.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.65 F. Form: Order Granting Leave to Intervene (After Hearing)

§31.65 F. Form: Order Granting Leave to Intervene (After Hearing)

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER GRANTING LEAVE TO INTERVENE**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The _ _[*order to show cause why* _ _[*name of intervenor*]_ _ *should not be granted leave to intervene in this action/motion of* _ _[*name of intervenor*]_ _ *for leave to intervene in this action*]_ _ **was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

The Court having considered (1) the documents submitted in support of and in opposition to the proposed intervention and (2) the arguments of counsel, and good cause appearing,

IT IS ORDERED that _ _[*name of intervenor*]_ _ **be granted leave to intervene in this action and to file** _ _[*his/her/its*]_ _ **complaint in intervention.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §31.37.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/31 Intervention/§31.66 G. Form: Complaint in Intervention

§31.66 G. Form: Complaint in Intervention

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Intervenor, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	
	)	**COMPLAINT IN**
vs	)	**INTERVENTION**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	[*In limited civil case, add:* **Amount demanded**
_____	)	_ _[*exceeds/does not*
_ _[*Name of employer or insurer*]_ _, **Intervenor**	)	*exceed*]_ _ **$10,000**]
_____	)	

Intervenor alleges:

1. On or about _ _[*date*]_ _, _ _[*plaintiff,* _ _[*name*]_ _, *commenced this action against defendant,* _ _[*name*]_ _,/*defendant,* _ _[*name*]_ _, *cross-claimed against plaintiff,* _ _[*name*]_ _,]_ _ **for** _ _[*state nature of cause of action*]_ _. _ _[*Trial of this action has not yet begun.*]_ _

2. In this action, intervenor, _ _[*name*]_ _, _ _[*joins plaintiff in claiming what is sought by the complaint/unites with defendant in resisting plaintiff's claims/demands relief adversely to both plaintiff and defendant*]_ _.

[*Option 1: If application is made under CCP §387(a)*]

3. Intervenor has an interest in the matter in litigation in this action _ _[*and in the success of plaintiff/and in the success of defendant/and against both plaintiff and defendant*]_ _ **as set forth below.**

[*Option 2: If application is made under CCP §387(b)*]

3. Intervenor has an interest in the matter in litigation in this action _ _[*and in the success of plaintiff/and in the success of defendant/and against both plaintiff and defendant*]_ _ **as set forth below.**

[*Continue*]

[4.]_ _[*Specify intervenor's claims in numbered paragraphs, as in any other complaint.*]_ _

WHEREFORE, intervenor demands judgment for:

1. _ _[*Specify relief desired.*]_ _

[2.] Costs of this action and other just relief.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: It is unclear whether the allegation in ¶2 must be used when intervention is sought under CCP §387(b).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134 and the discussion in §11.27.

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Injunctions and Other Provisional Remedies

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I. INTRODUCTION

§32.1 A. Scope of Chapter

This chapter discusses injunctions and provisional remedies. It discusses the nature of individual remedies (see §§32.3-32.10), injunctions generally (see §§32.11-32.35), application for order to show cause and temporary restraining order (see §§32.36-32.59), motion for preliminary injunction (see §§32.60-32.91), undertakings (see §§32.92-32.108).

It also discusses permanent injunction after trial on the merits (see §32.109), defenses to injunctive relief (see §§32.110-32.117), enforcement by contempt (see §§32.118-32.122), review of orders (see §§32.123-32.130), and injunctions against harassment under CCP §527.6 (see §§32.131-32.150).

It also contains forms for moving for and responding to a request for injunctive relief (see §§32.152-32.159), and forms for moving for and responding to an injunction against harassment under CCP §527.6 (see §§32.160-32.168).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.2 B. Governing Law

§32.2 B. Governing Law

Code of Civil Procedure §§481.010-574 provide for five provisional remedies:

- Attachment (CCP §§481.010-493.060; see §32.5);
- Claim and delivery (CCP §§511.010-516.050; see §32.6);
- Injunction (CCP §§525-534; Cal Rules of Ct 3.1150-3.1152; see §32.4);

NOTE: Although CC §3421 declares that provisional injunctions are regulated by the Code of Civil Procedure, they are also regulated by the Civil Code. See, *e.g., Lincoln v Superior Court* (1942) 51 CA2d 61, 124 P2d 179 (CC §3423, governing proceedings that may not be enjoined, applies to both provisional and permanent injunctions).

- Injunctions against civil harassment (CCP §527.6);
- Appointment of a receiver (CCP §§564-570; Cal Rules of Ct 3.1175-3.1184; see §32.7); and
- Deposit in court (CCP §§572-574; see §32.8).

The Judicial Council has adopted Cal Rules of Ct 3.20, 2.100(a) preempting local rule-making authority in several areas, including provisional remedies, "unless otherwise permitted or required" by statute or the California Rules of Court. Cal Rules of Ct 3.20(a). Nevertheless, local rules may continue to govern provisional remedies, and although they are preempted, it is recommended that they be followed. See §11.2.

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II. NATURE OF INDIVIDUAL REMEDIES

§32.3 A. Characteristics of Provisional Remedies

Provisional remedies are procedures a plaintiff can use to protect and preserve money, property, or the status quo until the court can determine parties' rights. They are used to prevent another party or person from dissipating assets or doing something that would diminish the value of a judgment ultimately obtained by the party using the remedy. See, *e.g.*, *White v Davis* (2003) 30 C4th 528, 554, 133 CR2d 648 (preliminary injunction).

These remedies are "provisional" in the sense that they are temporary and have effect only until the parties' rights in connection with the subject of the lawsuit are established. Provisional remedies can be obtained only in connection with an existing or newly instituted civil action; they are not themselves civil actions or special proceedings. See *White v Davis, supra*.

NOTE: Some injunctions and similar court orders are not necessarily provisional and not necessarily ancillary to the main proceeding. See CC §§3420-3421 (distinguishing between final injunctions and provisional injunctions). For discussion of final (permanent) injunctions, see §32.109. For statutes authorizing petitions for independent injunctive relief in specific situations, see §32.28.

Provisional remedies are usually obtained by presenting a declaration under penalty of perjury to a judge who issues the writ or order that restrains the defendant. See, *e.g.,* CCP §527(a). See also §§32.40-32.44. The party seeking the remedy must often furnish a bond or undertaking to secure the defendant against harm caused by the provisional remedy should it be determined that the plaintiff is not entitled to the relief sought in the lawsuit. See, *e.g., Allen v Pitchess* (1973) 36 CA3d 321, 329, 111 CR 658; §§32.92-32.108.

For further discussion of general characteristics of provisional remedies, see 6 Witkin, California Procedure, *Provisional Remedies* (5th ed 2008).

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§32.4 B. Injunction

The procedures for obtaining a provisional injunction, set forth in CCP §§525-534, are used to require a defendant or other person to take, or to refrain from taking, a specified action when necessary to protect a legal right being pursued by the plaintiff. See CCP §526. The basic provisional injunctions are temporary restraining orders and preliminary injunctions. See CCP §527(a)-(b). The party seeking this kind of provisional injunctive relief must show that the relief sought in the lawsuit depends, in whole or in part, on restraining the commission or continuance of an act that would cause waste or irreparable injury. See CCP §526(a)(3). Temporary restraining orders and injunctions against harassment are also governed by CCP §527.6.

Procedures and forms for obtaining injunctions are discussed in §§32.36-32.59 (application for order to show cause and temporary restraining order), §§32.60-32.91 (preliminary injunction), and §§32.152-32.159 (forms).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.5 C. Attachment

§32.5 C. Attachment

The attachment procedure, provided in CCP §§481.010-493.060, may be used by anyone to whom money is owed (the creditor) to secure collectibility of the creditor's expected judgment against the debtor. See CCP §483.010.

Basically, when filing a complaint against the debtor, the creditor also files an application for a writ of attachment with supporting declarations, showing the location of attachable assets, the plaintiff's right to recover on the claim, and the need for the attachment in order to ensure collectibility. See CCP §484.320. The court issues the writ, which requires the sheriff to levy on specified property. See CCP §488.020.

Procedures and forms for attachment are discussed in detail in Debt Collection Practice in California §§6.1-6.110 (2d ed Cal CEB 1999).

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§32.6 D. Claim and Delivery

The claim and delivery procedure, provided in CCP §§511.010-516.050, may be used by a person who claims an immediate right to possession of specific personal property. Basically, when filing a complaint against the person in possession, the person seeking possession also files an application for a writ of possession, with supporting declarations, showing the person's right to possession and that the possessor has wrongfully detained it. See CCP §511.010. The writ requires the sheriff to seize the property and deliver it to the creditor or, if the property is perishable or depreciating, to sell it and deposit the proceeds with the court. See CCP §§512.070, 514.030.

Procedures and forms for writ of possession are discussed in Debt Collection Practice in California §§6.111-6.166 (2d ed Cal CEB 1999).

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§32.7 E. Receivership

The receivership procedure, provided in CCP §§564-570 and Cal Rules of Ct 3.1175-3.1184, is used to obtain court appointment of a person (the receiver) to take charge of and manage the property that is the subject of a lawsuit. The receiver is not a party to the suit and has no personal claim on the property but is appointed for the benefit of all parties who claim an interest in the property. See CCP §568. Procedures and forms for receiverships are discussed in chap 3.

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§32.8 F. Deposit in Court

The deposit in court procedure, provided in CCP §§572-574, is used to preserve a fund of money or items of property during litigation when the holder of the fund or item, who has been made a party in the suit, has admitted, in the pleadings or on examination, that he or she is not legally entitled to ultimate ownership. Procedures for deposit in court are discussed in chap 34.

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G. Related Procedures

§32.9 1. Interpleader

A holder of money or property who asserts no claim to it and against whom multiple claims have been or may be made may use interpleader to avoid further involvement. See CCP §§386-386.6. The interpleading party deposits the asset with the court, leaving the interpleaded parties to assert and prove their claims to it. See CCP §386. Procedures and interpleader are discussed in chap 28.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.10 2. Declaratory Relief

§32.10 2. Declaratory Relief

The filing of a declaratory relief action under CCP §§1060-1062.5 permits a person interested under a written instrument, excluding a will or trust, or under a contract, or a person who wants a declaration of rights or duties with respect to another as well as in other specified situations, to obtain a judgment declaring the respective rights and duties of all parties. See CCP §1060. The judgment operates prospectively to resolve controversies before they lead to the repudiation of obligations, invasions of rights, or commission of wrongs. See CCP §1060. Declaratory relief procedures and forms are discussed in chap 35.

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III. INJUNCTIONS GENERALLY

§32.11 A. Purpose of Injunction

An injunction is an equitable remedy that protects a legal right. *Meridian Ltd. v City & County of San Francisco* (1939) 13 C2d 424, 447, 90 P2d 537; *Benasra v Mitchell Silberberg Knupp, LLP* (2002) 96 CA4th 96, 110, 116 CR2d 644. It requires the enjoined party to take or refrain from taking some specified action. *Comfort v Comfort* (1941) 17 C2d 736, 112 P2d 259; *People ex rel Renne v Servantes* (2001) 86 CA4th 1081, 1083, 103 CR2d 870. An injunction is not a cause of action, but a cause of action must exist on which injunctive relief may be granted. *Camp v Board of Supervisors* (1981) 123 CA3d 334, 356, 176 CR 620.

Provisional (temporary or preliminary) injunctive relief is available in both equitable actions and legal actions for damages. Permanent (or final) injunctive relief is available only in equitable actions. If a cause of action for damages or other legal relief is joined with an equitable cause of action, the legal action may be tried first with a jury, but the equitable action must be tried by the court. *Lenard v Edmonds* (1957) 151 CA2d 764, 312 P2d 308. See generally 6 Witkin, California Procedure, *Provisional Remedies* §§274-418 (5th ed 2008).

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§32.12 B. Types of Injunctions

Although CCP §525 defines an injunction as "a writ or order requiring a person to refrain from a particular act," injunctive relief may be mandatory as well as prohibitory. An injunction is prohibitory if it merely has the effect of preserving the subject of litigation in status quo; it is mandatory if it compels a party affirmatively to surrender a position or to perform a substantive act. See *Davenport v Blue Cross* (1997) 52 CA4th 435, 446, 60 CR2d 641; *Johnston v Superior Court* (1957) 148 CA2d 966, 307 P2d 946.

This distinction is important because a mandatory injunction is automatically stayed on appeal, while a prohibitory injunction, as a self-executing order, is stayed only by discretionary order of the trial or appellate court. See *Reed v Superior Court* (2001) 92 CA4th 448, 454 n3, 111 CR2d 842; *ALRB v Superior Court* (1983) 149 CA3d 709, 196 CR 920. But see *ALRB v Tex-Cal Land Mgmt.* (1987) 43 C3d 696, 238 CR 780 (mandatory injunction issued under Lab C §1160.8 was not an "action" but a "special proceeding" and thus not stayed by appeal). If the injunction is both mandatory and prohibitory, an appeal will stay operation of the mandatory, but not the prohibitory, features. *Kettenhofen v Superior Court* (1961) 55 C2d 189, 10 CR 356.

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1. Mandatory Injunction

§32.13 a. Changes Relative Position of Parties

A "specific" or mandatory injunction compels a party to do "that which ought to be done." CC §3367(2). It changes the relative position of the parties at the time of suit by requiring affirmative action. *Kettenhofen v Superior Court* (1961) 55 C2d 189, 10 CR 356 (order to remove fence). See *Allen v Stowell* (1905) 145 C 666, 79 P 371 (order to remove dam); *Davenport v Blue Cross* (1997) 52 CA4th 435, 446, 60 CR2d 641 (ordering insurer to perform affirmative acts).

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§32.14 b. Rarely Issued

Because mandatory preliminary injunctions require the enjoined party to take affirmative action before trial on the merits, they are rarely granted and are subject to stricter review on appeal. *Teachers Ins. & Annuity Ass'n v Furlotti* (1999) 70 CA4th 1487, 1493, 83 CR2d 455. California courts have limited their issuance to urgent cases with a clear showing of irreparable injury. See *Hagen v Beth* (1897) 118 C 330, 50 P 425 (mandatory preliminary injunction denied); *Slatkin v White* (2002) 102 CA4th 963, 972, 126 CR2d 54. When equity requires it, however, a mandatory preliminary injunction will issue. See *Fretz v Burke* (1967) 247 CA2d 741, 55 CR 879 (preliminary injunction requiring disbursement of partnership profits merely continued status quo); *In re Donovan* (1949) 94 CA2d 399, 210 P2d 860 (order to remodel house).

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§32.15 c. Look For Effect, Not Form, of Order

An injunction is classified as either prohibitory or mandatory by its effect—not its form or language. *United R.R. v Superior Court* (1916) 172 C 80, 155 P 463; *Davenport v Blue Cross* (1997) 52 CA4th 435, 446, 60 CR2d 641. Thus, an injunction may be mandatory in effect even though its language is prohibitory. See, *e.g., Byington v Superior Court* (1939) 14 C2d 68, 92 P2d 896 (order restraining city's water storage in excess of specified amount); *Paramount Pictures Corp. v Davis* (1964) 228 CA2d 827, 39 CR 791 (order prohibiting actress from rendering services under new contract until performance completed under previous one is mandatory to extent it required performance of services); *Pomin v Superior Court* (1941) 44 CA2d 206, 112 P2d 17 (order to refrain from obstructing road). For discussion, see 6 Witkin, California Procedure, *Provisional Remedies* §§281-283 (5th ed 2008).

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2. Prohibitory Injunction

§32.16 a. Prohibits Party From Engaging in Certain Acts

A preventive or prohibitory injunction prohibits a party from doing "that which ought not to be done." CC §3368. It requires a party "to refrain from a particular act." CCP §525.

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§32.17 b. Preserves Status Quo

A prohibitory injunction maintains the status quo by preventing a contemplated act or requiring cessation of an act in progress. See *Aguilar v Avis Rent A Car Sys.* (1999) 21 C4th 121, 87 CR2d 132; *People ex rel Brown v iMergent, Inc.* (2009) 170 CA4th 333, 343, 87 CR3d 844 (injunction required defendants to maintain status quo established when they stipulated to permanent injunction in prior action); *Franklin & Franklin v 7-Eleven Owners for Fair Franchising* (2000) 85 CA4th 1168, 1172, 102 CR2d 770. See also *Kettenhofen v Superior Court* (1961) 55 C2d 189, 10 CR 356 (order to refrain from obstructing easement).

Status quo has been defined as the "last actual peaceable, uncontested status which preceded the pending controversy" (see *United R.R. v Superior Court* (1916) 172 C 80, 155 P 463) and the "relative position or rights of the parties at the time the injunction is granted or the decree entered" (*Pomin v Superior Court* (1941) 44 CA2d 206, 112 P2d 17).

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§32.18 c. Minor Mandatory Characteristics Not Important

Incidental or minor affirmative features of an essentially prohibitory injunction will not transform it into a mandatory injunction. *United R.R. v Superior Court* (1916) 172 C 80, 155 P 463. See *Youngblood v Wilcox* (1989) 207 CA3d 1368, 255 CR 527 (injunction requiring country club to grant access to expelled members is prohibitory because it forbids interference with membership rights); *People v Mobile Magic Sales, Inc.* (1979) 96 CA3d 1, 157 CR 749 (injunction prohibiting certain mobilehome displays that violated law not mandatory even though defendants required to remove displays as incident to restraining objective). See 6 Witkin, California Procedure, *Provisional Remedies* §§278-283 (5th ed 2008).

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C. Prerequisites to Injunctive Relief

1. Jurisdiction

§32.19 a. Subject Matter Jurisdiction

The trial courts have initial jurisdiction to issue injunctive relief; appellate courts do not have original jurisdiction over actions seeking injunctive relief. See Cal Const art VI, §10; *Walsh v Railroad Comm'n* (1940) 16 C2d 691, 107 P2d 611. In limited civil cases, which are generally cases in which the amount in controversy does not exceed $25,000 (see CCP §85), courts may issue provisional injunctions (CCP §86(a)(8)), but not permanent injunctions.

Unelected court commissioners probably lack jurisdiction to issue injunctive relief, although it may be appropriate for them to make recommendations to the judges concerning applications for restraining orders. See Cal Const art VI, §22; CCP §259. See also 2 Witkin, California Procedure, *Courts* §§344-345 (5th ed 2008). On subject matter jurisdiction generally, see 2 Witkin, Procedure, *Juris* §§11-105.

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§32.20 b. Personal Jurisdiction

An injunctive order operates in personam. *Berger v Superior Court* (1917) 175 C 719, 167 P 143. Thus it is enforceable only after the court acquires personal jurisdiction over the defendant. *Chrysler Credit Corp. v Waegele* (1972) 29 CA3d 681, 105 CR 914 (personal jurisdiction acquired through personal service of order to show cause); *Rothschild v Erda* (1968) 258 CA2d 750, 66 CR 209 (personal jurisdiction not acquired through defendant's special appearance to challenge jurisdiction).

The respondent's appearance at a hearing on an ex parte application for a restraining order is not a general appearance for personal jurisdiction purposes. CCP §418.11. See CCP §1917. On personal jurisdiction generally, see 2 Witkin, California Procedure, *Jurisdiction* §§106-242 (5th ed 2008).

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2. Standing

§32.21 a. General Rules on Standing

Unless provided otherwise by statute, standing for injunctive relief is governed by the generally applicable rules on standing. As long as a plaintiff has standing to seek relief at trial on the merits, the plaintiff has standing to seek the same relief on a provisional basis. *Common Cause v Board of Supervisors* (1989) 49 C3d 432, 261 CR 574. See 4 Witkin, California Procedure, *Pleading* §§67-172 (5th ed 2008).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.22 b. Class Actions

§32.22 b. Class Actions

A temporary restraining order or preliminary injunction may be granted in a class action, whether or not the class (either plaintiff or defendant) has been certified. CCP §527(b). Taxpayers generally have no standing to enjoin illegal expenditures of public funds. *Cohen v Board of Supervisors* (1986) 178 CA3d 447, 225 CR 114.

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§32.23 c. Specific Statute

Special standing provisions may apply when injunctive relief is sought under a specific statute. See §32.28. See, *e.g., Diamond View Ltd. v Herz* (1986) 180 CA3d 612, 225 CR 651 (limited partnership not a "person" for purposes of injunction under CCP §527.6); *Pines v Tomson* (1984) 160 CA3d 370, 206 CR 866 (under Bus & P C §17203, plaintiffs may sue for injury to general public without threat of personal injury to them).

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§32.24 3. Venue

The proper forum for injunction proceedings is governed by the statutory provisions determining the proper place for trial of civil actions generally. See CCP §§392-395.5. See generally chap 8.

Thus, because an action for injunctive relief is ordinarily personal or transitory, it is usually triable in the defendant's county of residence unless otherwise provided by law. CCP §395(a). See *Golden Cross Mining & Milling Co. v Spiers* (1896) 115 C 247, 47 P 108; *Sloan v Court Hotel* (1945) 72 CA2d 308, 164 P2d 516. For the exception relating to actions against public officers, see CCP §393(1)(b). On venue in actions relating to real property, see CCP §392(a).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.25 4. Statutory Requirements

§32.25 4. Statutory Requirements

Statutes on injunctive relief either state equitable conditions for granting relief or authorize relief in particular kinds of actions. See CCP §526 (provisional injunctions) and CC §3422 (permanent injunctions). See §§32.26-32.35. Some special statutes simply authorize the court to grant injunctive relief in a particular case. See §32.28.

Not all situations in which injunctive relief may be appropriate are covered by statute. See, *e.g., City of Pasadena v Superior Court* (1910) 157 C 781, 109 P 620 (injunction pending appeal). Although most cases usually fall within a situation covered in the statutes, injunctive relief may be available even without statutory authority if equitable considerations are met (*City of Pasadena v Superior Court, supra*) and if the remedy is not prohibited by constitution or statute (see §32.28).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.26 a. Provisional Injunctions

§32.26 a. Provisional Injunctions

Provisional injunctive relief (*i.e.,* temporary restraining order or preliminary injunction) may issue against acts that:

- Threaten waste, or great or irreparable injury (CCP §526(a)(2));
- Violate another party's rights in the subject of the action and tend to render final judgment ineffectual (CCP §526(a)(3));
- When pecuniary compensation would not afford adequate relief (CCP §526(a)(4));
- Produce injury for which money damages are inadequate or extremely difficult to ascertain (CCP §526(a)(5));
- Threaten to cause a multiplicity of judicial proceedings (CCP §526(a)(6)); or
- Violate a trust obligation (CCP §526(a)(7)).

Injunctive relief may also restrain commission or continuance of an act whenever the complaint discloses "that plaintiff is entitled to the relief demanded." CCP §526(a)(1). This determination is based on equitable factors. See §§32.29-32.35.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.27 b. Permanent Injunctions

§32.27 b. Permanent Injunctions

Permanent (or final) injunctive relief may issue (CC §3422):

- When money damages are inadequate or difficult to ascertain;
- To prevent a multiplicity of judicial proceedings; or
- When the obligation arises from a trust.

In addition, the court may issue injunctive relief when necessary to prevent a party "from doing that which ought not to be done." CC §3368; see *City of Pasadena v Superior Court* (1910) 157 C 781, 109 P 620 (§3368 conforms with general grant of equity jurisdiction in California constitution).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.28 c. Specific Statutes Authorizing Injunctive Relief

§32.28 c. Specific Statutes Authorizing Injunctive Relief

The California legislature has enacted many statutes that specifically authorize provisional (preliminary) and/or final (permanent) injunctive relief. These statutes include:

- Injunction restraining violation of Unfair Trade Practices Act (Bus & P C §§17000-17101) (Bus & P C §17078);
- Injunction restraining violation of Unfair Competition Law (UCL) (Bus & P C §§17200-17210) (Bus & P C §17203);
- Injunction against violation of Alcoholic Beverage Control Act (Bus & P C §§23000-25762) (Bus & P C §23053.1);
- Violation of Uniform Trade Secrets Act (Bus & P C §§3426-3426.11) by actual or threatened misappropriation of trade secrets (CC §3426.2);
- Injunction to prevent harassment (CCP §527.6; see §§32.131-32.150);
- Injunction to prevent gang violence (CCP §527.7);
- Injunction by employer to prevent workplace threats or violence (CCP §527.8);
- Protective order under Domestic Violence Prevention Act (Fam C §§6200-6388; see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual));
- Injunction restraining violation of clean water statutes (Health & S C §117030);
- Injunction restraining violation of Jurisdictional Strike Act (Lab C §§1115-1122) (Lab C §1116);
- Injunction against grazing livestock on federal lands (Pub Res C §8506); and
- Injunction restraining unauthorized release of involuntary mental or narcotics patient's records (Welf & I C §§5330).

When a case comes within a special statute authorizing injunctive relief, the terms of the statute determine whether traditional equitable conditions for relief must also be shown. See, *e.g.,* Lab C §1116 (injunction may be granted in a "proper case"); Pub Res C §8506 (injunction may be granted under principles of equity); Bus & P C §17082 (unnecessary for Unfair Trade Practices Act plaintiff to show actual or threatened damages or injury). See also *Sommer v Metal Trades Council* (1953) 40 C2d 392, 254 P2d 559 (in granting injunction under Jurisdictional Strike Act, trial court could weigh equitable factors or probable injury to each party).

NOTE: When injunctive relief is sought under a particular statute, special provisions may apply with respect to the length of a restraining order, notice (*e.g.,* CCP §527.6(c) (temporary restraining order or injunction may issue without notice in domestic violence case)), exhaustion of administrative remedies (see, *e.g., Board of Police Comm'rs v Superior Court* (1985) 168 CA3d 420, 214 CR 493), and other matters. Counsel should carefully examine the specific statute under which an injunction is sought to ascertain whether it differs from CCP §527.

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5. Equitable Considerations

§32.29 a. Equitable Requirements

Unless a special statute authorizes injunctive relief without regard to traditional equitable considerations (see §32.28), an injunction will issue only when the applicant satisfies the court that equity requires use of this extraordinary remedy. See, *e.g., City of Tiburon v Northwestern Pac. R.R.* (1970) 4 CA3d 160, 84 CR 469. The court makes its determination by balancing the equitable factors favoring an injunction with those mitigating against it (see §§32.29-32.35). *White v Davis* (2003) 30 C4th 528, 554, 133 CR2d 648; *Tahoe Keys Prop. Owners Ass'n v State Water Resources Control Bd.* (1994) 23 CA4th 1459, 1470, 28 CR2d 734.

Trial courts should evaluate two related factors when deciding whether to issue a preliminary injunction:

- The likelihood that the plaintiff will prevail on the merits at trial; and
- The interim harm that the plaintiff is likely to sustain if the injunction is denied as compared with the harm that the defendant is likely to suffer if the preliminary injunction is issued.

By balancing the respective equities of the parties, the trial court concludes that, pending a trial on the merits, the defendant should or should not be restrained from exercising the right claimed by him or her. *White v Davis* (2003) 30 C4th 528, 554, 133 CR2d 648.

The likelihood of success on the merits and the balance-of-harms analysis are ordinarily interrelated factors in deciding whether to issue a preliminary injunction. The presence or absence of each factor is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue an injunction despite that party's inability to show that the balance of harms tips in his or her favor. *White v Davis, supra*. A trial court erred when it granted a preliminary injunction without considering the relative harms that would be imposed by its grant or denial. *White v Davis, supra*.

In the federal arena, the Ninth Circuit applies a sliding-scale test to injunctive relief. See *Southwest Voter Registration Educ. Project v Shelle*y (9th Cir 2003) 344 F3d 914, 918 (preliminary injunction is appropriate when plaintiffs "demonstrate either: (1) a likelihood of success on the merits and the possibility of prevailing on the merits, or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply" in their favor). This traditional injunctive test is not used in when an antisuit injunction in at issue, however, because those injunctions involve "a detailed analysis of international comity." *E. & J. Gallo Winery v Andina Licores, SA* (9th Cir 2006) 446 F3d 984. To halt foreign proceedings, a plaintiff need not establish the likelihood of prevailing in the underlying claim but rather must "demonstrate that the factors specific to an antisuit injunction weigh in favor of granting the injunction." *Gallo,* 446 F3d at 991.

PRACTICE TIP: The two-pronged test imposed in California is more restrictive than the sliding-scale test in federal courts. Thus, as a tactical matter, when a plaintiff has the choice of seeking injunctive relief under a federal statute in either state or federal court (*e.g.,* under 29 USC §185), the likelihood of success is probably greater in federal court.

Although a trial court has broad discretionary powers to grant or deny a request for a preliminary injunction, it has no discretion to act capriciously. See *Robbins v Superior Court* (1985) 38 C3d 199, 211 CR 398. See generally CCP §526; CC §3422; Restatement (Second) of Torts §936 (1979). For discussion generally, see 6 Witkin, California Procedure, *Provisional Remedies* §§289-298 (5th ed 2008).

Equitable conditions relating to injury may also be given less weight in a preliminary injunction setting when, based on a statutory right, the moving party is entitled to relief. See, *e.g., McCain v Phoenix Resources, Inc.* (1986) 185 CA3d 575, 230 CR 25 (limited partners entitled to inspect partnership records as matter of law).

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§32.30 b. Inadequacy of Legal Remedy

Because of the extraordinary nature of equitable relief, an injunction will usually issue only if the legal remedy (*e.g.,* damages) does not afford adequate relief or is difficult to ascertain. *Dodge, Warren & Peters Ins. Servs. v Riley* (2003) 105 CA4th 1414, 130 CR2d 385 (injunction requiring preservation of electronic records); *Tahoe Keys Prop. Owners Ass'n v State Water Resources Control Bd.* (1994) 23 CA4th 1459, 1471, 28 CR2d 734. See also CCP §526(a)(4)-(5) (injunction available when pecuniary compensation would not provide adequate relief or when it would be extremely difficult to ascertain the amount of compensation that would provide adequate relief); CC §3422(1)-(2). In deciding this issue, the court may consider factors outside the pleadings, such as insolvency of the responding party. See *West Coast Constr. Co. v Oceano Sanitary Dist.* (1971) 17 CA3d 693, 95 CR 169.

Availability of other remedies besides damages may furnish the basis for denial of injunctive relief. For example, injunctive relief may be denied if mandamus is available. See *Moore v Superior Court* (1936) 6 C2d 421, 57 P2d 1314. For discussion, see 6 Witkin, California Procedure, *Provisional Remedies* §§337-340 (5th ed 2008).

Difficulty in determining money damages is not in itself sufficient reason to award injunctive relief, nor, as a general rule, should injunctive relief issue to change the possession of real property, the title for which is in dispute, or to recover possession of personal property. *Jessen v Keystone Sav. & Loan Ass'n* (1983) 142 CA3d 454, 191 CR 104 (real property); *Voorhies v Greene* (1983) 139 CA3d 989, 189 CR 132 (personal property). But see *McCain v Phoenix Resources, Inc.* (1986) 185 CA3d 575, 230 CR 25 (injunction requiring change in possession of personal property).

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§32.31 c. Threat of Irreparable Injury

Issuance or denial of injunctive relief generally depends on the balance of the interim harm that the plaintiff is likely to sustain, if the injunction is not issued, against the interim harm the defendant is likely to suffer, if it is issued. *Cohen v Board of Supervisors* (1985) 40 C3d 277, 219 CR 467. An application for injunctive relief is more likely to be granted if the moving party can show that a threat of "irreparable injury" exists. See CCP §526(a)(2). See also *Intel Corp. v Hamidi* (2003) 30 C4th 1342, 1352, 1 CR3d 32. Taxpayers who have standing to seek permanent injunctive relief may not be subject to actual irreparable harm themselves such as to qualify them for provisional injunctive relief. See, *e.g., Loder v City of Glendale* (1989) 216 CA3d 777, 265 CR 66 (taxpayer denied preliminary injunction to stop drug testing); *Cohen v Board of Supervisors* (1986) 178 CA3d 447, 225 CR 114. See also *White v Davis* (2003) 30 C4th 528, 554, 133 CR2d 648.

The term "irreparable injury" is not easily defined. It is that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other. *Anderson v Souza* (1952) 38 C2d 825, 834, 243 P2d 497. This definition, however, invites the argument that every injury is irreparable. See, *e.g., Fretz v Burke* (1967) 247 CA2d 741, 55 CR 879. Irreparable injury may include injury resulting from wrongs of a "repeated and continuing character" (*Wind v Herbert* (1960) 186 CA2d 276, 285, 8 CR 817), wrongs consisting of "an overbearing assumption by one person of superiority and domination over the rights and property of others" (*Fretz v Burke, supra*), and wrongs that cannot be compensated for in damages (see *Intel Corp. v Hamidi* (2003) 30 C4th 1342, 1352, 1 CR3d 32). See §32.30.

EXAMPLE: Irreparable injury includes the threatened arrest by authorities or discontinuance of the method of conducting a business because of such fear of arrest (*Ebel v City of Garden Grove* (1981) 120 CA3d 399, 176 CR 312). The threatened occupancy of one's new home by another has also been found to be irreparable injury. *Grey v Webb* (1979) 97 CA3d 232, 158 CR 595.

Although a provisional injunction is generally not available to redress a completed act, a continuing course of conduct may warrant such relief. *Sahlolbei v Providence Healthcare, Inc.* (2003) 112 CA4th 1137, 1156, 6 CR3d 293 (physician's exclusion from staff without prior hearing constituted harm that continued as long as his staff privileges remained terminated); *Volpicelli v Jared Sydney Torrance Mem. Hosp.* (1980) 109 CA3d 242, 167 CR 610 (ordering hospital to temporarily return physician to its staff after terminating his staff privileges and continuing to interfere with his attempted return). But see *DVD Copy Control Ass'n, Inc. v Bunner* (2004) 116 CA4th 241, 255, 10 CR3d 185 (injunctive relief not available when hundreds of websites had already posted protected technology, making trade secret already available to anyone interested).

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§32.32 d. Multiplicity of Judicial Actions

An injunction may issue when necessary "to prevent a multiplicity of judicial proceedings." CCP §526(a)(6); CC §3422(3); see *Advanced Bionics Corp. v Medtronic, Inc.* (2002) 29 C4th 697, 706, 128 CR2d 172.

For example, this consideration would apply to the following cases:

- Repeated trespass (see *Fairrington v Dyke Water Co.* (1958) 50 C2d 198, 323 P2d 1001; *Mendelson v McCabe* (1904) 144 C 230, 77 P 915);
- Repeated vexatious suits relating to the same controversy (see *Rynsburger v Dairymen's Fertilizer Coop.* (1968) 266 CA2d 269, 279, 72 CR 102; *Verdier v Verdier* (1962) 203 CA2d 724, 735, 22 CR 93); and
- Other legal proceedings concerning funds that were already the subject of an interpleader action (see *Department of Educ. v Superior Court* (1979) 97 CA3d 977, 159 CR 265).

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§32.33 e. Public Interest and Balance of Conveniences in Favor of Moving Party

In determining whether to issue an injunction, the court may properly consider public interest. *City of San Diego v Southern Cal. Tel. Corp.* (1954) 42 C2d 110, 266 P2d 14 (injunction stayed in telephone franchise case); *Tahoe Keys Prop. Owners Ass'n v State Water Resources Control Bd.* (1994) 23 CA4th 1459, 1473, 28 CR2d 734 (public interest considered when plaintiff sought to enjoin public officers and agencies in performance of their duties). Public interest may demand that an injunction issue, even though the party seeking relief would not be entitled to it personally. See *Kofsky v Smart & Final Iris Co.* (1955) 131 CA2d 530, 281 P2d 5 (injunction restraining sale of cigarettes at less than cost issued on public policy grounds, despite plaintiff's "unclean hands"). Public interest may also demand that an injunction not issue, for example, if harm may result when enjoining public officers or agencies from performing their duties. *Tahoe Keys Prop. Owners Ass'n v State Water Resources Control Bd., supra.*

The court may also balance the conveniences between the parties. See *Hirshfield v Schwartz* (2001) 91 CA4th 749, 760, 110 CR2d 861 (injunction denied in encroachment case); *Diaz v Kay-Dix Ranch* (1970) 9 CA3d 588, 88 CR 443 (injunction denied in farm labor case).

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§32.34 f. Injunctive Relief Sought by Government Entity Under Statute

Traditional equitable conditions for relief need not be shown in a case in which injunctive relief is sought by a government entity under statute. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 196 CR 715. If the statute under which the injunction is sought expressly provides for injunctive relief, the government entity need only show that it is reasonably probable that it will prevail on the merits; a rebuttable presumption of irreparable harm arises as a matter of law. 35 C3d at 72.

PRACTICE TIP: *IT Corp.* represents a significant departure from the traditional two-prong injunction test. This departure is based on the idea that, because a statute proscribes a certain activity, the legislature has already decided that the activity is contrary to public interest, and no additional showing of harm is required.

Some federal courts apply this principle regardless of whether the moving party is a government entity. See, *e.g., Trailer Train Co. v State Bd. of Equalization* (9th Cir 1983) 697 F2d 860, 869 ("standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief"). Given this well-established rule in the federal courts, it seems appropriate for California litigants to seek to extend the rule of *IT Corp.* to nongovernmental parties.

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§32.35 g. Moving Party Must Show Likelihood of Success on Merits

In determining whether to grant or deny a preliminary injunction, the court does not adjudicate the ultimate rights in controversy, but it must consider the likelihood of the plaintiff's ultimately prevailing in the case. *Pleasant Hill Bayshore Disposal, Inc. v Chip-It Recycling, Inc.* (2001) 91 CA4th 678, 696, 110 CR2d 708. A preliminary injunction will ordinarily not issue unless the moving party shows that there is a "likelihood of success on the merits." *Cohen v Board of Supervisors* (1985) 40 C3d 277, 219 CR 467 (preliminary injunction denied). See also *Thayer Plymouth Ctr. v Chrysler Motors Corp.* (1967) 255 CA2d 300, 63 CR 148 (preliminary injunction denied in contract case because plaintiff's remedy was likely to be damages, not permanent injunction). Therefore, an injunction should not issue when there is no possibility of success even if issuing the injunction might prevent irreparable harm, such as correcting further "self-help" action by a party. *Teachers Ins. & Annuity Ass'n v Furlotti* (1999) 70 CA4th 1487, 83 CR2d 455 (trial court incorrectly granted mandatory preliminary injunction requiring party to remove fence it had built on "self-help" basis because opposing party had no probability of success on merits). See also *Nelson v Avondale Homeowners Ass'n* (2009) 172 CA4th 857, 861, 91 CR3d 726 (because plaintiff could not establish probability of success on merits, no need for court to consider whether irreparable injury would result).

The trial court's interlocutory decision on the likelihood that the plaintiff will prevail at trial reflects nothing more than the court's evaluation of the controversy based on the record before it at the time of its ruling. *Howard S. Wright Constr. Co. v Superior Court* (2003) 106 CA4th 314, 320, 130 CR2d 641. If the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction despite that party's inability to show that the balance of harm tips in his or her favor. *Common Cause v Board of Supervisors* (1989) 49 C3d 432, 447, 261 CR 574; *Pleasant Hill Bayshore Disposal, Inc. v Chip-It Recycling, Inc., supra*.

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IV. APPLICATION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

§32.36 A. When Appropriate

A temporary restraining order (TRO) is an interim order issued to preserve the status quo, pending a hearing on the application for a preliminary injunction. See CCP §527; *Biasca v Superior Court* (1924) 194 C 366, 228 P 861; *Scripps Health v Marin* (1999) 72 CA4th 324, 334, 85 CR2d 86. A TRO is technically not an injunction, although it has the same force and effect, because it may issue ex parte (see CCP §527; §32.38) without requiring a bond or undertaking (but see §32.56). Generally, a TRO:

- Expires automatically at the end of 15 days or, if good cause is shown, 22 days after its issuance (see CCP §527(d)(1); *Sharpe v Brotzman* (1956) 145 CA2d 354, 302 P2d 668 (relating to former 10-day provision));
- Terminates if a preliminary injunction is denied; or
- Is superseded by issuance of a preliminary injunction (*Houser v Superior Court* (1932) 121 CA 31, 8 P2d 483).

In some situations TROs issued under specific statutory authority may exceed 15 days. For example, Fam C §242(b) provides that certain temporary orders, including orders pertaining to domestic violence, shall expire after 20 days, or after 25 days if good cause is shown.

Whether an order is a TRO or a preliminary injunction is determined by its effect, not its title. *Yellen v Fidelity & Cas. Co.* (1931) 115 CA 434, 1 P2d 1019. If the order states that it is effective "until further order of the court" or "until final judgment on the merits," it is a preliminary injunction and requires a bond regardless of what it is called. See *San Diego Water Co. v Pacific Coast S.S. Co.* (1894) 101 C 216, 35 P 651; *McManus v KPAL Broad. Corp.* (1960) 182 CA2d 558, 6 CR 441.

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B. Moving Party's Procedures

§32.37 1. By Complaint or by Verified Affidavit

Preliminary injunctive relief will issue only on a showing of sufficient grounds, either by verified complaint or by affidavit. CCP §527(a). See *Smith v Stearns Rancho Co.* (1900) 129 C 58, 61 P 662 (showing on amended verified complaint sufficient); *Ancora-Citronelle Corp. v Green* (1974) 41 CA3d 146, 115 CR 879 (error to issue injunction on unverified complaint and insufficient declaration). Thus, the drafting attorney must decide whether the factual showing will be made entirely in the complaint or together with supporting affidavits (or declarations; see CCP §2015.5). Use of the complaint alone presents two problems:

- The complaint's sufficiency is then governed by the rules on oral testimony, with the result that conclusions that otherwise may be acceptable as a matter of pleading will not suffice. *Willis v Lauridson* (1911) 161 C 106, 118 P 530; *Bank of America v Williams* (1948) 89 CA2d 21, 200 P2d 151.
- A verified answer that denies all material allegations can result in denial of injunctive relief unless the complaint sets forth a particularly strong case for such relief. See *Kendall v Foulks* (1919) 180 C 171, 179 P 886; *Jessen v Keystone Sav. & Loan Ass'n* (1983) 142 CA3d 454, 191 CR 104.

For these reasons, most practitioners, rather than drafting the complaint in evidentiary form, use supporting affidavits or declarations to make the required factual showing. See §§32.40-32.44.

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§32.38 2. Special Requirements for Ex Parte Relief

Applications for ex parte temporary restraining orders are governed by Cal Rules of Ct 3.1200-3.1207. Cal Rules of Ct 3.1150(g). If relief is sought ex parte, the application must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of such party if known to the applicant. Cal Rules of Ct 3.1202(a).

If an ex parte application for an order has been made to the court and has been refused in whole or in part, any subsequent application of the same character or for the same relief, even though made on an alleged different state of facts, must include a full disclosure of any previous applications and the court's actions. Cal Rules of Ct 3.1202(b).

An ex parte application must be in writing and include all the following (Cal Rules of Ct 3.1201):

- An application containing the case caption and stating the relief requested;
- A declaration in support of the application making the factual showing required under Cal Rules of Ct 3.1202(c);
- A competent declaration based on personal knowledge of the notice given under Cal Rules of Ct 3.1204(a);
- A supporting memorandum; and
- A proposed order.

Ex parte motions and orders to show cause are discussed in chap 13.

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§32.39 3. Verification

If any part of the pleader's factual showing is made in the complaint, the complaint must be verified. CCP §527(a). An injunction that issues without a verified showing is void and unenforceable. *Ancora-Citronelle Corp. v Green* (1974) 41 CA3d 146, 115 CR 879; *Harlan v Superior Court* (1949) 94 CA2d 902, 211 P2d 942, disapproved on other grounds in *Signal Oil & Gas Co. v Ashland Oil & Ref. Co.* (1958) 49 C2d 764, 775 n5, 322 P2d 149.

Because a verified complaint requires a verified answer (CCP §446), many attorneys prefer to verify the complaint even when the factual showing is made entirely by separate affidavit or declaration. Whenever possible, the client should verify the complaint. See CCP §446.

When a corporate or public agency officer verifies on information and belief, or when the attorney does so because the party is for some reason unable to verify, the complaint cannot be used as an affidavit or declaration establishing the facts alleged. CCP §446. See *Ancora-Citronelle Corp. v Green, supra*. The contrary is true when the facts are within the attorney's or officer's knowledge. *Continental Baking Co. v Katz* (1968) 68 C2d 512, 67 CR 761 (attorney's verification). For further discussion of verification, see chap 15.

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4. Affidavits or Declarations

§32.40 a. Which to Use

Provisional injunctive relief may be obtained only "upon a verified complaint, or upon affidavits." CCP §527(a). Instead of affidavits, many attorneys prefer to use witness declarations (or certifications) under penalty of perjury as authorized by CCP §2015.5. See form of declaration in §32.153 and see CCP §2015.5(a). Even if witnesses are out of state, declarations in a slightly different form may be used. See form in CCP §2015.5(b).

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b. Contents

§32.41 (1) Showing Required

Declarations in support of an application for a temporary restraining order (TRO) must show that denial will result in irreparable injury to the moving party before the matter can be heard on notice (CCP §527(c)), *i.e.,* within the next 16 court days or other applicable notice period. See CCP §1005(b); Cal Rules of Ct 3.1300(a). This requirement is jurisdictional. See *Ancora-Citronelle Corp. v Green* (1974) 41 CA3d 146, 115 CR 879. Accordingly, the facts stated should clearly show the need for quick action.

The declarations should be directed at convincing the court that irreparable injury will result if injunctive relief is not granted. The declarations must set forth the *facts* showing immediate and irreparable injury; conclusory allegations of irreparable injury are inadequate. The court will often not address the question of the likelihood of the moving party's prevailing on the merits until it is satisfied that that party will incur the requisite level of injury. See *Cohen v Board of Supervisors* (1986) 178 CA3d 447, 225 CR 114.

NOTE: The TRO is not a favored remedy. It is generally sought on extremely short notice and requires opposing counsel to make a hurried response under pressure. For this reason, it should be requested only in the most urgent circumstances. Declarations should be directed toward persuading the judge that the moving party will be irreparably injured if required to wait for the regular motion calendar before obtaining the relief sought.

The declarations should state specific facts within the declarant's knowledge, recited in words he or she would use if called to testify. Hearsay and conclusory statements, inadmissible if the declarant were to testify personally in court, are generally insufficient to support a provisional injunction, although they may be considered if no objection is made. *Haskell v Carli* (1987) 195 CA3d 124, 240 CR 439. The declaration must be in such form that criminal sanctions for perjury would apply when facts declared to be true are in fact untrue or are not known to be true. *Ancora-Citronelle Corp. v Green, supra* (affidavit based on information or belief insufficient to support preliminary injunction).

PRACTICE TIP: Counsel should also bear in mind that the declarations can be used to impeach a witness who later testifies to the contrary.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.42 (2) Ex Parte Relief

§32.42 (2) Ex Parte Relief

If the relief is sought ex parte, the applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte. Cal Rules of Ct 3.1202(c).

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§32.43 (3) Attachments

When they are relevant, any written documents (*e.g.,* contracts) should be attached to the declarations. If location or physical circumstances are necessary to determining the nature and extent of injunctive relief, any available diagrams and photographs should be attached to the declarations. This type of evidence might be used, *e.g.,* in cases involving trespasses to land, water diversion, or acts causing environmental pollution. Plans, drawings, photographs, or other documents must be submitted when the injunction concerns picketing, encroachments, or easements. See Cal Rules of Ct 3.1151.

PRACTICE TIP: All accompanying declarations should include a statement that any attached diagrams or photographs accurately depict the events or conditions at a particular time.

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§32.44 (4) Statement of Prior Application

If an earlier application for a restraining order has been made and denied, the attorney must file a declaration disclosing that fact and stating any new facts that have developed to justify the new application. CCP §1008. See Cal Rules of Ct 3.1150(e) (application for TRO or OSC must state whether previous application for similar relief has been made and, if so, result of application). Failure to do so may be grounds for revocation of the TRO on an ex parte motion. CCP §1008(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.45 5. Supporting Memorandum

§32.45 5. Supporting Memorandum

Although apparently not required (see CCP §527), it is good practice, and most judges will expect, that a supporting memorandum accompany applications for temporary restraining orders (TROs). The format requirements for a memorandum are set forth in Cal Rules of Ct 3.1113

By filing a supporting memorandum before a TRO issues, the attorney provides the court with the legal basis for the application at the earliest possible date. If necessary, a supplementary memorandum may be filed before the show cause hearing. See CCP §527.

JUDICIAL PERSPECTIVE: In TRO proceedings, the judge often reviews the moving papers only moments before the matter is heard. Brevity and precision are therefore even more crucial than at other times. The memorandum should try to persuade the judge that the moving party will face severe consequences if forced to wait for the regular motion calendar before obtaining the relief sought. Without a showing of immediate injury, the judge may conclude that the moving party is merely trying to "cut in line" by circumventing regular notice procedures.

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§32.46 6. Form of Temporary Restraining Order and Order to Show Cause

Counsel must prepare a proposed temporary restraining order (TRO) and an order to show cause (OSC). They may be in separate documents to make it easier on the judge if he or she denies the TRO and issues only the OSC. The prevailing practice, however, is to set forth the proposed TRO and OSC separately, but in a single document. The OSC must be stated first. The restraining language must be separately stated in the OSC and TRO and may not be incorporated by reference. Cal Rules of Ct 3.1150(c). The TRO portion of the document should precisely delineate the relief the applicant is seeking. Cal Rules of Ct 3.1150(c).

PRACTICE TIP: It is also advisable to prepare brief prefatory statements setting forth the legal basis of the judge's determination (*e.g.,* "the court finds that applicant is likely to succeed on the merits"). These precautions should help to avoid a finding on review (by appeal or writ) that the trial court failed to make the requisite findings for a TRO.

The TRO must describe the activities to be enjoined prior to the hearing. Cal Rules of Ct 3.1150(c). The proposed OSC must contain blank spaces for the time and manner of service on the responding parties; must describe the injunction sought; and must set forth the date of the hearing on the preliminary injunction with blank spaces for the time and manner of service, the date when the proof of service must be delivered to the court along with a briefing schedule, and, if applicable, the expiration date for the TRO. Cal Rules of Ct 3.1150(c).

A TRO or OSC application must state whether any previous application for similar relief has been made, and the results of that application. Cal Rules of Ct 3.1150(e). For further discussion, see §32.44.

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§32.47 7. Filing and Service

If the action is initiated on the same day a TRO or an OSC is sought, the complaint must be filed first. The moving party must provide a file-stamped copy of the complaint to the judge who will hear the application. If an application for a TRO or OSC is made in an existing case, the moving party must request that the court file be made available to the judge hearing the application. Cal Rules of Ct 3.1150(b).

PRACTICE TIP: It is a good idea for counsel to provide a copy of the complaint with the papers in the event the file is unavailable for any reason.

The application may be made in chambers or, in emergencies, at the judge's home if the court is not in session. See CCP §166; *People v Valenzuela* (1968) 259 CA2d 826, 66 CR 825. It may be signed by the judge and served on any day, including Sundays and holidays. CCP §134(b).

Code of Civil Procedure §527 does not require that the responding party be served with the complaint or moving papers before they are presented to the judge. However, Rule 3.1203 requires the moving party seeking an ex parte order to notify all parties of the application and the relief sought by at least 10 a.m. of the court day before the day of ex parte appearance, absent exceptional circumstances that justify a shorter time for notice. The moving party must also file a declaration either showing that this advance notice was given and was attempted unsuccessfully in good faith, or supplying reasons why notice should not be given. See Cal Rules of Ct 3.1204(b). Advance notice is not required when "exceptional circumstances" can be shown. Cal Rules of Ct 3.1203(a). Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless such service has been made. Cal Rules of Ct 3.1206. For further discussion of ex parte relief, see chap 13.

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8. Notice

§32.48 a. Affidavit or Declaration Regarding Notice

Although an application for a temporary restraining order (TRO) is made ex parte, without formal notice, the applicant or his or her attorney must certify in an affidavit or declaration that, (1) within the applicable time period of Cal Rules of Ct 3.1203(a), he or she gave informal notice; (2) a good faith but unsuccessful attempt was made to give informal notice, specifying the efforts made to inform the opposing party; or (3) for the reasons specified (*e.g.,* notice would result in irreparable harm or would defeat the purpose of the proposed order), the applicant should not be required to give informal notice. CCP §527(c)(2); Cal Rules of Ct 3.1204(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.49 b. Time of Notice

§32.49 b. Time of Notice

The moving party must notify all other parties of the time and place of the hearing and of the relief sought by at least 10 a.m. on the court day before the day of the hearing unless there is a showing of exceptional circumstances that justify a shorter time. A party seeking an ex parte order in an unlawful detainer proceeding may provide shorter notice as long as the notice given is reasonable. Cal Rules of Ct 3.1203(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.50 c. Filing and Presentation by Clerk

§32.50 c. Filing and Presentation by Clerk

The clerk must not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration, even if the applicant failed to comply with the notification requirements in Cal Rules of Ct 3.1203(a). Cal Rules of Ct 3.1205.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.51 d. Contents of Notice

§32.51 d. Contents of Notice

When notice of an ex parte application is given, the person giving notice must state with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application, and must attempt to learn whether the opposing party will appear to oppose the application. Cal Rules of Ct 3.1204(a).

Every ex parte application must be accompanied by a declaration regarding notice that states (Cal Rules of Ct 3.1204(b)):

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected; or
- Why notice should not be required.

If notice was provided later than 10 a.m. the court day before the ex parte appearance, the declaration regarding notice must explain (Cal Rules of Ct 3.1204(c)):

- The exceptional circumstances that justify the shorter notice; or
- In unlawful detainer proceedings, why the notice given is reasonable.

PRACTICE TIP: Telephonic notice should be immediately confirmed by letter and "faxed" to the opposing party, if possible.

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§32.52 e. Failure to Notify Adverse Party in First Amendment Cases

Failure to notify the adverse party of an application for a TRO may not only violate a court rule, but may also result in an error of constitutional dimension if they restrain First Amendment rights. See, *e.g., Carroll v President & Comm'rs of Princess Anne* (1968) 393 US 175, 21 L Ed 2d 325, 89 S Ct 347 (ex parte order restraining rallies or meetings of "white supremacist" group held to violate First Amendment when no showing made of attempt to notify); *United Farm Workers v Superior Court* (1975) 14 C3d 902, 122 CR 877 (ex parte order restricting union's access to employees and limiting picketing violated First Amendment and Cal Const art I, §2); *Skinner v Superior Court* (1977) 69 CA3d 183, 137 CR 851 (ex parte TRO permitting police to take possession of defendant's premises and remove personal property was denial of due process). Orders that restrain exercise of First Amendment rights require either that prior notice be given or that it be shown that a reasonable effort was made to do so. Notice in such cases may be formal or informal and may be given either to defendant or to defendant's attorney. *United Farm Workers v Superior Court, supra*.

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9. Hearing

§32.53 a. Setting for Show Cause Hearing

When an order to show cause and temporary restraining order (TRO) issue, the show cause hearing (or "return date") must be set for the earliest day convenient to the court, but no later than 15 days (or, for good cause, 22 days) after the date of the order. CCP §527(d)(1). This requirement is jurisdictional; without a waiver, failure to comply renders the show cause order void, and the TRO unenforceable. *McDonald v Superior Court* (1937) 18 CA2d 652, 64 P2d 738.

NOTE: Although the original order is void and must be dissolved on the responding party's motion, the court may, on the plaintiff's reapplication, reissue any previously issued temporary restraining order. The reissued order shall be made returnable on the earliest date convenient to the court within the time limits of CCP §527(d)(1). CCP §527(d)(5).

The return date required by §527(d)(1) may be waived by the responding party. See *International Molders Local 164 v Superior Court* (1977) 70 CA3d 395, 138 CR 794 (waiver by requesting continuance beyond 15-day limit); *West Coast Constr. Co. v Oceano Sanitary Dist.* (1971) 17 CA3d 693, 95 CR 169 (waiver by failure to object to numerous continuances and by participating without objection in delayed hearing).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.54 b. Informal Conference or Hearing

§32.54 b. Informal Conference or Hearing

After opposing counsel has been notified, the court ordinarily conducts an informal conference or a hearing, during which both sides argue the merits of the application. Personal attendance of the moving party or counsel for the moving party is required for the issuance of a TRO. Cal Rules of Ct 3.1150(d). If the court decides that the TRO will issue, counsel for the responding party may assist the court in setting the amount of the undertaking if one is required.

NOTE: The defendant's appearance to resist an ex parte application for a TRO is not a general appearance and does not preclude a subsequent motion to dismiss for inadequate service. CCP §418.11.

On ex parte motions and orders to show cause generally, see chap 13.

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§32.55 c. Grant or Denial of TRO; Service of Orders

After it is signed by the judge, the TRO, order to show cause (OSC), and all supporting documents must be personally served on the respondent within the time ordered by the court. If the court does not specify a time, the OSC and supporting papers must be served within 5 days after issuance of the TRO or two days before the hearing, whichever is earlier. CCP §527(d)(2). A restraining order cannot be enforced unless the responding party or related person has been served. See *Phillips v Superior Court* (1943) 22 C2d 256, 137 P2d 838 (no showing that divorce defendant was served or otherwise had knowledge of custody order); *Chrysler Credit Corp. v Waegele* (1972) 29 CA3d 681, 105 CR 914 (service on corporate officer adequately notified corporate defendant). The usual practice is to serve the responding party as soon as possible after the TRO issues.

If a TRO is issued but the hearing is not set within 15 days (CCP §527(d)(1)) or if the papers are not served within the time required by CCP §527(d)(2), the court may still hear the OSC if the moving and supporting papers are served as required by CCP §1005 (16 court days before the hearing date). CCP §527(f).

Even if the court denies the application for a TRO, an OSC why a preliminary injunction should not issue, returnable within the time limits stated above, may still issue. If the OSC is issued without a TRO, the court may hear an application for a preliminary injunction if the moving and supporting papers are served within the time required by CCP §1005 (16 court days before the hearing date). CCP §527(f).

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§32.56 10. Bond or Undertaking

Whether to require a bond or an undertaking when issuing a temporary restraining order (TRO) is usually discretionary with the court but it is considered better practice to do so. *Biasca v Superior Court* (1924) 194 C 366, 228 P 861. See also *Allen v Pitchess* (1973) 36 CA3d 321, 329, 111 CR 658. The court must require an undertaking before issuing a TRO in an action for a claim and delivery of personal property. The undertaking must be in an amount not less than twice the defendant's interest in the property. CCP §515.010.

When a bond or undertaking is required, the TRO does not become effective until it is given. *Heyman & Co. v Landers* (1859) 12 C 107. See also *Armstrong v Superior Court* (1916) 173 C 341, 159 P 1176. Thus, it is advisable to make prior arrangements for an undertaking. The bond or undertaking provides security for the responding party for recovery of damages if the court later decides that the TRO was unwarranted.

Generally, sureties on the undertaking for a TRO may be either personal (CCP §995.510) or by admitted surety insurers (CCP §995.610). The responding party may challenge the sureties' sufficiency under the procedures established by CCP §529. This challenge must be made within 5 days after service of the TRO (CCP §529) by noticed motion under the procedures set forth under CCP §§995.910-995.960. See §§32.99-32.103.

PRACTICE TIP: Because there is no statute governing undertakings on a TRO (see CCP §529; injunction only), and because the sufficiency of individual sureties is often challenged, the court may refuse to accept individual sureties on the TRO and direct that the sureties be admitted surety insurers.

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C. Responding Party's Procedures

§32.57 1. Before Order Issues; Procedures

Counsel usually receives less than 24 hours' notice before an application for a temporary restraining order (TRO) is made. See discussion in §32.49. When receiving notice, counsel for the responding party should demand immediate delivery of the applicant's moving and supporting papers. If the applicant refuses, this noncooperation can be used in arguments seeking to defeat the TRO.

- **Gather facts.** It is essential for the attorney to develop a careful and complete compilation of the facts from the client.
- **Discuss legal fees and costs.** The attorney should be sure at the outset that the client understands the costs of litigation, particularly injunctive proceedings, because the information may affect the client's decision on how to respond to the suit. On written representation agreements with client, see chap 3.
- **Consider settlement.** After eliciting the facts from the client, the attorney should consider whether a settlement is feasible. Counsel might consider advising the client to discontinue the disputed activity voluntarily, thus removing the need for a TRO. See *Lee v Gates* (1983) 141 CA3d 989, 190 CR 682 (no injunction will issue when activity has been voluntarily discontinued and there is evidence that it will not be repeated).
- **Prepare argument for posting bond.** The attorney for the responding party should be prepared to argue the need for a bond and its amount, *i.e.,* how much damage the client is likely to suffer from a wrongfully issued TRO. If bond is set sufficiently high, the plaintiff may be unable to post bond, thus preventing issuance of the TRO.
- **Decide whether to remove case to federal court.** After telephonic notice of the TRO (see §32.51), counsel for the responding party may believe that the case is removable to federal court on federal question or diversity grounds. See chap 22. If so, it is nevertheless logistically difficult to arrange for filing a notice of removal before the hearing on the application for a TRO. If the federal court is geographically close to the state court (as in Orange and Los Angeles counties), counsel who has anticipated the TRO and prepared a notice of removal may be able to file it shortly after being served with the moving papers, or an attempted filing of the notice of removal may be accomplished by associate counsel, an assistant, or a paralegal while the state court judge is reviewing the moving papers.

PRACTICE TIP: Counsel who is aware that an application for a TRO against a client will be made can prepare early for the hearing by drafting opposing declarations to controvert the moving party's anticipated showing. These papers should not be filed, however, until the moving party's declarations have been reviewed and any appropriate adjustments added.

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§32.58 2. After Temporary Restraining Order Issues; Alternatives

Once a temporary restraining order (TRO) has issued, counsel for the responding party should consider:

- **Motion to dismiss under CCP §418.10.** Counsel's appearance at the hearing to resist the TRO does not constitute a general appearance precluding a motion to dismiss for lack of personal jurisdiction. CCP §418.11. See chap 19.
- **Motion for reconsideration under CCP §1008.** This motion is not generally useful, because the show cause hearing often takes place before the motion can be adequately noticed and heard, absent an order shortening time.
- **Motion to dissolve or modify TRO under CCP §§532(a), 533.** Like the motion for reconsideration, this procedure is not terribly valuable, because the show cause hearing will probably be scheduled sooner than the motion can be heard, absent an order shortening time. See 6 Witkin, California Procedure, *Provisional Remedies* §§402, 408 (5th ed 2008).
- **Filing appeal, with or without application for stay pending appeal.** An appeal automatically stays a mandatory injunction. *Paramount Pictures Corp. v Davis* (1964) 228 CA2d 827, 835, 39 CR 791. See §§32.127-32.129.
- **Motion for change of venue under CCP §396b.** The court has no jurisdiction to proceed with the show cause hearing until the venue motion has been heard and decided. *County of Riverside v Superior Court* (1968) 69 C2d 828, 73 CR 386. See chap 20.
- **Removing action to federal court.** If diversity lies, or if a federal claim is made under the state court's concurrent jurisdiction, the responding party may wish to remove the matter to federal court. For example, many pension and health benefit claims filed in state court are removed to federal court because they are governed by federal law (see 29 USC §1132). See, *e.g., Metropolitan Life Ins. Co. v Taylor* (1987) 481 US 58, 95 L Ed 2d 55, 107 S Ct 1542.
- **Motion for order shortening time for discovery.** It may be advisable to depose the plaintiff or third party witnesses before the preliminary injunction hearing. On orders shortening time generally, see CCP §2025.270. See also California Civil Discovery Practice §§5.52-5.54, 15.9 (4th ed Cal CEB 2006).
- **Motion for continuance.** The opposing party is entitled as a matter of right to a continuance. See CCP §527(d)(4).
- **Moving to disqualify judge under CCP §170.6** (peremptory challenge).

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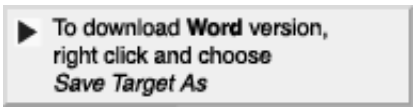
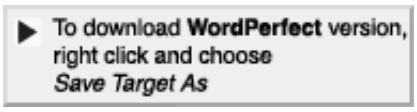
Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.59 D. Checklist: Temporary Restraining Order (TRO)

§32.59 D. Checklist: Temporary Restraining Order (TRO)





To obtain temporary restraining order (TRO) and hearing on order to show cause (OSC) regarding preliminary injunction:

- Prepare and file:
- Complaint or cross-complaint (have summons issued). See §32.37; see form in §32.152.
- Affidavits or declarations in support of OSC and TRO (and preliminary injunction). See §§32.40-32.44, 32.48; see form in §32.153.
- Supporting memorandum. See §32.45.
- Proposed TRO and OSC, which are usually combined in a single document filed with proof of service after signature by judge. See §32.154.
- Record:
- Lis pendens, if real property is involved. See California Real Property Remedies and Damages, chap 13 (2d ed Cal CEB 2002).
- Notify:
- Attorney for responding party or, if unknown, responding party of hearing on TRO. See §§32.48-32.52.
- Serve on responding party after ex parte hearing on TRO:
- Copies of complaint or cross-complaint, summons, affidavits or declarations, memorandums, and TRO, within time ordered by court or within the earlier of five days after issuance of TRO or two days before show cause hearing if court does not specify. CCP §527(d)(2). See §32.55.
- Order to show cause, as directed by court. See §§32.55, 32.154.

NOTE: There is no requirement that the party seeking a TRO prepare and file an "Application for Temporary Restraining Order," but attorneys often do so. Such a document is similar to a notice of motion and directs the court's attention to the nature of the action and the remedy sought. CCP §527(d)(2).

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V. MOTION FOR PRELIMINARY INJUNCTION

§32.60 A. When Appropriate

A preliminary injunction is usually prohibitory in effect and issues to preserve the status quo pending final determination of an action on its merits. See *Continental Baking Co. v Katz* (1968) 68 C2d 512, 528, 67 CR 761; *Dodge, Warren & Peters Ins. Servs. v Riley* (2003) 105 CA4th 1414, 1418, 130 CR2d 385. Except as otherwise provided, a bond or an undertaking is required to protect the enjoined party. CCP §529. See §32.92. After a trial on the merits, a preliminary injunction is either merged into a permanent injunction or extinguished if a permanent injunction is denied. See *Shahen v Superior Court* (1941) 46 CA2d 187, 115 P2d 516.

A decision to issue or deny a preliminary injunction is not an adjudication of ultimate issues in the action. *Cohen v Board of Supervisors* (1985) 40 C3d 277, 286, 219 CR 467. However, it may indicate what the final judgment will be. See *Continental Baking Co. v Katz, supra*. See also *State Bd. of Barber Exam'rs v Star* (1970) 8 CA3d 736, 87 CR 450 (constitutional issues will not be decided at preliminary injunction hearing unless parties so stipulate). The court considers such factors as whether there is a reasonable probability that the moving party will ultimately prevail (see §32.35), whether the moving party will suffer irreparable injury before trial on the merits if the injunction does not issue (see §32.31), and what the impact on the respondent and third parties will be if the injunction issues (see §32.33). The court's decision is discretionary. *Lagunitas Water Co. v Marin County Water Co.* (1912) 163 C 332, 125 P 351. It will be reversed on appeal only if abuse of discretion is shown. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 196 CR 715; *Gosney v State* (1970) 10 CA3d 921, 89 CR 390.

The procedures of CCP §527(a) have withstood attack on the ground that they permit an unconstitutional prior restraint when used to prevent the exhibition of allegedly obscene films (*People ex rel Gow v Mitchell Bros. Santa Ana Theater* (1981) 118 CA3d 863, 173 CR 476) and as an unconstitutional prejudgment attachment (*Chrysler Credit Corp. v Waegele* (1972) 29 CA3d 681, 105 CR 914).

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B. Moving Party's Procedures

§32.61 1. Notice of Motion or Order to Show Cause

A preliminary injunction can be granted only on notice and hearing. CCP §527(a). An injunction issued without prior notice to the responding party is void, even if issued on the court's own motion. *Thompson & Holmes Ltd. v Superior Court* (1960) 184 CA2d 306, 7 CR 386. Although the responding party may waive the notice requirement by general appearance (*Lacey v Bertone* (1949) 33 C2d 649, 203 P2d 755) or by participation at the hearing without objection (*Walberg v Underwood* (1919) 39 CA 748, 180 P 55), an oral motion for injunctive relief at a hearing at which the defendant is present does not constitute adequate notice, nor does the defendant's presence constitute a waiver (*Oksner v Superior Court* (1964) 229 CA2d 672, 40 CR 621). A voluntary waiver should be supported by a written stipulation or by a formal minute entry of an oral waiver made in court. See *Smith v Superior Court* (1923) 64 CA 722, 222 P 857.

If a temporary restraining order (TRO) is in effect, notice of hearing must be given by order to show cause (OSC). CCP §527. See §32.46; form in §32.154. The opposing party has a statutory right to one continuance; if the opposing party obtains a continuance, the TRO remains in effect until the continued hearing date. CCP §527(d)(4).

If a TRO has not issued, notice may be given by either notice of motion or OSC. See CCP §§527(a) (requiring notice generally), 528 (requiring notice or order to show cause after party has answered).

PRACTICE TIP: Because personal service of an order to show cause subjects a party who has not appeared in the action to the court's jurisdiction (*Chrysler Credit Corp. v Waegele* (1972) 29 CA3d 681, 105 CR 914), the order to show cause is generally used when the responding party has not appeared in the action. Otherwise, a noticed motion may be preferred because it gives the attorney a choice of hearing dates.

For form of notice of motion, see §32.155. See generally 6 Witkin, California Procedure, *Proceedings Without Trial* §§60-62 (5th ed 2008).

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§32.62 2. Complaint, Declarations, Supporting Memorandum, Order, Undertaking

In addition to notice of motion (see §32.155), moving papers for a preliminary injunction, like a temporary restraining order (TRO), include the complaint (see §32.152), declarations (see §32.153), and the supporting memorandum (see §32.72) that will be relied on by the moving party at the hearing. CCP §527(a).

PRACTICE TIP: Declarations and supporting memorandum prepared for a TRO may be used in support of the preliminary injunction, as appropriate.

Unlike an application for a TRO, an application for a preliminary injunction must be accompanied by a supporting memorandum. See CCP §527(a); Cal Rules of Ct 3.1113(a). The absence of a memorandum may be grounds to deny injunctive relief. Cal Rules of Ct 3.1113(a).

Counsel should also prepare a written order for preliminary injunction (see §32.156) and a written undertaking which the court must require when issuing a preliminary injunction (see §32.92).

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3. Filing and Service

§32.63 a. Order to Show Cause

When an order to show cause (OSC) issues with a temporary restraining order (TRO), they are usually served together personally on the responding party as soon as possible after issuance. See discussion in §32.58. The OSC, together with a copy of the complaint, all declarations used, and the moving party's memorandum must in any event be served on the responding party within the time ordered by the court or, if the court does not specify a time, within 5 days after issuance of the TRO or 2 days before the hearing, whichever is earlier. CCP §527(d)(2). See also *McDonald v Superior Court* (1937) 18 CA2d 652, 64 P2d 738 (CCP §527 satisfied by service more than 2 days before date of continued hearing). Otherwise, unless the responding party waives objection by participating at the hearing (see *Remillard Brick Co. v Dandini* (1941) 47 CA2d 63, 117 P2d 432), the court on its own motion must dissolve the TRO and summarily deny the preliminary injunction. CCP §527; *Green v Superior Court* (1924) 65 CA 237, 223 P 582.

An applicant who is unable to serve the opposing party within the time required by §527(d)(2) may file an affidavit to that effect and ask the court to reissue any previously issued TRO. CCP §527(d)(5). The reissued order to show cause must be made returnable as provided in CCP §527(d)(1). A new fee may not be charged for reissuing the order.

If an OSC issues without a TRO, and the responding party has not previously appeared or been personally served, the OSC should be served personally. See chap 17 (service of process). See also *Chrysler Credit Corp. v Waegele* (1972) 29 CA3d 681, 105 CR 914 (service of OSC equivalent to service of summons for purpose of subjecting respondent to court's jurisdiction). If the responding party has previously been served or appeared, the OSC serves as a notice of motion and may be served on the attorney. See chap 18 (service of papers in pending actions). See also 6 Witkin, California Procedure, *Proceedings Without Trial* §§60-62 (5th ed 2008).

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§32.64 b. Notice of Motion

When, instead of an order to show cause, notice of motion for preliminary injunction is used (see §32.155), filing and service of notice are governed by the same rules that apply to other motions. See CCP §527(f). See chap 12. See also 6 Witkin, California Procedure, *Provisional Remedies* §§368-369 (5th ed 2008). Code of Civil Procedure §1005 and Cal Rules of Ct 3.1300, which govern motions generally, require that supporting papers be served at least 16 court days before the hearing if papers are served personally, increased by 5 calendar days if served by mail to a California address, and longer periods if mailed outside California. CCP §1005(b).

On ex parte applications for order shortening time, see chap 10. On required notice when motion is served by mail, see chap 12.

Counsel should also make sure that the return of service is complete and properly specifies the papers served. For noticed motions, proof of service must be filed at least five calendar days before the date set for hearing. Cal Rules of Ct 3.1300(c).

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§32.65 4. Preparing for Hearing

Preliminary injunctions will be issued or denied according to the factual showing made by verified complaint or affidavit (or declaration; see §32.62). CCP §527(a).

PRACTICE TIP: Counsel for the moving party should prepare for the hearing by reviewing these papers to ensure that they contain competent evidence. If any material evidence is objectionable, the defect should be cured by new declarations or other available testimony. Counsel must also determine whether reply declarations, depositions, or other testimony are necessary to meet the responding party's anticipated evidence.

Oral testimony is not permitted at law and motion hearings except as the court allows on a showing of good cause. Cal Rules of Ct 3.1306(a). See also *Continental Baking Co. v Katz* (1968) 68 C2d 512, 67 CR 761. An application to present oral testimony must be submitted in writing at least 3 court days before the hearing. Cal Rules of Ct 3.1306(b). The application must set forth the nature and extent of the evidence and make a time estimate for the hearing. If the application is filed less than 5 court days before the hearing, the moving party must make sure that the other parties are served at least 2 days before the hearing. Cal Rules of Ct 3.1306(b).

If oral testimony is allowed and will be used, counsel should arrange for issuance and service of subpoenas. If a deposition will be needed, counsel should move the court for an order shortening time for discovery. See CCP §2025.270. See generally California Civil Discovery Practice §§5.16, 5.63-5.69, 15.9 (4th ed Cal CEB 2006). Counsel should also arrange for a prompt transcript of the reporter's notes in order to ensure a timely filing.

Counsel should prepare the proposed order for preliminary injunction (see §32.156) and any declaration bearing on the amount of the undertaking (see §32.153) to be ordered if the injunction issues.

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C. Responding Party's Procedures

§32.66 1. Papers to Prepare

To prepare for a hearing on an order to show cause or motion for preliminary injunction, the attorney for the responding party should consider the possible alternatives and prepare and file as appropriate:

- Motion to disqualify judge (peremptory challenge). CCP §170.6. See §32.67.
- Motion to shorten time for discovery. See §32.57.
- Verified answer to complaint or cross-complaint. See §32.69-32.70.
- Demurrer to complaint or cross-complaint, with memorandum. See §32.68.
- Affidavits or declarations under penalty of perjury in opposition to application for preliminary injunction. See §32.71.
- Memorandum in opposition to preliminary injunction. See §32.72.
- Motion to strike or objection to evidence. See §32.74.

Copies of the documents prepared should be served on counsel for the moving party. See §§32.63-32.64.

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§32.67 a. Motion to Disqualify Judge

The defendant may consider a peremptory challenge under CCP §170.6. See generally 2 Witkin, California Procedure, *Courts* §§133-136 (5th ed 2008). The peremptory challenge is available before a preliminary injunction hearing even if counsel appeared at an earlier ex parte hearing at which an application for a temporary restraining order was granted. *International Union of Operating Eng'rs v Superior Court* (1989) 207 CA3d 340, 254 CR 782; *Landmark Holding Group, Inc. v Superior Court* (1987) 193 CA3d 525, 238 CR 475.

For the timing of peremptory challenge under the trial delay reduction rules that are inconsistent with CCP §170.6, see *International Union of Operating Eng'rs v Superior Court, supra*.

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§32.68 b. Demurrer

Failure of the complaint to state a cause of action is grounds for denial of injunctive relief. See *Bank of America v Williams* (1948) 89 CA2d 21, 200 P2d 151. Counsel for defendant should consider filing a demurrer, accompanied by a memorandum in support of the demurrer (see Cal Rules of Ct 3.1112(a), 3.1113), whenever grounds exist. On demurrers generally, see chap 23.

A demurrer will not bar an injunction if (1) the defect in the complaint can be cured by amendment (*Handyspot Co. v Buegeleisen* (1954) 128 CA2d 191, 274 P2d 938) or (2) the demurrer is overruled and the respondent is given leave to answer (*People ex rel Savage v Los Angeles Trust Deed & Mortgage Exch.* (1961) 190 CA2d 66, 12 CR 144).

JUDICIAL PERSPECTIVE: Courts usually prefer hearing a demurrer at the same time the order to show cause is heard. A demurring party should try to arrange this and should seek a continuance of the hearing date if appropriate. See, *e.g.*, Los Angeles Ct R 9.6 (demurrer filed before hearing on order to show cause or motion for preliminary injunction heard by judge who will hear preliminary injunction).

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c. Answer

§32.69 (1) When to File

The defendant has 30 days in which to answer after service of the complaint. CCP §412.20. On answers generally, see chap 25. The usual practice is not to file an answer before the preliminary injunction hearing. Rather, any objections that appear on the face of the complaint can be raised by demurrer. See §32.68. Any factual showing in opposition to the moving party's application can be made by affidavit or declaration. See §32.71.

If counsel still elects to use the answer as a declaration in opposition to the application for a preliminary injunction (see §§32.69-32.70), the answer must be served on the applicant at least 2 days before the hearing to prevent the applicant from seeking a continuance on account of late service. CCP §527(e). See §§32.75-32.78. The answer and a demurrer, if any, may be filed together. CCP §430.30(c).

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§32.70 (2) Verification

The answer, when filed, must be verified if (1) the complaint is verified (CCP §446) or (2) the answer is to serve as a declaration at the hearing (CCP §§527, 2015.5).

PRACTICE TIP: If the complaint is not verified, the better practice is to prepare declarations in opposition to the moving party's application. On verified answers generally, see chap 25.

If an application for injunctive relief is based solely on a verified complaint, a verified answer denying the essential allegations will usually result in denial of a preliminary injunction. See *City & County of San Francisco v Market St. Ry.* (1950) 95 CA2d 648, 213 P2d 780. This is not the case, however, if the complaint establishes an unusually strong case for injunctive relief. See *Lutz v Western Iron & Metal Co.* (1923) 190 C 554, 213 P 962 (injunction granted in trade name case despite verified denials). See also *Garner v Journeyman Barbers, Local 573* (1963) 223 CA2d 101, 35 CR 693 (dictum). For further discussion, see 6 Witkin, California Procedure, *Provisional Remedies* §§379-380 (5th ed 2008).

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§32.71 d. Affidavits or Declarations

In rare instances, the responding party may resist an application for preliminary injunction by answer and demurrer alone (see §32.68), but it is usually advisable to use supplementary affidavits or declarations. On which to use, see §32.40. For form of declaration, see §32.153.

PRACTICE TIP: To assist the court in fixing the amount of the undertaking if the injunction issues, the attorney for the responding party should prepare declarations bearing on the amount of damages the client will sustain between issuance of the preliminary injunction and final judgment.

Because the show cause hearing is essentially evidentiary, declarations containing probative facts within the declarant's knowledge are always more effective than an answer that simply denies ultimate facts pleaded in the complaint. See *Schwartz v Arata* (1920) 45 CA 596, 188 P 313.

PRACTICE TIP: If an answer has been filed, supporting declarations should supplement, by a factual showing, general denials and affirmative, equitable, or other defenses raised by the answer. The declarations should focus particularly on the equities. If the plaintiff has presented exhibits or documentary evidence that is slanted or that can be controverted, counsel should present contradictory documentary evidence with a declaration supporting its accuracy.

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§32.72 e. Memorandum

When a demurrer or motion to strike (see §§32.68, 32.74) is filed, it must be accompanied by a memorandum in support of each ground stated in the demurrer or motion. Cal Rules of Ct 3.1112(a), 3.1113(a).

In addition, a separate memorandum, although apparently not required when responding to an order to show cause (see CCP §527), should be used to oppose the injunction on its merits whether the injunction is sought by show cause order or by motion. The facts of applicable cases should be summarized in the memorandum, and important cases should be copied and attached. See Cal Rules of Ct 3.1113. For discussion of formal requirements of a memorandum, see §§12.30-12.42.

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§32.73 2. Filing and Service

If a demurrer is to be heard at the preliminary hearing, the attorney should serve and file the demurrer and accompanying memorandum at least 16 court days prior to the hearing or obtain an order shortening the time. CCP §1005(b); Cal Rules of Ct 3.1300(b). See chap 13.

Opposing declarations (and the answer, if it will be used as a declaration) must be served on the moving party at least 2 days before the show cause hearing (CCP §527(e)) and at least 9 court days before a hearing on a motion for an injunction (CCP §1005(b); Cal Rules of Ct 3.1300(a)). Opposition to a motion for an injunction must be served by personal delivery, fax, express mail, or other method reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c).

On the respondent's procedures for continuance when the moving party waits until two days before the hearing to serve the complaint and supporting declarations, see §32.76.

JUDICIAL PERSPECTIVE: Despite the rules that permit such late filing, it is better practice to have all papers filed as early as practicable to give the judge enough time to evaluate the responding party's papers.

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§32.74 3. Evidentiary Objections; Motions to Strike

In preparing for the show cause hearing, the respondent's attorney should review the plaintiff's pleading and declarations for inadmissible evidence and prepare evidentiary objections or a motion to strike. Some courts allow counsel to orally object to incompetent evidence instead of entering a motion to strike. The attorney should ascertain local procedure prior to the hearing. On motions to strike generally, see chap 24.

The attorney who wants to take depositions for use at the hearing should immediately move the court for an order shortening time for discovery. See CCP §2025.270. On the deposition notice and order shortening time, see generally California Civil Discovery Practice §§5.52-5.54, 15.9 (4th ed Cal CEB 2006). If, in addition to opposing declarations and depositions, oral testimony will be permitted at the hearing (see chap 12), counsel should obtain subpoenas as necessary.

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D. Hearing on Preliminary Injunction

1. Request for Continuance

§32.75 a. By Applicant

If a temporary restraining order (TRO) is in effect, the moving party must be ready to proceed at the show cause hearing; otherwise, the matter will be dropped from the calendar and the TRO will be dissolved. CCP §527(d)(3). The hearing usually takes precedence over other calendar matters. CCP §527(e). Not even illness of the moving party's attorney is a ground for a continuance. *Kelsey v Superior Court* (1919) 40 CA 229, 180 P 662. Although the responding party can waive time, for tactical reasons there is usually an unwillingness to do so.

If the moving party has been served with the respondent's affidavits less than two days before the hearing, the court may grant a continuance and, in doing so, may also extend the TRO beyond the 15- or 20-day period prescribed by CCP §527. See CCP §527(e). See, *e.g., City of Los Angeles v Superior Court* (1925) 196 C 445, 238 P 670. However, a moving party is not entitled to a continuance to rebut affidavits filed two days or more before the hearing. CCP §527(a).

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§32.76 b. By Respondent

Except in Family Code matters (CCP §527(g); see Cal Rules of Ct 5.118), a party who is under a TRO has a right to a continuance "for a reasonable period" of at least 15 days or any shorter time requested by the opposing party, to respond to the moving party's showing. CCP §527(d)(4). To protect the moving party, the TRO remains in effect during the period of the continuance. CCP §527(d)(4). See *International Molders Local 164 v Superior Court* (1977) 70 CA3d 395, 138 CR 794 (defendant's request for continuance beyond 15-day restraining order limitation estops defendant from arguing that order has expired). Although the responding party has no right to a continuance when a TRO has not issued (see *Wutchumna Water Co. v Superior Court* (1932) 215 C 734, 12 P2d 1033), the court may grant one for a reasonable period (see generally *Cohen v Herbert* (1960) 186 CA2d 488, 8 CR 922).

If the moving party waits until two days before a show cause hearing to serve papers, as permitted by CCP §527(d)(2), the respondent will usually be unable to comply with CCP §527(a), requiring that opposing declarations be served two days before the hearing, *i.e.,* the same day. In this situation, the responding party can appear at the hearing and demand a continuance to prepare and serve opposing papers. If the responding party chooses instead to serve papers at the hearing, the moving party is entitled to a continuance and may serve rebuttal papers on the hearing date as reset, but the respondent is not entitled to further continuances. See *City of Los Angeles v Superior Court* (1925) 196 C 445, 238 P 670.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.77 c. By Stipulation

§32.77 c. By Stipulation

If a TRO is in effect and the parties stipulate to continuance of the show cause hearing and the TRO, they should notify the court and obtain a court order; otherwise, the order will expire on its own terms.

JUDICIAL PERSPECTIVE: Even when a TRO is in effect, early notice to the court is recommended to relieve the judge from incurring preparation time prematurely. The attorney should check local rules with respect to continuances.

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§32.78 d. On Court's Own Motion

The hearing on the order to show cause takes precedence over all other matters calendared for the same day except for older injunction matters and matters given still greater preference by law. CCP §527(e).

In rare instances, when these matters result in calendar congestion, the court may, on its own motion, continue the hearing over a party's objection. See *River Farms Co. v Superior Court* (1933) 131 CA 365, 21 P2d 643.

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2. Procedures at Hearing

§32.79 a. Ruling on Demurrer

If a demurrer has been filed, the first step at the hearing is for the court to hear and rule on the demurrer. If the demurrer is overruled or is sustained with leave to amend, the court will require the moving party to proceed on the motion for preliminary injunction.

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§32.80 b. Initial Receipt of Evidence

Because the moving papers, although already on file, are not evidence until the court agrees to receive them, the plaintiff's attorney should move to have the court receive into evidence the complaint, declarations, and other papers relied on in support of the motion. Opposing counsel should make objections or move to strike, as appropriate. Thereafter, counsel for the moving party may read depositions into evidence and take oral testimony, if permitted.

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§32.81 c. Plaintiff's Oral Argument

The moving party's attorney then usually presents oral argument to the court. Unless the court indicates otherwise, the attorney should make a complete presentation of the facts and the law. The argument should focus on the controverted issues, emphasizing particularly the equitable considerations that warrant injunctive relief.

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§32.82 d. Defendant's Procedures

On completion of the moving party's presentation, the respondent's attorney should move the court to receive opposing declarations and other supporting papers into evidence. In argument, the respondent's attorney should distinguish the opponent's cases and emphasize injury to the client and third persons if the injunction issues, as well as other equitable considerations that weigh against injunctive relief.

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§32.83 e. Argument on Undertaking

Some courts invite argument from counsel on the amount of the undertaking, and the attorney for the responding party should consider initiating argument on this issue. Both sides should be prepared to submit declarations on the extent of probable damage the responding party will suffer if the injunction issues.

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§32.84 f. Restrictions on Oral Testimony

There are restrictions on the use of oral testimony in an injunction hearing. A court does not abuse its discretion in denying a request for a plenary hearing at the show cause hearing if there is no direct conflict in testimony and the matter can be decided on declarations and documentary evidence. *Eddy v Temkin* (1985) 167 CA3d 1115, 213 CR 597. A party who wishes to introduce oral testimony must obtain a court order on a showing of good cause before the hearing begins. Cal Rules of Ct 3.1306. If oral testimony is allowed, a court does not abuse its discretion by prohibiting cross-examination at a hearing for injunctive relief, nor need it permit a complete adversary hearing. *City & County of San Francisco v Evankovich* (1977) 69 CA3d 41, 137 CR 883.

PRACTICE TIP: Oral testimony at show cause hearings is rarely permitted. A party who wishes to introduce oral testimony should argue that important conflicts in testimony will require the court to evaluate the demeanor of witnesses in making a factual determination.

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§32.85 3. Court's Ruling

At the conclusion of the show cause hearing, the court often rules from the bench, but it may take the matter under submission for a reasonable period to study the record. The court usually orders any outstanding temporary restraining order to remain in effect during this time.

When ruling on a demurrer, the court takes the complaint's allegations to be true. *Wirin v Horrall* (1948) 85 CA2d 497, 193 P2d 470. When ruling on the evidence presented at the hearing, the court, as the trier of fact, determines credibility and resolves conflicting evidence. *Voeltz v Bakery & Confectionery Workers Int'l Union* (1953) 40 C2d 382, 254 P2d 553, disapproved on other grounds in *Smyrniotis v Local Joint Executive Bd. of Hotel & Restaurant Employees & Bartenders Int'l Union of Long Beach & Orange County* (1966) 64 C2d 30, 48 CR 725. The court may draw inferences from written evidence and the witnesses' testimony. *Ensworth v Mullvain* (1990) 224 CA3d 1105, 274 CR 447 (inference of emotional distress absent direct evidence on subject). The court has considerable discretion, based on the equitable factors discussed in §§32.29-32.35, to determine whether the preliminary injunction should issue.

The court has the discretion to limit or modify the proposed preliminary injunction and to grant the applicant's request for relief either partially or in its entirety. See, *e.g., Metro Traffic Control, Inc. v Shadow Traffic Network* (1994) 22 CA4th 853, 27 CR2d 573. At least one reviewing court, however, has clearly expressed its opinion that the better practice is to require a statement of opinion, particularly when oral testimony is received. See *People v Landlords Prof. Servs.* (1986) 178 CA3d 68, 223 CR 483.

The court may impose conditions to protect the interests of those who may be affected by the injunction. *County of Inyo v City of Los Angeles* (1976) 61 CA3d 91, 132 CR 167. The conditions must relate directly to the interest to be protected. *Hummell v Republic Fed. Sav. & Loan Ass'n* (1982) 133 CA3d 49, 183 CR 708 (court improperly set interest rate of bond higher than that of property at issue).

If the court decides that a preliminary injunction should issue, it must require, except when excused by CCP §529, that the moving party file a written undertaking. CCP §529; see §32.92.

JUDICIAL PERSPECTIVE: When fixing the amount of bond, the court considers the extent of damage the enjoined party will probably sustain because of the injunction. It may consider attorney fees incurred in resisting it. The amount is made part of the court's minute order and is incorporated in the formal order. See form of order in §32.156.

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4. Court's Order of Injunction

§32.86 a. Prepared by Moving Party's Attorney

A written order of injunction, together with a written undertaking, must be presented to the judge within one court day after an application for preliminary injunction has been granted, or within the time ordered. Cal Rules of Ct 3.1150(f). Once issued, the order remains in effect until final judgment on the merits. See §32.109. For discussion of undertakings, see §§32.92-32.108.

During this time, any temporary restraining order (TRO) previously granted remains in effect, but if the written order and undertaking are not presented as required, the TRO may be vacated without notice. Cal Rules of Ct 3.1150(f). Given this rule of court, the plaintiff's attorney should always prepare a written order when a preliminary injunction issues, despite case law permitting an injunction to issue by minute order if the order on its face, or by reference, details the prohibited acts, and if it is clear that the order was intended to be final. See, *e.g., Wutchumna Water Co. v Superior Court* (1932) 215 C 734, 12 P2d 1033. See also *People v Gordon* (1951) 105 CA2d 711, 234 P2d 287.

PRACTICE TIP: A statement of decision is not required in addition to the injunctive order itself. The moving party should consider requesting such a statement, however, if it would aid in subsequent proceedings, as in an anticipated appeal.

The specific acts enjoined should be set out in language as close as possible to that used by the court in the minute order or at the hearing. General language should be avoided, and terms should be clearly defined. The order should contain sufficient detail to apprise the responding party of the acts enjoined, or it will not be enforceable through contempt proceedings. See *Watsonville Canning & Frozen Food Co. v Superior Court* (1986) 178 CA3d 1242, 224 CR 303. See also *In re Berry* (1968) 68 C2d 137, 65 CR 273 (description of activities forbidden overly broad, and that of persons enjoined indefinite). Ambiguity in an injunction order is generally construed against the party seeking the injunction.

Care should be taken not to draft the injunction in any broader manner than that required to prevent the injury at issue. *People v Mason* (1981) 124 CA3d 348, 177 CR 284. The injunction should be limited to preserve the defendant's interests that are not an element of the requisite injunctive relief. See *Franchise Tax Bd. v Firestone Tire & Rubber Co.* (1983) 139 CA3d 843, 189 CR 99 (injunction that carefully limited Board from releasing any information obtained under injunction did not threaten release of trade secrets).

Some leeway is permitted, however, if the applicant is entitled to broad categories of documents that the court cannot define with specificity. *McCain v Phoenix Resources, Inc.* (1986) 185 CA3d 575, 230 CR 25 (affirming order allowing plaintiffs access to "true and full information of all things affecting the partnership").

NOTE: Local courts may have specific rules on the form and content of injunction orders, which counsel should review. But see Cal Rules of Ct 3.20(a) (some local rules preempted by Judicial Council).

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§32.87 b. Filing and Service

When the court decides that a preliminary injunction will issue, any outstanding temporary restraining order (TRO) remains in effect to allow plaintiff's counsel a reasonable time in which to prepare the injunction order and have the judge sign it. Cal Rules of Ct 3.1150(f).

PRACTICE TIP: Although Rule 3.1150(f) does not appear to require service of the proposed order on the adverse party, service of this document is the better practice because (1) it enables the adverse party to alert the court to possible inconsistencies with the court's actual order, and (2) it may estop the restrained party from later attacking the terms of the order.

After the judge signs it, the order should be filed with the court clerk. Notice of the order should be given to each party (and any other related person bound) by personally serving each with a copy in the same manner as service of summons. See generally chap 17 (service of process). See *Sorrell v Superior Court* (1946) 73 CA2d 194, 166 P2d 80. See also *Chrysler Credit Corp. v Waegele* (1972) 29 CA3d 681, 105 CR 914 (personal service on corporate officer gave notice to corporate defendant).

NOTE: Notice may be given to counsel without personal service on the enjoined party. See *Freeman v Superior Court* (1955) 44 C2d 533, 282 P2d 857 (rebuttable presumption that notice to attorney is actual notice to client); *Mossman v Superior Court* (1972) 22 CA3d 706, 99 CR 638. It is nonetheless better practice to arrange for personal service of the injunction order on the enjoined party.

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§32.88 c. Persons Bound

A temporary restraining order or an injunction is enforceable against parties, officers, employees, agents, and other classes of persons aiding and abetting or acting in concert with parties and their officers, employees, and agents, if they had actual notice or knowledge of it and if the order is directed against them specifically or as a class. See *Ross v Superior Court* (1977) 19 C3d 899, 141 CR 133 (county board of supervisors who were not party to civil action were bound to injunction against Secretary of Health and Welfare Agency as its agent). Compare *Signal Oil & Gas Co. v Ashland Oil & Ref. Co.* (1958) 49 C2d 764, 322 P2d 149 (injunction against corporation and anyone acting in its behalf binds directors), with *In re Berry* (1968) 68 C2d 137, 65 CR 273 (injunction purporting to bind "all persons … in concert among themselves" held unconstitutionally vague). Note, however, that an injunction restricting demonstration activities at a Planned Parenthood clinic did not apply to individuals who were not named in that injunction and who were not acting in concert with named parties. An "actual notice provision" purporting to enjoin all demonstrators in addition to the enjoined parties was overbroad on its face. *Planned Parenthood Golden Gate v Garibaldi* (2003) 107 CA4th 345, 132 CR2d 46.

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§32.89 E. Responding Party's Alternatives When Preliminary Injunction Issues

Once an order for preliminary injunction issues, the respondent may consider the following alternatives with respect to the order:

- Compliance (if desired, couple with motion for early trial);
- Motion to dissolve or modify (see §§32.123-32.125);
- Appeal (see §§32.127-32.129), coupled with compliance or with motion to stay pending appeal (see §32.126) (unless the injunction is mandatory and thus stayed automatically);
- Deliberate violation when the injunction is void on its face (*e.g.,* because too broad or vague). If a contempt proceeding ensues, the defendant may defend by challenging the validity of the injunction in the contempt proceeding. See *People v Gonzalez* (1996) 12 C4th 804, 822, 50 CR2d 74 (void order cannot be basis of valid contempt judgment). See §32.118. See generally 6 Witkin, California Procedure, *Provisional Remedies* §§399-413 (5th ed 2008).

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§32.90 F. Diagnostic Questions

The attorney for the responding party should obtain a copy of the complaint and other supporting documents as soon as possible to review them before the hearing on the application for preliminary injunction. When reviewing the papers, the attorney should consider these questions:

1. **Does the complaint state a cause of action? Unless the defect can be cured by amendment, a restraining order will seldom issue on a complaint susceptible of a general demurrer.**
2. **Are the supporting declarations sufficient or do they rely on hearsay, conclusions, or information susceptible of a general demurrer?**
3. **Do the complaint and supporting declarations show the need for immediate action, *e.g.,* that irreparable injury will result to the plaintiff if action is not taken before the matter can be heard at a preliminary injunction hearing? Has there been any delay in the plaintiff's request?**
4. **Is the application based only on a verified complaint? If so, a verified answer denying all material allegations will usually defeat the application.**

For discussion of the moving party's procedures, see §§32.61-32.65.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.91 G. Checklist: Preliminary Injunction

§32.91 G. Checklist: Preliminary Injunction

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To obtain a hearing on an application for a preliminary injunction when a TRO is not sought or not in effect:

- Prepare and serve on responding party:
- Notice of motion or order to show cause. See §32.61.
- Summons and complaint or cross-complaint. See §32.37; see form of complaint in §32.152.
- Supporting memorandum. See §32.62.
- Affidavits or declarations. See §32.62; see form in §32.153.
- File:
- Complaint or cross-complaint (have summons issued). See §32.37; see form in §32.152.
- Notice of motion (or order to show cause) with proof of service of moving papers. See §§32.154-32.155.
- Supporting memorandum. See §32.62.
- Affidavits or declarations in support of restraining order (and preliminary injunction). See §32.62; see form in §32.154.
- Undertaking with proof of service, after presentation to judge. See §32.158.
- Record:
- Lis pendens, if real property is involved. See California Real Property Remedies and Damages, chap 13 (2d ed Cal CEB 2002).

Timing: Service must be at least 16 court days before the hearing (unless time has been shortened). CCP §1005(b); Cal Rules of Ct 3.1300(a). Proof of service must be filed at least 5 calendar days before the date set for hearing. Cal Rules of Ct 3.1300(c). An order to show cause must be served within the time ordered by the court, but no later than 2 days before the hearing. See CCP §527(d)(2).

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VI. UNDERTAKING

§32.92 A. Purpose and Requirements

An undertaking provides security for damages suffered if the court subsequently decides that the injunction was improperly granted. Bonds and undertakings are governed by the Bond and Undertaking Law (CCP §§995.010-996.560).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.93 1. Exceptions

§32.93 1. Exceptions

When a preliminary injunction issues, the court must require that the moving party give a written undertaking with sufficient sureties, unless:

- The applicant is either spouse in a proceeding for legal separation or dissolution of marriage (CCP §529(b)(1));
- The applicant is a plaintiff in an injunctive proceeding under the Fam C §§6200-6409 (prevention of domestic violence) (CCP §529(b)(2));
- The applicant is a public entity or officer described in CCP §995.220 (public entities exempt from bond requirements) (CCP §529(b)(3));
- The enjoined party waives the undertaking requirement (CCP §995.230 (beneficiary's written waiver of bond); see *City of Los Angeles v Superior Court* (1940) 15 C2d 16, 98 P2d 207); or
- The court, in its discretion, waives the requirement for an indigent person (CCP §995.240).

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§32.94 2. Jurisdictional Nature

The undertaking requirement, when applicable, is jurisdictional. If the court does not require a mandatory undertaking, or if the undertaking is not given, the injunction is inoperative. *Federal Auto. Servs. v Lane Buick Co.* (1962) 204 CA2d 689, 22 CR 603. If the undertaking is insufficient or not timely filed, the order granting the injunction must be dissolved. CCP §529(a). See also Cal Rules of Ct 3.1150(f) (TRO may be vacated without notice).

A protective order to preserve evidence is tantamount to a prohibitory injunction and is therefore void without an undertaking. *Northpoint Homeowners Ass'n v Superior Court* (1979) 95 CA3d 241, 157 CR 42.

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§32.95 3. Summary of Bond and Undertaking Law

The Bond and Undertaking Law (CCP §§995.010-996.560) applies to bonds and undertakings given as security under any statute, except to the extent the statute "prescribes a different rule or is inconsistent." CCP §995.020(a). Thus, the requirement in CCP §529(a) that any objection to the sufficiency of a surety be made within five days after issuance of the injunction controls over CCP §995.930(b), which allows 10 days in which to file objections. A statutory requirement for a bond may be satisfied by an undertaking, and vice versa. See CCP §995.210.

The undertaking may be given by an individual, who is referred to as a personal surety. CCP §995.510(a); *River Trails Ranch Co. v Superior Court* (1980) 111 CA3d 562, 168 CR 747 (single personal surety may be sufficient for preliminary injunction). Personal sureties are required to execute a declaration under penalty of perjury in establishing their qualifications to accompany the undertaking. CCP §995.520. If the amount of the bond exceeds $10,000, special provisions apply if more than two sureties are used. CCP §995.510(b). For form, see §32.158.

The undertaking may also be given by a corporate surety, referred to in the statute as an "admitted surety insurer." CCP §§995.610-995.660. Admitted surety insurers will furnish the plaintiff with a form that complies with the statutes. See CCP §995.630.

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§32.96 4. Amount of Undertaking

The court bases the amount of the undertaking on the probable damage that the enjoined party will sustain because of the injunction. CCP §529(a). When the court, in its discretion, requires an undertaking on a TRO, damages to third persons may also be considered in fixing the amount. *Allen v Pitchess* (1973) 36 CA3d 321, 111 CR 658.

If, after the undertaking is given, the enjoined party shows that damages sustained may exceed the undertaking, the court can require an additional undertaking as a condition of continued injunctive relief. CCP §996.010. See also *Dickey v Rosso* (1972) 23 CA3d 493, 498, 100 CR 358. The court may also order that an excessive bond be reduced. CCP §996.030.

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§32.97 5. When Bond Becomes Effective

A bond becomes effective without court approval. CCP §995.410(a). An undertaking given on a TRO expires with the order, and a new one must be given on a preliminary injunction. *Casitas Inv. Co. v Charles L. Harney, Inc.* (1962) 203 CA2d 811, 21 CR 821; *Maier v Luce* (1923) 61 CA 552, 215 P 399.

If an undertaking posted to secure a particular preliminary injunction is not, by its terms, limited to the previously issued injunction, it may be interpreted to apply to preliminary injunctions pending, but not as yet issued, when the undertaking is posted. *Greenly v Cooper* (1978) 77 CA3d 382, 143 CR 514.

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§32.98 B. Filing and Service

Unless otherwise ordered, the preliminary injunction and the undertaking must both be presented to the judge within 1 court day after the decision. Cal Rules of Ct 3.1150(f). Thereafter, a copy of the undertaking should be personally served together with the injunction on each party or related person bound. Service must be made in the same manner as service of process in civil actions generally. CCP §995.030. See chaps 17-18. The original undertaking and proof of service is then filed with the court clerk.

On filing, the clerk enters the date, names of sureties, and amount of undertaking in the registry of actions. The entries are prima facie evidence of due execution if the original undertaking is ever lost. CCP §995.350. A certified copy of the record of a bond recorded under statute, with appropriate attachments, may be admitted as evidence in an action in lieu of the original. CCP §995.260.

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C. Challenging Sufficiency of Sureties

§32.99 1. Notice of Motion

Within 5 days after service of the injunction, the enjoined party may object to the sufficiency of sureties in the undertaking. CCP §§529(a), 995.930(b). The objection must be in writing by noticed motion. CCP §995.930. See also CCP §995.650 (objection to sufficiency of admitted surety insurer).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.100 2. Grounds

§32.100 2. Grounds

Objections may be made on any of the following grounds set forth in CCP §995.920:

- The sureties are insufficient.
- The amount of the bond is insufficient.
- The bond, from any other cause, is insufficient.

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§32.101 3. Waiver

Failure to object within the statutory time period constitutes a waiver of all objections, except on a showing of changed circumstances. CCP §995.930(c). There is no waiver, however, when the sufficiency of the undertaking is challenged ex parte rather than by noticed motion. *ABBA Rubber Co. v Seaquist* (1991) 235 CA3d 1, 11, 286 CR 518.

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§32.102 4. Hearing

Unless otherwise agreed by the parties, the hearing on the objection must take place between 2 and 5 days after service of the notice of motion. CCP §995.950(a). The hearing on the objection may be a full evidentiary hearing, and individual sureties may be called to testify. If the value of property is at issue, the court may order an independent appraisal. CCP §995.950(c). Admitted surety insurers can demonstrate the sufficiency of the undertaking by complying with CCP §995.630, which the court must accept.

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§32.103 5. Effect of Court's Ruling

If the court determines that the bond is insufficient, it must order that a sufficient bond with sufficient sureties be given within the time required by the court; all rights obtained by giving the bond cease immediately. CCP §995.960(b)(1). If the court determines that the bond is sufficient, no further objection may be made except on a showing of changed circumstances. CCP §995.960(c).

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D. Recovery on Undertaking

§32.104 1. When Right of Recovery Arises

An undertaking is ordered on the condition that the party in whose favor the restraint is granted will pay to the responding party damages sustained, if the court ultimately decides that the moving party was not entitled to the injunction. CCP §§529(a), 996.430-996.440. A defendant who has been damaged by voluntary compliance with a temporary restraining order (TRO) with which he or she was never served is entitled to prove damages in a proceeding to enforce the liability of the surety after the complaint for injunction has been dismissed without prejudice on the plaintiff's motion. *Special Editions v Kellison* (1982) 129 CA3d 803, 181 CR 351. The procedures under CCP §996.440 are not available if the court exercised its discretion not to require an undertaking on issuance of a TRO. *Wallace v Miller* (1983) 140 CA3d 636, 189 CR 637. In this situation, the defendant must pursue common law remedies by way of an action for abuse of process or malicious prosecution.

The right of recovery on the undertaking does not arise until final judgment is entered. See CCP §996.440(b). A suit brought any earlier is premature even if a TRO or preliminary injunction has been dissolved. *Clark v Clayton* (1882) 61 C 634; *Satinover v Dean* (1988) 202 CA3d 1298, 249 CR 277. Nor can the court decide that the restraint was proper, and thus exonerate the bond, until final judgment. *Special Editions v Kellison, supra*; *Nuclear Elec. Labs. v William C. Cornell Co.* (1965) 239 CA2d 8, 48 CR 416. If recovery is sought by motion (see §§32.104-32.108), the motion may not be made until the time to appeal has expired or, if an appeal is taken, until the appeal is finally determined. CCP §996.440(b).

In addition to final judgment, the action is "finally decided" when it is dismissed involuntarily for want of prosecution (*Dowling v Polack* (1861) 18 C 625) or voluntarily by the moving party without prejudice (*Special Editions v Kellison, supra*). Dismissal by stipulation of the parties does not, however, constitute a final decision and may even constitute a waiver of the responding party's right to recover on the undertaking. See *Wilshire Mortgage Corp. v O. A. Graybeal Co.* (1940) 41 CA2d 1, 105 P2d 996.

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2. Procedures

§32.105 a. Use of Independent Action or Summary Procedure

There are two methods for recovering against the surety or sureties posting a bond under CCP §§995.310-995.380:

- An independent civil action may be filed, to which both the surety and the principal must be joined. CCP §996.430.
- A motion to enforce liability may be filed. CCP §996.440. This procedure is less costly and less time consuming. See 6 Witkin, California Procedure, *Provisional Remedies* §§38-39 (5th ed 2008).

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§32.106 b. Motion After Judgment

Whenever a bond, undertaking, or deposit under CCP §§995.310-995.380 is given as security for issuance of a temporary restraining order (TRO) or preliminary injunction, each surety or individual depositor submits to the court's jurisdiction in all matters affecting liability or security. CCP §996.420. After trial and final decision that the injunction was not proper, liability of the party-depositor or surety may be enforced on motion in the trial court without filing an independent action. CCP §996.440.

The procedures in §996.440 must be strictly followed:

- The motion to enforce liability on a bond must not be made more than 1 year (1) after entry of final judgment and the time to appeal has expired or (2), if an appeal is taken, after the appeal is finally determined, whichever date is later. CCP §996.440(b). Notice of motion must be served on the surety or the depositor at least 30 days before the time set for hearing. It must state the amount of the claim, must be supported by affidavits (or declarations), and must set forth facts on which the claim is based. Service must be in accordance with CCP §§1010-1020. CCP §996.440(c).
- Summary judgment may be had against anyone served with the notice, unless they file and serve opposing affidavits (or declarations) that present triable issues of fact. CCP §996.440(d).
- Trial is necessary if the court determines that factual issues are presented by the opposing declarations. The court must specify the issues and set the matter for trial at the earliest convenient date, allowing sufficient time for discovery proceedings. The statute does not provide for a jury trial. CCP §996.440(d).

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§32.107 c. Pleading and Proof

Recovery from a surety is based on the terms of the undertaking. The proof is the same whether a right of recovery for wrongful injunction is asserted by motion or by independent action. See CCP §§996.430 (independent action), 996.440 (motion). The party seeking recovery need show only that the restraint was issued, that he or she suffered resulting damage, and that the court finally decided that the moving party was not entitled to the injunction. No element of wrongful motive need be shown. See *Russell v United Pac. Ins. Co.* (1963) 214 CA2d 78, 29 CR 346.

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§32.108 d. Measure of Damages

The party seeking damages sustained by wrongful issuance of an injunction may recover damages necessarily and proximately flowing from the restraint, including damages sustained after the restraint has been terminated. *Russell v United Pac. Ins. Co.* (1963) 214 CA2d 78, 29 CR 346; *Moore v Maryland Cas. Co.* (1929) 100 CA 658, 280 P 1008. A judgment of liability on a bond operates against both surety and principal, and obligates each of them jointly and severally (CCP §996.460), although the surety's liability is limited to the amount of the bond and the principal's is not (CCP §996.470).

Attorney fees are includable as an item of damages if they were incurred in attempting to dissolve a temporary restraining order (TRO) or preliminary injunction (see *Allen v Pitchess* (1973) 36 CA3d 321, 111 CR 658; *Mason v United States Fid. & Guar. Co.* (1943) 60 CA2d 587, 141 P2d 475), but not if they were incurred after the preliminary injunction is denied and the TRO dissolved (*Allen v Pitchess, supra*).

Recoverable damages sustained by issuance of an injunction may not exceed the amount of the undertaking required by CCP §529 unless the facts support an action in tort against the moving party for abuse of process or malicious prosecution. *Dickey v Rosso* (1972) 23 CA3d 493, 100 CR 358.

A court may in its discretion add an award of interest at the legal rate to the judgment in an action on an undertaking. CC §3287(b).

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§32.109 VII. PERMANENT INJUNCTION AFTER TRIAL ON MERITS

An injunction case is entitled to trial-setting priority and takes precedence over other cases except for older injunction cases and cases given even greater priority by law. See CCP §527(e). The case must be tried by a court sitting "in equity" without a jury, although a jury may be demanded on the issue of damages. *Pacific W. Oil Co. v Bern Oil Co.* (1939) 13 C2d 60, 87 P2d 1045. See also CCP §592.

A permanent (or final) injunction issues after a trial on the merits. See *Jameson v Five Feet Restaurant, Inc.* (2003) 107 CA4th 138, 131 CR2d 771. Because it is not a provisional remedy, it need not have the same scope and effect as a preliminary injunction previously issued by the court. See *San Diego Water Co. v Pacific Coast S.S. Co.* (1894) 101 C 216, 35 P 651. A permanent injunction supersedes any preliminary injunction that may have been in effect and does not require an undertaking. *Shahen v Superior Court* (1941) 46 CA2d 187, 115 P2d 516. A permanent injunction may be modified or vacated after judgment on a motion disclosing changed circumstances or a change in the law that render continued enforcement unjust. CC §3424.

A permanent injunction may be ordered in a hearing on a motion for preliminary injunction, without a "trial," when the court is called on to resolve a question of law without resort to extrinsic evidence or when there is a "stipulation or other satisfactory showing which warrants submitting the cause on the merits." *Camp v Board of Supervisors* (1981) 123 CA3d 334, 358, 176 CR 620.

The court issues a statement of decision explaining the factual and legal basis for the court's decision if a party requests one in a timely fashion. CCP §632. On trial without jury generally, see California Trial Practice: Civil Procedure During Trial, chap 24 (3d ed Cal CEB 1995).

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VIII. DEFENSES TO INJUNCTIVE RELIEF

§32.110 A. Jurisdictional Limitations

A defense to an application for an injunction is that the court, because of constitutional or statutory limitations, lacks jurisdiction to issue it. See *People v Superior Court (Witzerman)* (1967) 248 CA2d 276, 56 CR 393.

An injunction issued in violation of constitutional or statutory limitations may be attacked by appeal or writ. See §32.52. See generally 2 Witkin, California Procedure, *Jurisdiction* §320 (5th ed 2008).

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§32.111 1. Constitutional Limitations

The "supremacy clause" of the federal constitution (US Const art VI, §2) in effect bars state court injunctive relief in matters exclusively within federal jurisdiction. See, *e.g., San Diego Bldg. Trades Council v Garmon* (1959) 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (state courts cannot enjoin picketing of interstate businesses, except to maintain order under state police power). State courts lack authority to enjoin the commencement or prosecution of *in personam* actions in federal court. *General Atomic Co. v Felter* (1977) 434 US 12, 54 L Ed 2d 199, 98 S Ct 76; *Biosense Webster, Inc. v Superior Court* (2006) 135 CA4th 827, 37 CR3d 759. Further, courts may not issue an injunctive order to carry out its declaration that a foreign sovereign's official act is invalid. See *Philippine Nat'l Bank v U.S. Dist. Court* (9th Cir 2005) 397 F3d 768 (district court lacked authority to issue injunctive order restraining Philippine bank from transferring funds under "act of state doctrine" and constitutional separation of powers).

Jurisdiction of California courts to issue injunctions may be limited directly or indirectly by state and federal constitutions. For example, Cal Const art XIII, §32 specifically prohibits injunctive relief to prevent collection of certain state taxes, while the First and Fourteenth Amendments to the United States Constitution substantially limit state court authority to enjoin picketing in labor disputes. See *Thornhill v Alabama* (1940) 310 US 88, 84 L Ed 1093, 60 S Ct 736 (criminal case); *Schwartz-Torrance Inv. Corp. v Bakery & Confectionery Workers' Union* (1964) 61 C2d 766, 40 CR 233 (injunction denied). Because the Thirteenth Amendment prohibits involuntary servitude, a court may not enjoin an employer from entering into a personal service contract with a former employee who has breached a contract with a previous employer. *Beverly Glen Music, Inc. v Warner Communications, Inc.* (1986) 178 CA3d 1142, 224 CR 260. Both the state and federal constitutions prohibit restraint of speech and other First Amendment rights except in extraordinary circumstances. Cases have held the following:

- Remedial injunction against continued use of derogatory racial epithets in workplace was constitutional once judicial determination was made that epithets constituted employment discrimination. *Aguilar v Avis Rent A Car Sys.* (1999) 21 C4th 121, 87 CR2d 132.
- Unconstitutional to enjoin sidewalk sales of merchandise. *Welton v City of Los Angeles* (1976) 18 C3d 497, 134 CR 668.
- Error to enjoin political candidate's newsletter. *Wilson v Superior Court* (1975) 13 C3d 652, 119 CR 468.
- Injunction against communicating facts of labor disputes was too broad. *United Farm Workers v Superior Court* (1971) 4 C3d 556, 94 CR 263.
- No injunction against protected right to petition government. *Smith v Silvey* (1983) 149 CA3d 400, 197 CR 15. But see *Golden Gateway Ctr. v Golden Gateway Tenants Ass'n* (2001) 26 C4th 1013, 111 CR2d 336 (apartment complex is not functionally equivalent to traditional public forum; thus management's decision to prohibit leafleting was not state action that impinged on tenant association's free speech rights).
- Injunction against protesters demonstrating in driveway and parking lot of private medical center upheld. *Planned Parenthood v Wilson* (1991) 234 CA3d 1662, 286 CR 427; *Allred v Shawley* (1991) 232 CA3d 1489, 284 CR 140 (same; parking lot).
- Injunction against picketing in support of illegal strike upheld. *City & County of San Francisco v Evankovich* (1977) 69 CA3d 41, 137 CR 883.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.112 2. Statutory Limitations

§32.112 2. Statutory Limitations

The court's authority to issue injunctive relief may be limited or abolished by legislative action. See *Modern Barber Colleges, Inc. v California Employment Stabilization Comm'n* (1948) 31 C2d 720, 192 P2d 916. Thus, neither provisional (CCP §526) nor final (CC §3423) injunctions can issue to do the following:

- Stay judicial proceedings, unless necessary to prevent a multiplicity of actions (CCP §526(b)(1); CC §3423(a));
- Stay proceedings in federal courts (CCP §526(b)(2); CC §3423(b));
- Prevent lawful execution of a valid statute (CCP §526(b)(4); CC §3423(d));
- Prevent breach of a contract not specifically enforceable other than certain written personal services contracts (CCP §526(b)(5); CC §3423(e));
- Prevent lawful exercise of public or private office by an incumbent (CCP §526(b)(6); CC §3423(f));
- Prevent legislative acts by a municipal corporation (CCP §526(b)(7); CC §3423(g));
- Restrain the sale, the offering for sale, or the issuance of any municipal bonds for public improvements or public utilities (CCP §526a; *Howard Jarvis Taxpayers Ass'n v City of La Habra* (2001) 25 C4th 809, 814 n1, 107 CR2d 369 (§526a inapplicable when plaintiffs are not seeking to enjoin illegal *expenditure* of taxpayer funds; rather, they are seeking to stop the collection of taxes));
- Enjoin the reasonable and necessary operation in any industrial zones or airports, except for actions brought by the state to abate public nuisance (CCP §731a);
- Enjoin secondary recovery operations for oil and gas, subject to undertaking requirement (CCP §731c);
- Enforce a penalty, forfeiture, or penal law, except in a nuisance case or as otherwise provided by law (CC §3369);
- Enjoin the collection of certain taxes, even if the taxing statute is unconstitutional, unless there is no adequate legal remedy (Rev & T C §§6931, 8146, 19381, 32411; see *Hunter-Reay v Franchise Tax Bd.* (1983) 140 CA3d 875, 189 CR 810; *Helms Bakeries v State Bd. of Equalization* (1942) 53 CA2d 417, 128 P2d 167); or
- Enjoin certain activities in conjunction with labor disputes. Moscone Act (CCP §527.3), such as publishing and communicating information about a labor dispute, peaceful picketing and patrolling, and peaceful assembly. See *Sears, Roebuck & Co. v San Diego County Dist. Council of Carpenters* (1979) 25 C3d 317, 158 CR 370 (Act prohibits injunction against conduct occurring on private property open to public, such as shopping centers). But see *M Restaurants, Inc. v San Francisco Local Joint Exec. Bd.* (1981) 124 CA3d 666, 177 CR 690 (Act does not prohibit injunctions reasonably limiting number of persons who may engage in picketing and patrolling or injunctions prohibiting violence or unlawful obstruction of access to or egress from private premises); *City & County of San Francisco v Evankovich* (1977) 69 CA3d 41, 137 CR 883 (Act does not apply to public employees).

NOTE: The court's authority to grant injunctive relief is also limited by statutes that establish mandatory procedural prerequisites. Some of these requirements have been held to be "jurisdictional" in scope. For examples, see §§32.37, 32.39 (verification), 32.52 (notice), and 32.92 (undertaking).

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§32.112A 3. Judicial Restraint Limitation

Under principles of judicial restraint and comity, courts may not restrain proceedings in a sister state absent "exceptional circumstances." *Advanced Bionics Corp. v Medtronic, Inc.* (2002) 29 C4th 697, 128 CR2d 172 (TRO that enjoined party to California action from taking any action in Minnesota proceedings was improper based on principles of comity and judicial restraint); *Biosense Webster, Inc. v Superior Court* (2006) 135 CA4th 827, 37 CR3d 759 (California's public policy against noncompetition agreements was not exceptional circumstance justifying restraint of any actions in states other than California).

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B. Equitable Defenses

§32.113 1. Laches

The laches doctrine is a bar to injunctive relief. To sustain a laches defense, the evidence must show unreasonable delay by the petitioner and either the petitioner's acquiescence in the decision or prejudice to adverse parties resulting from the delay. *Miller v Eisenhower Med. Ctr.* (1980) 27 C3d 614, 624, 166 CR 826; *Motion Picture Studio Teachers & Welfare Workers Local No. 884 v Millan* (1996) 51 CA4th 1190, 1197, 59 CR2d 608. For discussion of laches generally, see 13 Witkin, Summary of California Law, *Equity* §§16-19 (10th ed 2005).

As a rule, laches must be pleaded as an affirmative defense. In extraordinary cases, however, courts have denied relief on their own motion when laches is disclosed by the complaint or appears from the evidence even if the defense has not been pleaded. *San Bernardino Valley Audubon Soc'y v City of Moreno Valley* (1996) 44 CA4th 593, 608, 51 CR2d 897. No particular rule governs the time necessary to invoke laches. Although the statute of limitations for a similar action provides a guide (see *Holmberg v Armbrecht* (1946) 327 US 392, 90 L Ed 743, 66 S Ct 582), there can be laches within the limit of the statute of limitations. Considerable discretion, based on the circumstances of each case, rests with the trial court. See *Volpicelli v Jared Sydney Torrance Mem. Hosp.* (1980) 109 CA3d 242, 167 CR 610 (action not barred by laches even though plaintiff had waived administrative remedies and waited two years before initiating suit); *Lusk v Krejci* (1960) 187 CA2d 553, 9 CR 703 (4-year delay in bringing suit for mandatory injunction not unreasonable).

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§32.114 2. Unclean Hands

A plaintiff's "unclean hands" bar injunctive relief when the plaintiff's misconduct arose from the transaction pleaded in the complaint. *California Satellite Sys. v Nichols* (1985) 170 CA3d 56, 216 CR 180. The unclean hands doctrine demands that a plaintiff act fairly in the matter for which he or she seeks a remedy. The plaintiff must come into court with clean hands, and keep them clean, or he or she will be denied relief, regardless of the merits of the claim. *Kendall-Jackson Winery Ltd. v Superior Court* (1999) 76 CA4th 970, 978, 90 CR2d 743. Whether the doctrine applies is a question of fact. *CrossTalk Prods., Inc. v Jacobson* (1998) 65 CA4th 631, 639, 76 CR2d 615.

Not every wrongful act constitutes unclean hands, and the misconduct does not need to be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine. *De Rosa v Transamerica Title Ins. Co.* (1989) 213 CA3d 1390, 1395, 262 CR 370.

The unclean hands doctrine will not bar injunctive relief when the plaintiff's hands, although "unclean," are less so than those of the defendant. See *Belling v Croter* (1943) 57 CA2d 296, 134 P2d 532. See also *Hernandez v Stabach* (1983) 145 CA3d 309, 193 CR 350 (landlord who rented knowing that overcrowding would occur cannot raise overcrowding as defense to injunctive order restraining landlord from evicting tenants). The same is true when the public interest requires that relief be granted. See §32.33. See generally 13 Witkin, Summary of California Law, *Equity* §§9-15 (10th ed 2005).

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§32.115 3. Repetition Unlikely

An injunction will not issue when, because of a change in circumstances, a repetition of the act complained of appears unlikely. *Engle v City of Oroville* (1965) 238 CA2d 266, 47 CR 630.

Thus, unless the evidence shows that the wrongful conduct will probably recur (*Fretz v Burke* (1967) 247 CA2d 741, 55 CR 879), injunctive relief will be denied if the defendant has voluntarily discontinued the activity. *Lee v Gates* (1983) 141 CA3d 989, 190 CR 682; *Mallon v City of Long Beach* (1958) 164 CA2d 178, 330 P2d 423.

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§32.116 4. Contrary to Public Interest or Statute

Injunctive relief may be denied if the act complained of is found to be in the public interest. See *Loma Portal Civic Club v American Airlines, Inc.* (1964) 61 C2d 582, 39 CR 708. As a rule, unless a statute is unconstitutional, injunctive relief will not issue to prevent the execution of a public statute or enforcement of a public statute by law enforcement officers. See *ALRB v Superior Court* (1976) 16 C3d 392, 128 CR 183; *Theresa Enters. v Davis* (1978) 81 CA3d 940, 146 CR 802, disapproved on other grounds in *Morris v Municipal Court* (1982) 32 C3d 553, 565 n13, 186 CR 494.

An injunction will be denied if it is contrary to statute. See, *e.g., Matull & Assocs. v Cloutier* (1987) 194 CA3d 1049, 240 CR 211 (court of appeal reversed injunctive order to extent it conflicted with Bus & P C §16600 concerning covenants not to compete).

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§32.117 5. Balance of Conveniences in Favor of Responding Party

The doctrine of balancing the conveniences, sometimes called "relative hardship" or "balancing the equities," is an important factor when determining whether to issue an injunction. Despite a proper showing in other respects of a right to injunctive aid, if a plaintiff is merely seeking to protect a technical and unsubstantial right, and the issuance of the injunction will bring no actual advantage, it may be properly refused when to do otherwise would result in unusual hardship to the defendant or the public. *Wright v Best* (1942) 19 C2d 368, 386, 121 P2d 702.

A necessary element of this doctrine is that, if the injunction issues, the defendant will suffer irreparable injury, not merely deprivation of a substantial benefit. *Fairrington v Dyke Water Co.* (1958) 50 C2d 198, 323 P2d 1001 (judgment denying mandatory injunction reversed). In encroachment cases, the court usually balances the conveniences or weighs the relative hardships to the parties only if the defendant's conduct was innocent. See *Keith v Superior Court* (1972) 26 CA3d 521, 103 CR 314 (error to deny preliminary injunction to prevent defendant's willful destruction of easement). If both parties' conduct was negligent, the court may balance the conveniences, taking the relative negligence and hardship into account. See *Christensen v Tucker* (1952) 114 CA2d 554, 562, 250 P2d 660. See also *Linthicum v Butterfield* (2009) 175 CA4th 259, 266, 95 CR3d 538 (court may balance conveniences if defendant is merely negligent and not wrongdoer); *Hirshfield v Schwartz* (2001) 91 CA4th 749, 754, 759, 110 CR2d 861.

With respect to provisional injunctions, the Restatement (Second) of Torts (1979) takes the position that, because the court is being asked to restrain the defendant from acting before his or her conduct has been proved wrongful, the plaintiff must show that the loss, if no provisional injunction is issued, will be substantially greater than the defendant's loss if one issues. Restatement (Second) of Torts §936, Comment *e* at 569 (1979).

Once a prima facie showing has been made that the defendant's conduct is wrongful, the defendant has the burden of showing that the hardship, if an injunction issues, would be "greatly disproportionate" to the hardship caused to the plaintiff by the continued wrong. *Christensen v Tucker, supra*; *Hirshfield v Schwartz, supra*; *Volpicelli v Jared Sydney Torrance Mem. Hosp.* (1980) 109 CA3d 242, 167 CR 610.

In balancing the conveniences, the court must consider the relative hardship not only to the parties and the general public, but also to third persons. See *Loma Portal Civic Club v American Airlines, Inc.* (1964) 61 C2d 582, 39 CR 708 (public interest in continued operation of jet planes precluded injunction); *Keith v Superior Court, supra* (court could consider effect of potential flood on nonparty homeowners in deciding whether to enjoin destruction of easements). For further discussion, see 6 Witkin, California Procedure, *Provisional Remedies* §§345-348 (5th ed 2008).

NOTE: Courts are reluctant to issue injunctions that will require ongoing court supervision. See *Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 145 CR 665 (request for specific performance).

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IX. ENFORCEMENT BY CONTEMPT

§32.118 A. What Constitutes Contempt

A contempt of court is committed when an enjoined party, having knowledge of the order and the ability to comply, willfully refuses to obey a lawful injunctive order. See CCP §1209(a)(5); *In re Liu* (1969) 273 CA2d 135, 78 CR 85. In addition to civil contempt, violation of a lawfully issued injunctive order can result in a criminal contempt misdemeanor prosecution. Pen C §166; *People v Gonzalez* (1996) 12 C4th 804, 50 CR2d 74.

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§32.119 B. Initiating Proceedings

Because contempts of injunctive orders are usually indirect or constructive (*i.e.,* occurring outside of court), proceedings to enforce the injunction order must be initiated by affidavit (or declaration; see CCP §2015.5) presented to the court or judge. CCP §1211(a).

The moving party's affidavits or declarations constitute the complaint and frame the issues. *Reliable Enters. v Superior Court* (1984) 158 CA3d 604, 204 CR 786, disapproved on other grounds in *Mitchell v Superior Court* (1989) 49 C3d 1230, 1248, 265 CR 144. They must recite the facts showing contempt (CCP §1211), including facts establishing (1) issuance of injunction and (2) the enjoined party's knowledge, ability to comply, and willful disobedience. See *In re Liu* (1969) 273 CA2d 135, 78 CR 85.

Any defects in a declaration:

- Are waived if no objection is made (CCP §1211.5(a));
- Can be cured by amendment at any stage of the proceedings unless substantial prejudice will result (CCP §1211.5(b)); and
- Do not affect a judgment of contempt unless a miscarriage of justice has resulted (CCP §1211.5(c)).

When declarations showing contempt are filed, an order to show cause for contempt usually issues ex parte. See CCP §1212. The declarations and show cause order must be personally served. See chap 17 on service of process. Personal service is jurisdictional, and noncompliance voids a resulting contempt finding. See *In re Wren* (1957) 48 C2d 159, 308 P2d 329. However, an enjoined party may waive the right to personal service explicitly or by conduct. See, *e.g., Leonis v Superior Court* (1952) 38 C2d 527, 241 P2d 253 (violator appeared and participated voluntarily and without objection).

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§32.120 C. Enjoined Party's Response; Defenses

The enjoined party may respond to the moving party's declarations (or complaint) with declarations or an answer. See *Hotaling v Superior Court* (1923) 191 C 501, 217 P 73 (defendant's affidavits in contempt proceeding constitute answer and serve as pleadings). Violation of an invalid order may not be punished as contempt. *People v Gonzalez* (1996) 12 C4th 804, 50 CR2d 74; *In re Berry* (1968) 68 C2d 137, 65 CR 273. It is a defense to a contempt citation that:

- The issuing court lacked jurisdiction to issue the injunctive order (*Hotaling v Superior Court, supra* (record failed to show existence of all necessary facts on which jurisdiction depended));
- The order is too broad or vague (*Welton v City of Los Angeles* (1976) 18 C3d 497, 134 CR 668 (injunction unconstitutionally overbroad and violative of First Amendment rights; party persisted in selling maps to movie stars' homes); *In re Berry, supra* (violation of antipicketing order that was too broad and constitutionally void on its face not punishable as contempt));
- The enjoined party did not have notice of the order (*Phillips v Superior Court* (1943) 22 C2d 256, 137 P2d 838 (no contempt unless violator had notice or knowledge of order)); or
- The issuing court lacked authority to issue the injunctive order (*Philippine Nat'l Bank v U.S. Dist. Court* (9th Cir 2005) 397 F3d 768 (contempt proceedings against Philippine bank were improper because district court lacked authority to issue injunctive order, which was basis of contempt, under "act of state doctrine")).

Although a defendant may not directly attack an injunction in contempt proceedings by seeking to dissolve it, the defendant may collaterally challenge the injunction on constitutional grounds in defending against the contempt charges. *People v Gonzalez, supra* (criminal contempt proceedings under Pen C §166).

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§32.121 D. Hearing

A hearing, at which competent evidence must be produced, must be held on the issues raised by the opposing declarations (or pleadings). See CCP §1217; *Hotaling v Superior Court* (1923) 191 C 501, 217 P 73. Witnesses may testify; in fact, the court must hear "any answer" the accused makes. CCP §1217. See also CCP §1218. See *Ruppe v Superior Court* (1932) 127 CA 118, 15 P2d 197. Because the hearing is quasi-criminal, however, the accused need not testify. See *Hotaling v Superior Court, supra*; *In re Witherspoon* (1984) 162 CA3d 1000, 209 CR 67.

The accused must be proved guilty beyond a reasonable doubt. *Mitchell v Superior Court* (1989) 49 C3d 1230, 265 CR 144. However, there is no right to a jury trial. *In re Morelli* (1970) 11 CA3d 819, 91 CR 72, disapproved on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287 n6, 100 CR2d 320.

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§32.122 E. Punishment

A finding of contempt may result in a fine of up to $1000, imprisonment of up to five days in jail, or both. CCP §1218(a). Because separate acts constitute separate contempts, multiple fines and consecutive jail sentences may be imposed. *Donovan v Superior Court* (1952) 39 C2d 848, 250 P2d 246 (multiple fines); *In re Stafford* (1958) 160 CA2d 110, 324 P2d 967 (multiple fines and consecutive sentences). But see *Conn v Superior Court* (1987) 196 CA3d 774, 242 CR 148 (multiple punishment for single contempt of a continuing nature violates Pen C §654 prohibition against multiple punishments for single crime). Additionally, a person who is found guilty of contempt for violating a court order may be required to pay reasonable attorney fees and costs to the party initiating the contempt proceedings. CCP §1218(a).

If the order of commitment expressly finds that the contempt consists of failure to perform, CCP §1219 provides for imprisonment until the act is performed. For further discussion, see 8 Witkin, California Procedure, *Enforcement of Judgment* §§355-360 (5th ed 2008).

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X. REVIEW OF ORDERS

A. In Trial Court

1. Motion to Modify, Vacate, or Dissolve Injunctive Order

§32.123 a. Who May Move

Ordinarily, a motion to dissolve or modify an injunctive order is made by the enjoined party. *New Tech Devs. v Bank of Nova Scotia* (1987) 191 CA3d 1065, 236 CR 746 (preliminary injunction may be dissolved if improvidently granted, without showing of new facts or changed circumstances). See CCP §§532-533. However, when grounds exist, the moving party may seek modification. See *Green Trees Enters. v Palm Springs Alpine Estates, Inc.* (1967) 66 C2d 782, 59 CR 141 (duration of permanent injunction extended). In addition, a plaintiff may move again for a previously denied injunction. *Brunzell Constr. Co. v Harrah's Club* (1967) 253 CA2d 764, 62 CR 505.

The court on its own motion may dissolve or modify an ex parte order that states it is effective "until further order of this court" whenever it becomes satisfied that the order was erroneous or improvident. *Wolf v Board of Supervisors* (1907) 150 C 285, 89 P 85 (dictum).

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§32.124 b. When Available

An enjoined person may move to dissolve or modify a preliminary or permanent injunction that was issued without notice to the person enjoined. CCP §532(a). The court may dissolve or modify an injunction or a temporary restraining order in any action in which a material change has occurred in the facts or law under which the injunction was granted, or in the interests of justice. CCP §533. See *Loeffler v Medina* (2009) 174 CA4th 1495, 1505, 95 CR3d 343 (no abuse of discretion to deny motion to terminate domestic violence restraining order; no material changes had occurred in law or facts and movant did not establish that termination would serve interests of justice). The court may dissolve or modify a final injunction on noticed motion on a similar showing under CC §3424.

Cases predating the 1995 amendment of §533 acknowledged the court's inherent power—whenever a change occurred in either the law or the controlling facts on which an injunction was based, or whenever injustice and fairness required it—to do the following:

- Modify or dissolve a preliminary or permanent prohibitory injunction. *Union Interchange, Inc. v Savage* (1959) 52 C2d 601, 342 P2d 249 (preliminary); *New Tech Devs. v Bank of Nova Scotia* (1987) 191 CA3d 1065, 236 CR 746 (preliminary); *Sontag Chain Stores Co. v Superior Court* (1941) 18 C2d 92, 113 P2d 689 (permanent).
- Vacate an order denying an injunction and issue the injunction previously denied. *Brunzell Constr. Co. v Harrah's Club* (1967) 253 CA2d 764, 62 CR 505.

The trial court has broad discretion in exercising this inherent power, and its decision will not be reversed unless abuse of discretion is shown. *Union Interchange, Inc. v Savage, supra*. See also *Palo Alto-Menlo Park Yellow Cab Co. v Santa Clara Transit Dist.* (1976) 65 CA3d 121, 135 CR 192 (trial court was held to have inherent power to modify its own judgment and set aside permanent injunction when defendant voluntarily discontinued conduct and damages were adequate).

A court need not specifically reserve jurisdiction to exercise an inherent power, although some cases suggest the advisability of a specific reservation of authority to modify an original injunctive order. See, *e.g., Components for Research, Inc. v Isolation Prods., Inc.* (1966) 241 CA2d 726, 50 CR 829. This element is satisfied if the order simply states that it is effective "until the court shall otherwise order." See *State Compensation Ins. Fund v Maloney* (1953) 121 CA2d 33, 262 Pd 662.

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§32.125 c. Procedures

The court may not dissolve or modify an injunctive order unless notice of motion is given to the opposing party. CCP §533; *Cherry Hill Gold Mining Co. v Baker* (1905) 147 C 724, 82 P 370 (modification); *Page v Vaughn* (1901) 133 C 335, 65 P 740 (dissolution).

NOTE: However, a provisional order is dissolved without notice if the applicant fails to post an undertaking. See §32.92.

The notice of motion should state the grounds and should be accompanied by a memorandum in support of the motion. See CCP §1010; Cal Rules of Ct 3.1112(a), 3.1113. A party seeking modification or dissolution under CCP §532 may prepare declarations in support of the notice of motion, in which case opposing declarations or other evidence may be produced in rebuttal. See CCP §532.

Although no appeal may be taken from a judgment of civil contempt (CCP §§904.1(a)(1)(B), 904.2(a)(2), 1222), a party held in contempt for disobeying a void order may collaterally attack the validity of the contempt judgment. The customary method is by writ of habeas corpus directed to the trial court. See, *e.g., In re Berry* (1968) 68 C2d 137, 65 CR 273; *Board of Med. Exam'rs v Terminal-Hudson Elec.* (1977) 73 CA3d 376, 140 CR 757. One court has held that a writ of prohibition will also lie. See, *e.g., Harlan v Superior Court* (1949) 94 CA2d 902, 211 P2d 942, disapproved on other grounds in *Signal Oil & Gas Co. v Ashland Oil & Ref. Co.* (1958) 49 C2d 764, 775 n5, 322 P2d 149. Certiorari (or writ of review (CCP §1067)) is also available to review the contempt order. *Fortenbury v Superior Court* (1940) 16 C2d 405, 106 P2d 411. See 6 Witkin, California Procedure, *Provisional Remedies* §409 (5th ed 2008).

In a prosecution for criminal contempt under Pen C §166, such a collateral attack may be raised on appeal to the appellate department of the superior court. *People v Gonzalez* (1996) 12 C4th 804, 50 CR2d 74.

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§32.126 2. Staying or Issuing Injunction Pending Appeal

A mandatory injunction is automatically stayed during appeal. See *Reed v Superior Court* (2001) 92 CA4th 448, 453 n3, 111 CR2d 842. But see *ALRB v Tex-Cal Land Mgmt.* (1987) 43 C3d 696, 238 CR 780 (mandatory injunction issued under Lab C §1160.8 was not an "action" but a "special proceeding" and therefore was not stayed by appeal).

Because a prohibitory injunction is not automatically stayed by appeal (*Reed v Superior Court, supra*), the party subject to a prohibitory injunction should move the issuing court for an order staying its execution, if an appeal is contemplated. The court may stay an injunction under conditions that protect both parties. See *City of San Diego v Southern Cal. Tel. Corp.* (1954) 42 C2d 110, 266 P2d 14.

When an injunction has been denied, the court, to preserve the status quo pending appeal, has authority to issue a temporary restraining order or continue a preliminary injunction previously issued. *City of Pasadena v Superior Court* (1910) 157 C 781, 109 P 620. The court has this power even after a notice of appeal has been filed. *General Elec. Co. v Federal Employees' Distrib. Co.* (1955) 132 CA2d 649, 282 P2d 941. The court will usually require an undertaking to protect the enjoined party. See §32.92.

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B. In Appellate Courts

§32.127 1. By Appeal

Direct appeal may be taken from an order issuing, dissolving, or refusing to issue or dissolve a temporary restraining order or preliminary injunction. CCP §§904.1(a)(6) (other than a limited civil case), 904.2(g) (limited civil case); *County of San Diego v State of Cal.* (1997) 15 C4th 68, 110, 61 CR2d 134 (preliminary injunction); see *McLellan v McLellan* (1972) 23 CA3d 343, 100 CR 258 (restraining order). On trial court unification, see chap 6. Direct appeals of interim orders are not particularly effective, however, because the matter may proceed to trial and judgment before the appeal can be heard. For discussion, see 6 Witkin, California Procedure, *Provisional Remedies* §§402-405 (5th ed 2008). A more effective means of challenging an interim injunctive order is by extraordinary writ. See §32.130.

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§32.128 a. Stay Pending Appeal

When, pending appeal, the trial court denies a stay, the appellant may petition the reviewing court for a stay or a writ of supersedeas to preserve the status quo. CCP §923; Cal Rules of Ct 8.112. See, *e.g., McCain v Phoenix Resources, Inc.* (1986) 185 CA3d 575, 230 CR 25 (writ granted). See also form in §5.58 (Notice of Stay of Proceedings (Judicial Council Form CM-180)).

A writ of supersedeas cannot issue until the respondent has had an opportunity to file opposition papers (Cal Rules of Ct 8.112), which may be filed within 15 days after filing the petition, unless otherwise ordered, and a temporary stay pending a decision on the petition may be granted (Cal Rules of Ct 8.112). See generally California Civil Appellate Practice, chap 6 (3d ed Cal CEB 1996).

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§32.129 b. Standard of Review

An appellate court, when examining the trial court's exercise of discretion in granting a preliminary injunction, must view the facts most favorable to the trial court's disposition, and all reasonable inferences in support of the trial court's order must be indulged. *Common Cause v Board of Supervisors* (1989) 49 C3d 432, 261 CR 574; *Cohen v Board of Supervisors* (1985) 40 C3d 277, 219 CR 467. An abuse of discretion will be found only when the trial court's decision exceeds the bounds of reason or contravenes uncontradicted evidence. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 196 CR 715. See also *Millennium Rock Mort., Inc. v T.D. Serv. Co.* (2009) 179 CA4th 804, 812, 102 CR3d 544 (reversing trial court's order granting preliminary injunction because movant had no reasonable likelihood of prevailing on merits at trial).

In contrast, a preliminary mandatory injunction is subject to stricter review on appeal because such an injunction is rarely granted pending trial except in an extreme case when the right to it is clearly established. *Teachers Ins. & Annuity Ass'n v Furlotti* (1999) 70 CA4th 1487, 83 CR2d 455.

Denial of a preliminary injunction will be upheld on appeal if the trial court did not abuse its discretion with respect to either the question of success on the merits or the question of irreparable harm. Whether or not the trial court granted or denied a preliminary injunction, the appellate court does not resolve conflicts in the evidence, reweigh the evidence, or assess the credibility of witnesses. *Whyte v Schlage Lock Co.* (2002) 101 CA4th 1443, 1450, 125 CR2d 277.

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§32.130 2. By Writ

Use of extraordinary writs to attack an injunctive order directly is generally limited to extraordinary situations in which public interest is at stake or an appeal would be futile. See *Robbins v Superior Court* (1985) 38 C3d 199, 211 CR 398 (peremptory writ of mandate issued when trial court abused its discretion in refusing to issue preliminary injunction); *Northcutt v Superior Court* (1924) 66 CA 350, 356, 226 P 25 (prohibition available only when appeal would be inadequate).

Thus, extraordinary writs are commonly used to collaterally attack an injunctive order. If the enjoined party deliberately violates the injunctive order, the order may be collaterally attacked by review of the resulting contempt order. See, *e.g., In re Berry* (1968) 68 C2d 137, 65 CR 273 (habeas corpus); *Conn v Superior Court* (1987) 196 CA3d 774, 242 CR 148 (certiorari); *Harlan v Superior Court* (1949) 94 CA2d 902, 211 P2d 942 (prohibition), disapproved on other grounds in *Signal Oil & Gas Co. v Ashland Oil & Ref. Co.* (1958) 49 C2d 764, 775 n5, 322 P2d 149.

In appropriate circumstances, this approach often provides the fastest and most effective means of review. For discussion, see 8 Witkin, California Procedure, *Extraordinary Writs* §33 (5th ed 2008). For discussion on drafting the petition for writ, with forms, see California Civil Writ Practice, chaps 17-28 (4th ed Cal CEB 2008).

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XI. INJUNCTIONS AGAINST HARASSMENT UNDER CCP §527.6

§32.131 A. When Available

A person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment. CCP §527.6(a). "Harassment" is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. CCP §527.6(b); *Byers v Cathcart* (1997) 57 CA4th 805, 807, 67 CR2d 398. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must cause substantial emotional distress to the plaintiff. CCP §527.6(b). The relief is available when the victim has been "stalked, threatened, or harassed." *Grant v Clampitt* (1997) 56 CA4th 586, 591, 65 CR2d 727. The relief generally applies when the action is brought by someone not covered by a family relationship, which would be governed by restraining orders under the Family Code. *Oriola v Thaler* (2000) 84 CA4th 397, 403, 100 CR2d 822 (woman obtained civil harassment restraining order against man with whom she did not have a "dating relationship").

The conduct must be ongoing, and a single incident of harassment is not a "course of conduct" entitling the applicant to injunctive relief. *Leydon v Alexander* (1989) 212 CA3d 1, 4, 260 CR 253. Similarly, a trial court misinterpreted CCP §527.6 in holding that an injunction must issue based on a single incident of battery without finding a threat of future harm. *Russell v Douvan* (2003) 112 CA4th 399, 401, 5 CR3d 137 (attorney followed opposing counsel into elevator and forcefully grabbed his arm).

For Instructions for Lawsuits to Prohibit Harassment (Judicial Council Form CH-150), see §32.168.

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§32.132 1. Situations in Which Injunction Granted

Harassment injunctions were granted in the following cases:

- Victim was followed by private detective hired by defendant, victim's children were threatened, victim was threatened with legal action and physical harm, and was falsely accused of having AIDS and of causing defendant's marriage to fail. See *Kobey v Morton* (1991) 228 CA3d 1055, 278 CR 530.
- Psychiatrist/victim's former patient followed victim in her car and tried to stop victim's car in middle of street, repeatedly drove around her house and kept it under surveillance, made numerous phone calls, sent threatening letters, and threatened to commit suicide in victim's presence. *Ensworth v Mullvain* (1990) 224 CA3d 1105, 274 CR 447; see *Madhani v Cooper* (2003) 106 CA4th 412, 416 n7, 130 CR2d 778.
- Upstairs neighbors (victims) alleged that the downstairs neighbors played their stereo at extremely high volume, made false reports to animal regulation officers about victims, parked in victims' parking spaces, broke into victims' storage shed, and repeatedly rang victims' doorbell. *Elster v Friedman* (1989) 211 CA3d 1439, 260 CR 148.

The injunction was not proper in the following situations:

- Against the observer of a public proceeding when there was no evidence of harassing conduct. *Nebel v Sulak* (1999) 73 CA4th 1363, 1370, 87 CR2d 385.
- By one neighbor against the other for parking alongside a driveway when there was no evidence that parking was done to harass. *Byers v Cathcart* (1997) 57 CA4th 805, 808, 67 CR2d 398.
- By tenants against a property owners' association to maintain the peace and quiet and to refrain "from making any provocative statements" when there was no clear and convincing evidence that unlawful harassment already existed in fact. *Schraer v Berkeley Prop. Owners' Ass'n* (1989) 207 CA3d 719, 255 CR 453.

A civil harassment injunction under CCP §527.6 is not subject to the automatic stay provisions of federal bankruptcy law (11 USC §362(a)). *Grant v Clampitt* (1997) 56 CA4th 586, 591, 65 CR2d 727.

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§32.133 2. Statute Enacted as Expedited Procedure for Preventing Harassment

Code of Civil Procedure §527.6 was enacted to provide an expedited procedure for preventing "harassment" as defined. See, *e.g., Schild v Rubin* (1991) 232 CA3d 755, 761, 283 CR 533; *Diamond View Ltd. v Herz* (1986) 180 CA3d 612, 616, 225 CR 651. The motivation for the statute was the experience of a young woman who was hounded by a male admirer who followed her, and incessantly telephoned her. *Schild,* 232 CA3d at 761 (citing *Byers v Cathcart* (1997) 57 CA4th 805, 811, 67 CR2d 398). The statute was designed to provide a quick and simple procedure by which this type of wholly unjustifiable conduct, having no proper purpose, could be enjoined. *Byers v Cathcart, supra*; *Smith v Silvey* (1983) 149 CA3d 400, 405, 197 CR 15. The statute is limited to protecting only those who have suffered "substantial emotional distress" caused by conduct that "serves no legitimate purpose." CCP §527.6(b) (defining "harassment"). Nothing in the statute indicates that it was intended to supplant normal injunctive procedures applicable to cases concerning issues other than "harassment" as statutorily defined. *Byers v Cathcart*, *supra*.

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§32.134 3. Normal Injunctive Procedures Contrasted

Normal injunctive procedures allow time for research and investigation, pleading and other motions if necessary, discovery and preparation, etc., followed by opportunity for a full trial. See, *e.g.*, CCP §527; *Byers v Cathcart* (1997) 57 CA4th 805, 811, 67 CR2d 398. A temporary restraining order is initially available to stabilize a situation; a preliminary injunction can follow. *Byers v Cathcart, supra*. Thereafter the matter can proceed to a full trial. If this matter had been handled according to normal injunctive procedures, the plaintiff would have had ample time to develop evidence and prepare his or her case, and would not have had to defend her use of the easement on 24 hours' notice. *Byers v Cathcart*, *supra*.

In contrast, CCP §527.6 provides a quick and truncated procedure. Offsetting its truncated nature is the limited scope of the antiharassment orders that can legitimately follow. Section 527.6 provides for temporary restraining orders or injunctions to handle immediate problems, followed quickly by a court hearing on a limited-scope antiharassment injunction—normally within 15 days, but in no case more than 22 days even if time is extended for good cause. CCP §527.6(c)-(d); *Byers v Cathcart, supra*.

This expedited and summary proceeding is subject to several limitations designed to confine it to its proper scope. One such limitation is that any injunction that results cannot exceed 3 years. Hence §527.6 does not allow for final resolution of disputed rights. *Byers v Cathcart, supra*.

Other limitations are that "harassment" must be found by clear and convincing evidence before future conduct may be enjoined (CCP §527.6(d)), and that a §527.6 injunction may enjoin only "harassment" as defined. CCP §527.6(b). Conduct that serves a legitimate purpose is outside the definition of "harassment" and cannot be enjoined under the summary procedures of §527.6, even if such conduct might ultimately be enjoinable according to normal injunctive procedures after full development of the facts and law. *Byers v Cathcart*, *supra.*

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B. Definitions

§32.135 1. Unlawful Violence

"Unlawful violence" is any assault or battery, or stalking as prohibited in Pen C §646.9, but it must not include lawful acts of self-defense or defense of others. CCP §527.6(b)(1); see *Grant v Clampitt* (1997) 56 CA4th 586, 591, 65 CR2d 727.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.136 2. Credible Threat of Violence

§32.136 2. Credible Threat of Violence

A "credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose. CCP §527.6(b)(2).

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3. Course of Conduct

§32.137 1. Temporary Restraining Order

On filing a petition for an injunction under CCP §527.6, the plaintiff may obtain a temporary restraining order in accordance with CCP §527, except to the extent that §527.6 provides a rule that is inconsistent. See *Byers v Cathcart* (1997) 57 CA4th 805, 811, 67 CR2d 398. A temporary restraining order may be issued with or without notice on an affidavit that, to the court's satisfaction, shows reasonable proof of harassment of the plaintiff by the defendant, and that great or irreparable harm would result to the plaintiff. In the court's discretion, and on a showing of good cause, the temporary restraining order or injunction may include other named family or household members who reside with the plaintiff. A temporary restraining order issued under §527.6 must remain in effect, at the court's discretion, for a period not to exceed 15 days, or, if the court extends the time for hearing under CCP §527.6(d), not to exceed 22 days, unless otherwise modified or terminated by the court. CCP §527.6(c). See *Byers v Cathcart*, *supra*.

A supporting memorandum is apparently not required. See Cal Rules of Ct 3.1114(a)(7).

For forms of petition, and order to show cause and temporary restraining order, see §§32.160-32.162.

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§32.138 2. Hearing on Injunction

Within 15 days or, if good cause appears to the court, 22 days after the date the temporary restraining order is issued, a hearing shall be held on the petition for the injunction. CCP §527.6(d); see *Oriola v Thaler* (2000) 84 CA4th 397, 403, 100 CR2d 822. The defendant may file a response that explains, excuses, justifies, or denies the alleged harassment or may file a cross-complaint. For a form of response, see §32.163.

At the hearing, the judge must receive any testimony that is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction must issue prohibiting the harassment. An injunction issued under CCP §527.6 must have a duration of no more than three years. At any time within three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under §527.6. CCP §527.6(d).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.139 3. Representation by Counsel

§32.139 3. Representation by Counsel

Code of Civil Procedure §527.6 does not preclude either party from representation by private counsel or from appearing on the party's own behalf. CCP §527.6(e).

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§32.140 4. Use of Support Person

In a proceeding under CCP §527.6, if there are allegations or threats of domestic violence, "a support person may accompany a party in court and, if the party is not represented by an attorney, may sit with the party at the table that is generally reserved for the party and the party's attorney." The role of the support person is to:

- Provide moral and emotional support for a person who alleges that he or she is a victim of domestic violence.
- Assist the person who alleges that he or she is a victim of domestic violence in feeling assured that he or she will not be injured or threatened by the other party during the proceedings if the alleged victim and the other party must be in close proximity.

The support person is not present as a legal adviser and may not provide legal advice.

The court has discretion to remove the support person from the courtroom if the court believes that the support person is prompting, swaying, or influencing the alleged victim. CCP §527.6(f).

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5. Service and Delivery to Law Enforcement Agencies

§32.141 a. Petition

On filing of a petition for an injunction under CCP §527.6, the defendant must be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition. Service shall be made at least five days before the hearing. The court may for good cause, on the plaintiff's motion or on its own motion, shorten the time for service on the defendant. CCP §527.6(g).

For forms of proof of service, see §§32.164-32.165.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.142 b. Delivery to Law Enforcement Agencies

§32.142 b. Delivery to Law Enforcement Agencies

The court must order the plaintiff or the attorney for the plaintiff to deliver a copy of each temporary restraining order or injunction, or any modification or termination, granted under CCP §527.6, by the close of the business day on which the order was granted, to the law enforcement agencies within the court's discretion as are requested by the plaintiff. Each appropriate law enforcement agency must make available information on the existence and current status of these orders to law enforcement officers responding to the scene of reported harassment. CCP §527.6(h).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.143 c. Notification of Department of Justice

§32.143 c. Notification of Department of Justice

Information on any temporary restraining order or injunction relating to harassment or domestic violence issued by a court under CCP §527.6 or CCP §527.8 must be transmitted to the Department of Justice in accordance with Fam C §6380(b). CCP §527.6(o).

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§32.144 6. Order

An order issued under CCP §527.6 must, on the plaintiff's request, be served on the defendant, whether or not the defendant has been taken into custody, by any law enforcement officer who is present at the scene of reported harassment involving the parties to the proceeding. The plaintiff must provide the officer with an endorsed copy of the order and a proof of service that the officer must complete and send to the issuing court. CCP §527.6(h).

A person subject to a protective order issued under §527.6 must not own, possess, purchase, receive, or attempt to purchase or receive a firearm while the protective order is in effect. CCP §527.6(k)(1).

The court must order a person subject to a protective order issued under §527.6 to relinquish any firearms he or she owns or possesses under CCP §527.9 (procedure for relinquishment of firearms). CCP §527.6(k)(2).

Every person who owns, possesses, purchases, or receives, or attempts to purchase or receive a firearm while the protective order is in effect is punishable under Pen C §12021(g). CCP §527.6(k)(3).

For a form of order after hearing, see §32.166.

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§32.145 D. Protected Person's Production of Certified Copy of Order

On receiving information at the scene of an incident of harassment that a protective order has been issued under CCP §527.6, or that a person who has been taken into custody is the subject of an order, if the protected person cannot produce a certified copy of the order, a law enforcement officer must immediately attempt to verify the existence of the order. If the law enforcement officer determines that a protective order has been issued, but not served, the officer must immediately notify the defendant of the terms of the order and must at that time also enforce the order. Verbal notice of the terms of the order must constitute service of the order and is sufficient notice for the purposes of §527.6 and for purposes of Pen C §§273.6 and 12021(g). CCP §527.6(h).

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E. Fees and Costs

§32.146 1. Costs and Attorney Fees

The prevailing party in any action brought under CCP §527.6 may be awarded court costs and attorney fees, if any. CCP §527.6(i). The action need not have been filed frivolously or in bad faith for a defendant to recover costs and fees. *Krug v Maschmeier* (2009) 172 CA4th 796, 803, 91 CR3d 452.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.147 2. Filing Fees

§32.147 2. Filing Fees

There must be no filing fee for a petition that alleges that a person has inflicted or threatened violence against the petitioner, or stalked the petitioner, or acted or spoken in any other manner that has placed the petitioner in reasonable fear of violence, and that seeks a protective or restraining order or injunction restraining stalking or future violence or threats of violence, in any action brought under CCP §527.6. No fee need be paid for a subpoena filed in connection with a petition alleging these acts. No fee need be paid for filing a response to a petition alleging these acts. CCP §527.6(p).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.148 3. Service Fees

§32.148 3. Service Fees

Regardless of any other provision of law, a petitioner who so requests is not required to pay a fee for serving process in connection with a protective order, restraining order, or injunction to be issued, if any of the following conditions apply (CCP §527.6(q)(1)):

- The protective order, restraining order, or injunction issued under CCP §527.6 is based on stalking, as prohibited by Pen C §646.9.
- The protective order, restraining order, or injunction issued under §527.6 is based on a credible threat of violence resulting from a threat of sexual assault. As used in this subparagraph, "sexual assault" means the offenses enumerated in Evid C §1036.2.
- The protective order, restraining order, or injunction is issued under Fam C §6222.

Under CCP §527.6(q)(2) the Judicial Council is given responsibility for preparing and developing application forms for applicants who wish to avail themselves of the services described in this subdivision. CCP §527.6(q)(1).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.149 F. Disobedience of Order

§32.149 F. Disobedience of Order

Any willful disobedience of any temporary restraining order or injunction granted under CCP §527.6 is punishable under Pen C §273.6. CCP §527.6(j).

Code of Civil Procedure §527.6 does not apply to any action or proceeding governed by CC §§1788-1788.33 (fair debt collection practices) or by Fam C §§6200-6409 (prevention of domestic violence), nor does it preclude a plaintiff's right to use other existing civil remedies. CCP §527.6(*l*).

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§32.150 G. Judicial Council Forms

The Judicial Council is charged with promulgating forms and instructions, including rules for service of process, scheduling of hearings, and any other matters required by CCP §527.6. The petition and response forms are to be simple and concise, and their use in §527.6 actions is mandatory. CCP §527.6(m).

A temporary restraining order or injunction relating to harassment or domestic violence issued by a court under §527.6 must be issued on forms adopted by the Judicial Council of California and that have been approved by the Department of Justice under Fam C §6380(i). However, an order issued by a court under §527.6 that was not issued on forms adopted by the Judicial Council and approved by the Department of Justice is not unenforceable for that reason. CCP §527.6(n).

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§32.151 H. Repeal Date [Deleted]

This section has been deleted because the material is now outdated.

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XII. FORMS

A. Injunctive Relief

§32.152 1. Form: Complaint for Injunctive Relief

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**COMPLAINT FOR INJUNCTIVE**
vs	)	**RELIEF _ _[*AND* *DAMAGES*]_ _**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	[*In limited civil case, add:* **Amount demanded** _ _[*exceeds/does not* *exceed*]_ _ **$10,000**]

Plaintiff, _ _[*name*]_ _, alleges:

First Cause of Action for Injunctive Relief

1. Plaintiff is now, and at all times mentioned in this complaint has been, _ _[*allege facts showing plaintiff's status and interest in subject of action, e.g., owner of certain described real property/shareholder of _ _[name of corporation*]_ _ *engaged in the business of _ _[specify*]_ _]_ _.

2. Defendant, _ _[*name*]_ _, is now, and at all times mentioned in this complaint has been, _ _[*allege facts showing defendant's status in relation to plaintiff, e.g., adjoining landowner/officer of _ _[name of corporation*]_ _ engaged in the business of _ _[*specify*]_ _]_ _.

3. On or about _ _[*date*]_ _, and continuing to the present, defendant has wrongfully and unlawfully _ _[*allege defendant's wrongful acts in particular as well as general course of conduct*]_ _. _ _[*If acts have not yet been committed, but are imminent, allege accordingly*]_ _.

4. On or about _ _[*date*]_ _, and at other times between that date and the present, plaintiff has demanded that defendant refrain from committing the above acts, but defendant has refused and has threatened to _ _[*continue/commence*]_ _ such acts unless immediately enjoined by this Court from doing so.

**5. As a result of defendant's acts, plaintiff _ _[*has sustained/will sustain*]_ _ great and irreparable injury in that _ _[*allege specific injury, showing irreparable character, e.g., specific waste, destruction, trespass, or injury to real property/facts and circumstances showing that acts constitute nuisance/loss of contracts, customers, or trade/deprivation*

of civil or constitutional rights]_ _.

6. Plaintiff cannot be fully compensated in damages, is without an adequate remedy at law because the exact amount of damage plaintiff will sustain will be difficult to determine, and _ _[*allege other facts showing inadequacy of legal remedy, e.g., defendant's inability to respond in damages/imminent multiplicity of actions/public policy considerations/exhaustion of legal or administrative remedies*]_ _.

[*Add if incidental damages are sought*]

7. As a further result of defendant's acts, plaintiff has sustained damage in the amount of $_ _ _ _ _ _. If these acts are permitted to continue, plaintiff will be further damaged in an amount to be alleged when additional damages have been determined.

[*Continue*]

WHEREFORE, plaintiff demands judgment for:

1. _ _[*State character of relief sought, e.g., temporary restraining order/preliminary and permanent injunction*]_ _ **enjoining** _ _[*name persons to be enjoined, e.g., defendant,* _ _[*his/her/its*]_ _ *agents, employees, officers, attorneys, and representatives*]_ _ **from engaging in or performing any of the following acts:** _ _[*Specify acts sought to be enjoined*]_ _.

2. Damages against defendant in the amount of $_ _ _ _ _ _ _ _[*and additional damages according to proof*]_ _.

3. Costs of this action and other just relief.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of whether the complaint should be verified, see §32.39. On drafting considerations, see §32.37.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.153 2. Form: Declaration Supporting Temporary Restraining Order and Preliminary Injunction

§32.153 2. Form: Declaration Supporting Temporary Restraining Order and Preliminary Injunction

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**TEMPORARY RESTRAINING**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**ORDER AND PRELIMINARY INJUNCTION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*e.g., plaintiff*]_ _ **in this action.**

2. I have personal knowledge of the following facts and am competent to testify as to their truth if called as a witness.

3. On _ _[*date and time*]_ _**, I was present at** _ _[*location*]_ _**.**

4. _ _[*Describe in detail (a) acts sought to be enjoined; (b) person committing them; (c) person's relation to, e.g., plaintiff; and (d) irreparable effect of acts on, e.g., plaintiff's land or business*]_ _**.**

[*Add if appropriate*]

5. I requested that _ _[*e.g., defendant*]_ _**,** _ _[*name*]_ _**, refrain from the conduct described above, but** _ _[*he/she/it*]_ _ **refused to do so and** _ _[*describe conduct or statements indicating intention to continue acts; state that* _ _[*e.g., plaintiff*]_ _ *observed conduct and heard remarks directly*]_ _**.**

[*Continue*]

[6.]_ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The caption of the declaration must state the name of the declarant. Cal Rules of Ct 3.1115. For discussion of papers to be filed with complaint in support of application for injunctive relief, see §32.62.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.154 3. Form: Order to Show Cause and Temporary Restraining Order

§32.154 3. Form: Order to Show Cause and Temporary Restraining Order

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Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No. _ _ _ _ _ _**
vs	**ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

After considering the moving papers filed in this action, the Court finds (1) that this is a proper case for issuance of an order to show cause, and (2) that, unless the Court issues a temporary restraining order, plaintiff, _ _[*name*]_ _, will suffer irreparable injury before the matter can be heard on formal notice.

IT IS ORDERED that:

1. Defendant, _ _[*name*]_ _, appear before this Court at the above date and time to show cause why a preliminary injunction should not be issued enjoining _ _[*him/her/it*]_ _ from engaging in or performing _ _[*specify acts sought to be enjoined*]_ _.

2. Pending the hearing on the order to show cause, defendant, _ _[*his/her/its*]_ _ agents, officers, employees, and representatives, and all persons acting in concert or participating with them, be enjoined from engaging in or performing the following: _ _[*Track acts listed above in language clear enough to be enforceable via contempt proceedings*]_ _.

3. A copy of the complaint, declaration(s), and memorandum, together with a copy of this order to show cause and temporary restraining order, be served by _ _[*manner of service specified by court*]_ _ on defendant no later than _ _[*date set by court; at least two days before hearing*]_ _. Any opposition must be filed and served by _ _[*manner of service specified by court*]_ _ by _ _[*date set by court*]_ _. _ _[*No reply may be filed./Any reply must be filed and served by _ _[manner of service specified by court*]_ _ *by _ _[date set by court*]_ _.]_ _

[*Add if appropriate; see §32.56 (bond or undertaking)*]

4. Bond on this temporary restraining order be fixed at $_ _[*amount to be inserted by court*]_ _.

[*Continue*]

[5.]_ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: The two orders in this form (an order to show cause and a temporary restraining order) can be prepared as two separate documents, if desired. Stating the proposed orders separately in one document, as shown in this form,

permits the court to modify or delete terms of the restraining order by striking or interlineating certain language without altering the order to show cause. The restraining order should be narrowly drawn so that it will not be declared void by a reviewing court as interfering with constitutionally protected rights or being otherwise overbroad. See, *e.g., In re Berry* (1968) 68 C2d 137, 65 CR 273 (overbroad order restraining picketing); *New Method Laundry Co. v MacCann* (1916) 174 C 26, 161 P 990 (trade secret order properly drawn). For discussion of bond or undertaking that may be required at the court's discretion when issuing a temporary restraining order, see §32.56.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.155 4. Form: Notice of Motion for Preliminary Injunction

§32.155 4. Form: Notice of Motion for Preliminary Injunction

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR PRELIMINARY**
	)	**INJUNCTION;**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*SUPPORTING*
	)	*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that plaintiff, _ _[*name*]_ _**, on** _ _[*date*]_ _ **at** [*time*]**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _**of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §527 for an order for preliminary injunction as demanded in the complaint on file in this action, enjoining defendant,** _ _[*name*]_ _**, and** _ _[*his/her/its*]_ _ **agents, officers, employees, and representatives, from engaging in or performing the following acts:** _ _[*Specify acts sought to be enjoined*]_ _**. The grounds for issuance of this order are stated in the** _ _[*complaint/verified complaint*]_ _ **on file in this action and in the attached documents and exhibits, all of which are incorporated in this notice by reference.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: If no temporary restraining order (TRO) has issued, notice may be given by notice of motion or order to show cause. See §32.61 on motion for preliminary injunction. In courts with more than one department, the proper department in which to move for a preliminary injunction is set by local court rules. The notice of motion must be accompanied by a memorandum in support of the motion and supporting declarations. Cal Rules of Ct 3.1112(a). On formal requirements for noticed motions, see chap 12.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example,

"pleading paper" (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.156 5. Form: Preliminary Injunction and Order for Undertaking

§32.156 5. Form: Preliminary Injunction and Order for Undertaking

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Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No. _ _ _ _ _ _**
vs	**PRELIMINARY INJUNCTION AND ORDER FOR UNDERTAKING**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of plaintiff, _ _[*name*]_ _, for an order _ _[*for preliminary injunction/to show cause*]_ _ was heard at the above-stated date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. During pendency of this action or until further court order, defendant, _ _[*name*]_ _, and _ _[*his/her/its*]_ _ agents, officers, employees, and representatives, be enjoined from engaging in or performing the following: _ _[*Specify acts sought to be enjoined in language used by court in minute order or at hearing*]_ _.

[*Add if appropriate*]

2. Defendant, and _ _[*his/her/its*]_ _ agents, officers, employees, and representatives, immediately and until further court order shall do the following: _ _[*Specify acts to be performed*]_ _.

[*Continue*]

[3.] The above injunction issue on plaintiff's filing an undertaking in the amount of $_ _ _ _ _ _, as required by law.

[4.]_ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: Many courts prefer that the written order be titled "Preliminary Injunction" rather than "Order Granting Preliminary Injunction." Some courts also instruct counsel to include in the order language such as "The court reserves jurisdiction to modify this injunction as the ends of justice may require." On persons bound by the order, see §32.88. The court must require an undertaking when issuing a preliminary injunction. See §32.92.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details

required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.157 6. Form: Order Denying Preliminary Injunction

§32.157 6. Form: Order Denying Preliminary Injunction

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER DENYING PRELIMINARY INJUNCTION**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of plaintiff, _ _[*name*]_ _**, for an order** _ _[*for preliminary injunction/to show cause*]_ _ **was heard at the above-stated date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. The application for preliminary injunction be denied.

2. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: If a temporary restraining order (TRO) had previously issued, inclusion of a provision stating that the TRO is dissolved is unnecessary, because a TRO is dissolved automatically when a preliminary injunction is denied. See *San Diego Water Co. v Pacific Coast S.S. Co.* (1894) 101 C 216, 35 P 651; *Marsh Bros. & Gardenier, Inc. v United States Fid. & Guar. Co.* (1929) 97 CA 474, 275 P 886. Nevertheless, some courts insist on including such a provision. On appellate review of court order, see §32.127-32.129.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.158 7. Form: Undertaking by Surety on Preliminary Injunction

§32.158 7. Form: Undertaking by Surety on Preliminary Injunction

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**UNDERTAKING ON**
vs	)	**PRELIMINARY INJUNCTION**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

WHEREAS plaintiff, _ _[*name*]_ _**, desires to give** _ _[*a bond/an undertaking*]_ _ **for issuance of a preliminary injunction under Code of Civil Procedure §529, we the undersigned** _ _[_ _[*principal and*]_ _ _ _[*surety/sureties*]_ _]_ _ **obligate ourselves jointly and severally to defendant,** _ _[*name*]_ _**, under the statutory obligations in the amount of $**_ _ _ _ _ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name(s) of* _ _[*surety/sureties*]_ _]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On purpose and requirements for undertaking, see §32.92. On filing and service requirements, see §32.98.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.159 8. Form: Declaration of Personal Surety's Qualifications

§32.159 8. Form: Declaration of Personal Surety's Qualifications

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**DECLARATION OF**
vs	)	**PERSONAL SURETY'S**
	)	**QUALIFICATIONS**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

_ _[*Name*]_ _**, one of the sureties for the above-stated undertaking, declares:**

1. I am a resident and a _ _[*householder/freeholder*]_ _ **within the State of California and am worth the sum specified in the undertaking, over and above all debts and liabilities, excluding property exempt from execution.**

2. I reside at _ _[*address and city*]_ _**,** _ _ _ _ _ _ **County, California.**

[*Add if amount of undertaking exceeds $5000; see CCP §995.520(c)*]

3. The property belonging to me and relied on in this undertaking is _ _[*describe real or personal property*]_ _**. My interest in this property is** _ _[*state nature of interest or estate in property*]_ _**. My best estimate of the actual cash value of the property is $**_ _ _ _ _ _**. The property is subject to the following known charges and liens:** _ _[*State amounts of any known charges and liens, whether or not recorded*]_ _**. The property is not subject to any other cloud or impediment known to me.**

[*Continue*]

[4.]_ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of bonds and undertakings, see §§32.92-32.108.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details

required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/ B. Injunctions Against Harassment Under CCP §527.6/§32.160 1. Form: Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-100)

B. Injunctions Against Harassment Under CCP §527.6

§32.160 1. Form: Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-100)

CH-100 Request for Orders to Stop Harassment

Clerk stamps date here when form is filed.

1 Your name *(person asking for protection):*

Your address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

City: _____ State: _____ Zip: _____

Your telephone number *(optional):* (____) _____

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):*

Fill in court name and street address:

Superior Court of California, County of

2 Name of person you want protection from:

Describe the person: Sex: ☐ M ☐ F Weight: _____

Height: _____ Race: _____ Hair Color: _____

Eye Color: _____ Age: _____ Date of Birth: _____

Court fills in case number when form is filed.

Case Number:

Home Address *(if you know):* _____

City: _____ State: _____ Zip: _____

Work Address *(if you know):* _____

City: _____ State: _____ Zip: _____

3 Besides you, who needs protection? *(Family or household members)*

Full Name	Sex	Age	Lives with you?	How are they related to you?
_____	_____	_____	☐ Yes ☐ No	_____
_____	_____	_____	☐ Yes ☐ No	_____
_____	_____	_____	☐ Yes ☐ No	_____
_____	_____	_____	☐ Yes ☐ No	_____

☐ *Check here if you need more space. Attach a sheet of paper and write "CH-100, item 3—Describe Protected Persons" at the top of the page.*

4 Why are you filing in this court? *(Check all that apply):*

☐ The person in ② lives in this county.

☐ I was hurt (physically or emotionally) by the person in ② here.

☐ Other *(specify):* _____

5 How do you know the person in ②? *(Describe):*

_____

_____

_____

_____

This is not a Court Order.

Print

Your name: _____ Case Number:

6 Describe how the person in ② has harassed you:

a. Date of most recent harassment: _____

b. Who was there? _____

c. Did the person in ② commit any acts of violence or threaten to commit any acts of violence against you? ☐ Yes ☐ No

If yes, describe those acts or threats: _____

d. Did the person in ② engage in a course of conduct that harassed you and caused substantial emotional distress? ☐ Yes ☐ No

If yes, describe: _____

e. Did the conduct of the person in ② described above seriously alarm, annoy, or harass you? ☐ Yes ☐ No

☐ *Check here if you need more space. Attach a sheet of paper and write "CH-100, item 6—Describe Harassment" at the top of the page.*

Check the orders you want ☑

7 ☐ **Personal Conduct Orders**

I ask the court to order the person in ② to **not** do the following things to me or anyone listed in ③ :

a. ☐ Harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, destroy personal property, keep under surveillance, or block movements.

b. ☐ Contact (either directly or indirectly), or telephone, or send messages or mail or e-mail.

The person in ② will also be ordered not to take any action to get the addresses or locations of any protected persons, their family members, or their caretakers unless the court finds good cause not to make the order.

8 ☐ **Stay-Away Orders**

I ask the court to order the person in ② to stay at least *(specify):*_____ yards away from me and the people listed in ③ and the places listed below: *(Check all that apply):*

a. ☐ My home
b. ☐ My job or workplace
c. ☐ My children's school or child care
d. ☐ My vehicle
e. ☐ Other *(specify):* _____

If the court orders the person in ② to stay away from all the places listed above, will that person still be able to get to his or her home, school, or job? ☐ Yes ☐ No

If no, explain: _____

This is not a Court Order.

Print

Your name: _____ Case Number:

9 ☐ **Others to Be Protected**

Should the other people listed in 3 also be covered by the orders described above?

☐ Yes ☐ No ☐ Does not apply

If yes, explain: _____

10 **Order About Guns or Other Firearms**

I ask the court to order the person in 2 to be prohibited from owning, possessing, purchasing, or receiving, or attempting to purchase or receive firearms **and** to sell or turn in any guns or firearms that he or she controls.

11 ☐ **Other Orders**

I ask the court to order the person in 2 to *(specify):* _____

12 ☐ **Temporary Orders**

Do you want the court to make orders now on the matters listed in 7, through 11 that will last until the hearing? ☐ Yes ☐ No

If yes, explain why you need these orders right now: _____

☐ *Check here if you need more space. Attach a sheet of paper and write "CH-100, item 12—Temporary Orders" at the top of the page.*

13 **Delivery of Orders to Law Enforcement**

My lawyer or I will give copies of the orders to the following law enforcement agencies:

a. Name of Agency: _____

Address: _____

City: _____ State: _____ Zip: _____

b. Name of Agency: _____

Address: _____

City: _____ State: _____ Zip: _____

14 ☐ **Other Court Cases**

Have you ever asked any court for other restraining orders against the person in 2? ☐ Yes ☐ No

If yes, specify the counties and case numbers if you know them: _____

This is not a Court Order.

Print

Case Number:

Your name: _____

15 ☐ **Time for Service**

You must have your papers personally served on (notify) the person in ② at least 5 days before the hearing, unless the court orders a different time for service. *(Form CH-135 explains* "What Is Proof of Service?" *Form CH-130 may be used to show the court that the papers have been served.)* If your papers cannot be served at least 5 days before the hearing and you need more time, explain why:

_____

_____

_____

16 ☐ **No Fee for Filing**

I ask the court to waive the filing fee because the person in ② has used or threatened to use violence against me, has stalked me, or has acted or spoken in some other way that makes me reasonably fear violence. I am asking for a restraining order to stop this conduct.

17 ☐ **No Fee to Serve Orders**

I ask the court to order the sheriff or marshal to serve (notify) the person in ② about the orders for free because:

a. ☐ My request for orders is based on stalking; or

b. ☐ My request for orders is based on a credible threat of violence; or

c. ☐ I am entitled to a fee waiver.

(If you are requesting free service of the orders based on a fee waiver, you must complete and file the Application for Waiver of Court Fees and Costs *(Form FW-001).)*

18 ☐ **Lawyer's Fees and Costs**

I ask the court to order payment of my:

a. ☐ Lawyer's fees

b. ☐ Out-of-pocket expenses

The amounts requested are:

Item	Amount	Item	Amount
_____	$ _____	_____	$ _____
_____	$ _____	_____	$ _____
_____	$ _____	_____	$ _____

☐ *Check here if you need more space. Attach a sheet of paper and write "CH-100, item 18—Lawyer's Fees and Costs" at the top of the page.*

19 **Additional Relief**

I ask the court for additional relief as may be proper.

20 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

This is not a Court Order.

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing form is the mandatory Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-100). This form tells the judge the facts of plaintiff's case and what orders the plaintiff wants the court to make. The plaintiff must specify recent acts of harassment and should give details of the most recent incidents. It should be filled in except for the date of the court hearing and the judge's signature.

Personal service is required (see CCP §527.6(g)), and the person effecting service should complete the Proof of Personal Service (Civil Harassment) (Judicial Council Form CH-130). See §32.164. The plaintiff should serve the Request, and after it is signed by the judge, the Notice of Hearing and Temporary Restraining Order (CLETS) (Civil Harassment) (Judicial Council Form CH-120) (see §32.162), and a blank copy of the Answer to Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-110) (see §32.163).

For Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150), see §32.168.

Note: Judicial Council forms are available on the Judicial Council website at www.courtinfo.ca.gov/forms or in the California Judicial Council Forms Manual (Cal CEB 1981).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.161 2. Form: Request and Order for Free Service of Restraining Order (Domestic Violence or Civil Harassment (Sexual Assault or Stalking)) (Judicial Council Form CH-101/DV-290)

§32.161 2. Form: Request and Order for Free Service of Restraining Order (Domestic Violence or Civil Harassment (Sexual Assault or Stalking)) (Judicial Council Form CH-101/DV-290)

CH-101/DV-290 Request and Order for Free Service of Restraining Order

Clerk stamps date here when form is filed.

1 Your name (person asking for protection):

Your address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

City: _____ State: _____ Zip: _____

Your telephone *(optional):* (_____) _____

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):*

Fill in court name and street address:

Superior Court of California, County of

2 Name of person you want protection from:

Clerk fills in case number when form is filed.

Case Number:

Request for Free Service

3 If you qualify for a fee waiver, complete *Application for Waiver of Court Fees and Costs* (Form FW-001) and file it with this request. *(Check one):*

a. ☐ I have completed and filed a fee waiver application.

b ☐ I am not eligible for a fee waiver.

4 I am entitled to free service of the restraining orders by the sheriff or marshal because *(check either item a or b):*

a. ☐ I asked for domestic violence prevention restraining orders on Form DV-100.

b. ☐ I asked for civil harassment restraining orders on Form CH-100, and my request was based on my fear of *(check at least one box, if applicable):*

(1) ☐ sexual assault.

(2) ☐ stalking.

(If you are not entitled to free service under a or b, you may be eligible under a fee waiver or may pay the sheriff or marshal to serve the restraining orders.)

I declare under penalty of perjury, under the laws of the State of California, that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

(Order is on next page)

Print

Case Number:

Protected person's name: _____

Court Order

5 The court has reviewed the request of the person in ① and finds that *(check one box only):*

a. ☐ The person qualifies for a fee waiver under rule 985 of the California Rules of Court.

b. ☐ The person does not qualify for a fee waiver, but qualifies for orders under item 4a or 4b above.

c. ☐ The person does not qualify for a fee waiver or for orders under item 4a or 4b above.

6 The sheriff or marshal shall serve the restraining order (on Form DV-110 or DV-130 or CH-120 or CH-140 and reference documents) ☐ without cost ☐ with cost to the person in ①.

Date: _____

☐ Clerk, by _____, Deputy
(Clerk may grant in full a nondiscretionary fee waiver; see Cal. Rules of Court, rule 985(d).)

— or —

☐ _____
Judicial Officer

Instructions for Protected Person

- Fill out page 1 of this form. This form will allow you to ask the sheriff or marshal to serve the restraining order on the restrained person. **There is no cost to you if you qualify under either item 4a or 4b on page 1.**
- Fill out the *Application for Waiver of Court Fees and Costs* (Form FW-001) if you qualify for a fee waiver based on financial need.
- Give the forms to the court clerk together with your request for a restraining order.
- Ask the clerk how to make sure the sheriff or marshal gets your papers for service.
- If you do not qualify for free service of the restraining order under this request or a fee waiver, you may pay the sheriff or marshal to serve the order on the restrained person.
- For more information about service, read *What is "Proof of Service"?* (Form CH-135 or Form DV-210).

Instructions for Law Enforcement

- Government Code section 6103.2(b) allows the sheriff or marshal to bill the court only for orders or injunctions described in subdivision (q)(1) of Code of Civil Procedure section 527.6. The sheriff or marshal may bill the court for service **only** if item 5b above is checked.
- If the sheriff or marshal is seeking reimbursement for service, the box below must be filled out and a copy of this form returned to the court listed on page 1. **This is not a proof of service.**

Service of the order was made or attempted on *(date):* _____ **Fee for service: $** _____

Date: _____

_____ _____
(Type or Print Name of Law Enforcement Representative) *(Signature of Law Enforcement Representative)*

_____
(Title and Agency)

(This is Not a Proof of Service.)

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing is the mandatory Request and Order for Free Service of Restraining Order (Domestic Violence or Civil Harassment (Sexual Assault or Stalking)) (Judicial Council Form CH-101/DV-290). See CCP §527.6(p). See §32.147.

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.162 3. Form: Notice of Hearing and Temporary Restraining Order (CLETS) (Civil Harassment) (Judicial Council Form CH-120)

§32.162 3. Form: Notice of Hearing and Temporary Restraining Order (CLETS) (Civil Harassment) (Judicial Council Form CH-120)

CH-120 Notice of Hearing and Temporary Restraining Order

Clerk stamps date here when form is filed.

1 Name of person asking for protection:

Address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

City: State: Zip:

Your telephone number *(optional):* ( )

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):*

Fill in court name and street address:

Superior Court of California, County of

2 Name of person to be restrained:

Court fills in case number when form is filed.

Case Number:

Description of that person:

Sex: ☐ M ☐ F Height: Weight: Race:

Hair Color: Eye Color: Age: Date of Birth:

Home Address *(if known):*

City: State: Zip:

Work Address *(if known):*

City: State: Zip:

To the person in ②:

3 **Notice of Hearing**

A court hearing is scheduled on the request for orders against you to stop harassment:

Name and address of court if different from above:

Hearing Date → Date: Time:

Dept.: Rm.:

If you do not want the court to make orders against you, file Form CH-110. Then go to the hearing and tell the court why you disagree. You may bring witnesses and other evidence. If you do not go to this hearing, the court may make restraining orders against you that could last up to 3 years.

4 **Court Orders**

The court *(check a or b):*

a. ☐ Has scheduled the hearing stated in ③. No orders are issued against you at this time.

b. ☐ Has scheduled the hearing stated in ③ **and** has issued the temporary orders against you specified on page 2. If you do not obey these orders, you can be arrested and charged with a crime. And you may have to go to jail, pay a fine of up to $1,000, or both.

This is a Court Order.

Print

Your name: _____ Case Number:

Temporary Orders Against the Restrained Person

(Write the name of the person in ②): _____

The court has made the temporary orders indicated below against you. You must obey all these orders. These orders will expire on the date of the hearing listed in ③ unless they are extended by the court.

⑤ ☐ Personal Conduct Orders

You must **not** do the following things to the people listed in ① and ⑩:

☐ a. Harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, destroy personal property, keep under surveillance, or block movements.

☐ b. Contact (directly or indirectly), telephone, send messages, mail, or e-mail.

☐ c. Take any action, directly or through others, to obtain the addresses or locations of the persons in ① and ⑩. *(If item c is not checked, the court has found good cause not to make this order.)*

Peaceful written contact through a lawyer or a process server or other person for service of legal papers related to a court case is allowed and does not violate this Order.

⑥ ☐ Stay-Away Order

You **must** stay at least *(specify):* _____ yards away from:

a. ☐ The person listed in ①
b. ☐ The people listed in ⑩
c. ☐ The home of the persons in ① and ⑩
d. ☐ Jobs or workplaces of the persons in ① and ⑩
e. ☐ Vehicle of person in ① ☐ Vehicles of persons in ⑩
f. ☐ The protected children's school or child care
g. ☐ Other *(specify):* _____

This stay-away order does not prevent the person in ② from going to or from that person's home or place of employment.

⑦ No Guns or Other Firearms

You cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get a gun or firearm.

⑧ Turn In or Sell Guns or Firearms

You must:

- Sell to a licensed gun dealer or turn in to police any guns or firearms that you possess or control. This must be done within 24 hours of being served with this order.
- File a receipt with the court within 48 hours of receiving this order that proves guns have been turned in or sold. *(You may use Form CH-145 for this.)*

⑨ ☐ Other Orders *(specify):* _____

This is a Court Order.

Print

Your name: _____ Case Number:

10 ☐ Other Protected Persons

List of the full names of all family or household members protected by these orders:

_____

_____

_____

Instructions for the Protected Person

To the person in ①: *(Write the name of the person in ①):* _____

11 Service of Order on Law Enforcement

If the court issues temporary restraining orders, by the close of business on the date the orders are made, you or your lawyer should deliver a copy of this Order and any proof of service forms to each law enforcement agency listed below.

Name of Law Enforcement Agency:	Address (City, State, Zip)
_____	_____
_____	_____
_____	_____
_____	_____

12 Service of Documents

You must have someone personally deliver to the person in ② a copy of all the documents checked below:

a. ☐ CH-120, *Notice of Hearing and Temporary Restraining Order (CLETS)* (completed and file-stamped)
b. ☐ CH-100, *Request for Orders to Stop Harassment* (completed and file-stamped)
c. ☐ CH-110, *Answer to Request for Orders to Stop Harassment* (blank form)
d. ☐ CH-145, *Proof of Firearms Turned In or Sold* (blank form)
e. ☐ CH-151, *How Can I Answer a Request for Orders to Stop Harassment?*
f. ☐ Other *(specify):* _____

You must file with the court before the hearing a proof of service of these documents on the person in ②.

13 Time for Service *(check a, b, or c)*

a. ☐ A copy of the documents listed in ⑫ must be served in person to the person in ② at least 5 days before the hearing.
b. ☐ A copy of the documents listed in ⑫ must be served in person to the person in ② at least 2 days before the hearing.
c. ☐ A copy of the documents listed in ⑫ must be served in person to the person in ② at least _____ days before the hearing.

14 ☐ No Fee for Filing

Filing fees are waived.

This is a Court Order.

Print

Your name: _____ Case Number:

15 ☐ **No Fee for Service of Order by Law Enforcement**

The sheriff or marshal will serve this Order without charge because:

a. ☐ The Order is based on stalking.
b. ☐ The Order is based on a credible threat of violence.
c. ☐ The person in (1) is entitled to a fee waiver.

Date: _____ ▶ _____
Judicial Officer

Warnings and Notices to the Restrained Person in (2)

You Cannot Have Guns or Firearms

You cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get a gun while this Order is in effect. If you do, you can go to jail and pay a $1,000 fine. You must sell to a licensed gun dealer or turn in to police any guns or firearms that you have or control in accordance with item (8) above. The court will require you to prove that you did so. If you do not obey this Order, you can be charged with a crime.

Instructions for Law Enforcement

This Order is effective when made. It is enforceable anywhere in all 50 states, the District of Columbia, all tribal lands, and all U.S. territories and shall be enforced as if it were an order of that jurisdiction by any law enforcement agency that has received the Order, is shown a copy of the Order, or has verified its existence on the California Law Enforcement Telecommunications System (CLETS). If the law enforcement agency has not received proof of service on the restrained person, and the restrained person was not present at the court hearing, the agency shall advise the restrained person of the terms of the Order and then shall enforce it. Violations of this Order are subject to criminal penalties.

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the hearing. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Order* (Form *MC-410*). (Civil Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate
[seal]

I certify that this *Notice of Hearing and Temporary Restraining Order* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing is the optional Notice of Hearing and Temporary Restraining Order (CLETS) (Civil Harassment) (Judicial Council Form CH-120). It should be filled out along with the Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-100). See §32.160. The hearing date and judge's signature should be left blank. If the judge signs the Order to Show Cause (OSC), and Temporary Restraining Order (TRO) if requested, plaintiff should take the form to the court clerk for filing.

Plaintiff should have defendant personally served with copies of the Request (see §32.160), OSC/TRO, and a blank copy of the Answer to Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-110) (see §32.163). The person who serves the defendant should complete the Proof of Personal Service (Civil Harassment) (Judicial Council Form CH-130). See §32.164.

For Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150), see §32.168.

Note: Judicial Council forms are available on the Judicial Council website at www.courtinfo.ca.gov/forms or in the California Judicial Council Forms Manual (Cal CEB 1981).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.163 4. Form: Answer to Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-110)

§32.163 4. Form: Answer to Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-110)

CH-110 Answer to Request for Orders to Stop Harassment

Clerk stamps date here when form is filed.

(1) Name of person who asked for the order:

_____

(2) Your name: _____

Your address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

_____

City: _____ State: _____ Zip: _____

Your telephone *(optional):* (____) _____

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):* _____

_____

_____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Use this form to give the court your answers to CH-100

- Read Form CH-151 to protect your rights.
- Fill out this form and then take it to the court clerk.
- Serve the person in (1) with a copy of this form and any attached pages.

The court will consider your Answer at the hearing. Write your hearing date and time here:

Hearing Date → Date: _____ Time: _____
Dept.: _____ Room: _____

You must obey the court's orders until the hearing. If you do not come to this hearing, the court may make the orders requested against you last for up to 3 years.

(3) ☐ **Personal Conduct Orders**

a. ☐ I agree to the order requested.
b. ☐ I do not agree to the order requested.
c. ☐ I agree to the following order *(specify):*

_____

_____

_____

(4) ☐ **Stay Away Orders**

a. ☐ I agree to the order requested.
b. ☐ I do not agree to the order requested.
c. ☐ I agree to the following order *(specify):* _____

_____

(5) ☐ **Turn In Guns or Other Firearms**

a. ☐ I do not own or have any guns or firearms.
b. ☐ I agree to the order requested.
c. ☐ I do not agree to the order requested.
d. ☐ I agree to the following order *(specify):* _____

_____

(6) ☐ **Other Orders**

a. ☐ I agree to the orders requested.
b. ☐ I do not agree to the orders requested.
c. ☐ I agree to the following orders *(specify):* _____

_____

Print

Your name: _____ Case Number:

(7) ☐ Emotional Distress

a. ☐ The person in (1) has not suffered emotional distress. *(Explain):* _____

b. ☐ A reasonable person in the same position as the person in (1) would not have suffered emotional distress. *(Explain):* _____

c. ☐ If the person in (1) has suffered any emotional distress, it is not because of what that person has accused me of doing. *(Explain):* _____

(8) ☐ Purpose of Actions

What I did to the person in (1)—if anything—was not done on purpose.

(9) ☐ Denial

a. ☐ I did not do anything described in (6) of Form CH-100. *(Skip to (11).)*

b. ☐ I did some or all of the things described in (6) of Form CH-100. *(Explain in (10)–(11).)*

(10) ☐ Reason or Excuse

I have done some or all of the things the person in (1) has accused me of, but:

a. ☐ What I did was legal. *(Explain):* _____

b. ☐ I had a good reason for doing these things. *(Explain):* _____

c. ☐ I have other reasons to justify what I did. *(Explain):* _____

(11) ☐ The court should not make an order against me because: *(List facts or reasons below):*

_____

☐ *Check here if you need more space. Attach a sheet of paper and write "CH-110, Item 11— Facts and Reasons" at the top. Give specific facts and reasons.*

Print

Your name: _____ **Case Number:**

(12) ☐ No Fee for Filing

I ask the court to waive the filing fee because the person in ① claims that I have used or threatened to use violence against them or have acted in some other way that would make them reasonably fear violence.

(13) ☐ Lawyer's Fees and Costs

I ask the court to order payment of my:

a. ☐ Lawyer's fees

b. ☐ Out-of-pocket expenses

because the temporary restraining order was issued without enough supporting facts.

The amounts requested are:

Item	Amount	Item	Amount
_____	$_____	_____	$_____
_____	$_____	_____	$_____
_____	$_____	_____	$_____

(14) ☐ Other Relief

I ask for additional relief as may be proper.

(15) Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Attorney's name *Attorney's signature*

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing form is the mandatory Answer to Request for Orders to Stop Harassment (Civil Harassment) (Judicial Council Form CH-110). If the defendant desires to oppose the Request (see §32.161) or make his or her own request for court orders, defendant must file the Response form. The person who serves the plaintiff should complete a Proof of Service by Mail (Civil Harassment) (Judicial Council Form CH-131). See §32.165. It appears that the Response may be served personally or by mail. See Paragraph 4, under Instructions for Defendant, Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150).

A defendant who wishes to file a cross-complaint for harassment against the plaintiff, should file a Request and Order for Free Service of Restraining Order (Domestic Violence or Civil Harassment (Sexual Assault or Stalking)) (Judicial Council Form CH-100). See §32.161.

For Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150), see §32.168.

Note: Judicial Council forms are available on the Judicial Council website at www.courtinfo.ca.gov/forms or in the California Judicial Council Forms Manual (Cal CEB 1981).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.164 5. Form: Proof of Personal Service (Civil Harassment) (Judicial Council Form CH-130)

§32.164 5. Form: Proof of Personal Service (Civil Harassment) (Judicial Council Form CH-130)

CH-130 Proof of Personal Service

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

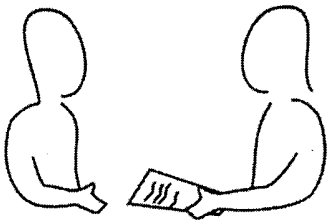
(1) Name of person asking for protection:

(2) Name of person you want protection from:

(3) Notice to Server

The server must:

- Be over 18 years of age.
- Not be listed on the restraining order.
- Give a copy of all documents checked in (4) to the person in (2). (You cannot send them by mail.) Then complete and sign this form, and give or mail it to the person in (1).



PROOF OF PERSONAL SERVICE

(4) I gave the person in (2) a copy of the documents checked below:

a. ☐ CH-120, *Notice of Hearing and Temporary Restraining Order (CLETS)*
b. ☐ CH-100, *Request for Orders to Stop Harassment*
c. ☐ CH-110, *Answer to Request for Orders to Stop Harassment* (blank form)
d. ☐ CH-145, *Proof of Firearms Turned In or Sold* (blank form)
e. ☐ CH-151, *How Can I Answer a Request for Orders to Stop Harassment?*
f. ☐ CH-140, *Restraining Order After Hearing to Stop Harassment*
g. ☐ Other *(specify):* _____

(5) I personally gave copies of the documents checked above to the person in (2) :

a. On *(date):* _____ b. At *(time):* _____ ☐ a.m. ☐ p.m.

c. At this Address: _____

City: _____ State: _____ Zip: _____

(6) Server's Information

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____

(If you are a registered process server):

County of registration: _____ Registration number: _____

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print server's name *Server to sign here*

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing form is the optional Proof of Personal Service (Civil Harassment) (Judicial Council Form

CH-130). It appears that the Petition and the OSC/TRO must be served personally. See CCP §527.6(g). Service may be made by a licensed process server, the sheriff's department, or any person 18 years or older who is not a party to the proceeding. See CCP §§262.1, 1011; Govt C §§26720, 26721.2.

For Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150), see §32.168.

Note: Judicial Council forms are available on the Judicial Council website at www.courtinfo.ca.gov/forms or in the California Judicial Council Forms Manual (Cal CEB 1981).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.165 6. Form: Proof of Service by Mail (Civil Harassment) (Judicial Council Form CH-131)

§32.165 6. Form: Proof of Service by Mail (Civil Harassment) (Judicial Council Form CH-131)

CH-131 **Proof of Service by Mail**

Clerk stamps date here when form is filed.

(1) Name of person asking for protection:

_____

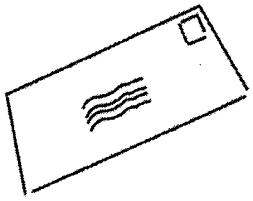
(2) Your name:

_____

(3) **Notice to Server**

The server must:

- Be over 18 years of age.
- Be a resident or employed in the county where the mailing took place.
- Not be a party in the case.
- Mail a copy of all documents checked in (4) to the person in (1). Complete and sign this form and give it to the person in (2).



Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

PROOF OF SERVICE BY MAIL

(4) I am over 18 years of age and am a resident or employed in the county where the mailing took place. I mailed the person in (1) a copy of all documents checked below:

a. ☐ CH-110, *Answer to Request for Orders to Stop Harassment*

b. ☐ Other *(specify):*

(5) I placed copies of the documents checked above in a sealed envelope and mailed them as described below:

a. Mailed from *(City):*_____ *(State):* _____

b. On *(Date):*_____

c. To this Address:_____

City: _____State:_____ Zip:_____

(6) **Server's Information**

Name:_____

Address:_____

City: _____State:_____ Zip:_____

Telephone:_____

(If you are a registered process server):

County of registration: _____ Registration number:_____

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:_____

_____ ▶ _____

Type or print server's name *Server to sign here*

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing form is the optional Proof of Service by Mail (Civil Harassment) (Judicial Council Form CH-

131). It appears that the Response may be served personally or by mail. See Paragraph 4, under Instructions for Defendant, Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150).

For Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council form CH-150), see §32.168.

Note: Judicial Council forms are available on the Judicial Council website at www.courtinfo.ca.gov/forms or in the California Judicial Council Forms Manual (Cal CEB 1981).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.166 7. Form: Restraining Order After Hearing to Stop Harassment (CLETS) (Civil Harassment) (Judicial Council Form CH-140)

§32.166 7. Form: Restraining Order After Hearing to Stop Harassment (CLETS) (Civil Harassment) (Judicial Council Form CH-140)

CH-140 Restraining Order After Hearing to Stop Harassment

Clerk stamps date here when form is filed.

1 Your name *(person asking for protection):*

Your address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

City: State: Zip:

Your telephone *(optional):* ( )

Your lawyer *(if you have one): (Name, address, telephone number, and State Bar number):*

Fill in court name and street address:

Superior Court of California, County of

2 Name of person to be restrained:

Fill in case number:

Case Number:

Description:

Sex: ☐ M ☐ F Height: Weight: Race:

Hair Color: Eye Color: Age: Date of Birth:

3 Hearing

There was a hearing:

on *(date):* at *(time):* ☐ a.m. ☐ p.m. Dept.: Rm:

made the orders at the hearing.
(Name of judicial officer)

These people were at the hearing:

a. ☐ Plaintiff *(the person in 1)*
b. ☐ Defendant *(the person in 2)*
c. ☐ Plaintiff's lawyer *(name):*
d. ☐ Defendant's lawyer *(name):*

4 This Is a Court Order

You must obey all the orders indicated below. If you do not obey this Order, you can be arrested and charged with a crime. And you may have to go to jail, pay a fine of up to $1,000, or both.

5 Expiration Date

This Order, except for an award of lawyer's fees, expires at:
(time): ☐ a.m. ☐ p.m. or ☐ midnight on *(date):*
If no date is present, this Order expires three years from the date of issuance.

This is a Court Order.

Print

Case Number:

Your name: _____

6 ☐ Personal Conduct Orders

You must ***not*** do the following things to the people listed in 1 and 11:

a. ☐ Harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, destroy personal property, keep under surveillance, or block movements.

b. ☐ Contact (directly or indirectly), telephone, send messages, mail, or e-mail.

c. ☐ Take any action, directly or through others, to obtain the addresses or locations of the persons in 1 and 11. *(If item c is not checked, the court has found good cause not to make this order.)*

Peaceful written contact through a lawyer or a process server or other person for service of legal papers related to a court case does not violate these orders.

7 ☐ Stay-Away Order

You must stay at least *(specify):* _____ yards away from:

a. ☐ The person listed in 1

b. ☐ The people listed in 11

c. ☐ The home of the persons in 1 and 11

d. ☐ Jobs or workplaces of the persons in 1 and 11

e. ☐ Vehicle of person in 1 ☐ Vehicles of persons in 11

f. ☐ The protected children's school or child care

g. ☐ Other *(specify):* _____

This stay-away order does not prevent the person in 2 from going to or from that person's home or place of work.

8 No Guns or Other Firearms

You cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get a gun or firearm.

9 Turn In or Sell Guns or Firearms

You must:

- Sell to a licensed gun dealer or turn in to police any guns or firearms that you possess or control. This must be done within 24 hours of being served with this order.
- File a receipt with the court within 48 hours of receiving this order that proves guns have been turned in or sold. *(You may use CH-145 for this.)*

10 ☐ Other Orders *(specify):* _____

11 ☐ Other Protected Persons

List of the full names of all family and household members protected by these orders:

This is a Court Order.

Print

Case Number:

Your name: _____

Instructions for the Protected Person

To the person in ① *(Write the name of the person in ①)*: _____

12 ☐ Delivery to Law Enforcement

If the court issues restraining orders, by the close of business on the date this Order is made, you or your attorney must deliver a copy of this Order and any proof of service forms to each law enforcement agency listed below:

Name of Law Enforcement Agency:	Address (City, State, Zip)

13 ☐ No Fee for Service of Order by Law Enforcement

The sheriff or marshal will serve this Order without charge because:

a. ☐ The Order is based on stalking.
b. ☐ The Order is based on a credible threat of violence.
c. ☐ The person in ① is entitled to a fee waiver.

Date: _____

▶ _____
Judicial Officer

Warnings and Notices to the Restrained Person in ②

You Cannot Have Guns or Firearms

You cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get a gun while this Order is in effect. If you do, you can go to jail and pay a $1,000 fine. You must sell to a licensed gun dealer or turn in to police any guns or firearms that you have or control in accordance with item ⑨ above. The court will require you to prove that you did so. If you do not obey this Order, you can be charged with a crime.

Instructions for Law Enforcement

This Order is effective when made. It is enforceable anywhere in all 50 states, the District of Columbia, all tribal lands, and all U.S. territories and shall be enforced as if it were an Order of that jurisdiction by any law enforcement agency that has received the Order, is shown a copy of the Order, or has verified its existence on the California Law Enforcement Telecommunications System (CLETS). If the law enforcement agency has not received proof of service on the restrained person, and the restrained person was not present at the court hearing, the agency shall advise the restrained person of the terms of the Order and then shall enforce it. Violations of this restraining order are subject to criminal penalties.

(Clerk will fill out this part)

Clerk's Certificate

Clerk's Certificate [seal]

I certify that this *Restraining Order After Hearing to Stop Harassment (CLETS)* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing form is the optional Restraining Order After Hearing to Stop Harassment (CLETS) (Civil Harassment) (Judicial Council Form CH-140). The plaintiff should attend the hearing; the order should be filled in and presented to the judge for signing.

If the judge signs the order, the plaintiff should file the original with the clerk. The file-stamped copies should be immediately delivered to law enforcement agencies. See §32.143. If the defendant was not present at the hearing, the plaintiff should arrange to have him or her personally served with a copy of the order. The person effecting services should complete Proof of Personal Service (Civil Harassment) (Judicial Council Form CH-130) (see §32.164), which plaintiff should file with the court. File-stamped copies of the proof of service should be delivered to law enforcement agencies. The plaintiff should keep copies of the order and the proof of service for personal reference. Counsel should advise him or her to keep a copy with him or her at all times.

For Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150), see §32.168.

Note: Judicial Council forms are available on the Judicial Council website at www.courtinfo.ca.gov/forms or in the California Judicial Council Forms Manual (Cal CEB 1981).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.167 8. Form: Reissue Temporary Restraining Order (Civil Harassment) (Judicial Council Form CH-125)

§32.167 8. Form: Reissue Temporary Restraining Order (Civil Harassment) (Judicial Council Form CH-125)

CH-125 Reissue Temporary Restraining Order

Clerk stamps date here when form is filed.

(1) Your name (person asking to reissue order):

Your address *(skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):*

City: State: Zip:

Your telephone *(optional):* ( )

Your attorney *(if you have one): (Name, address, telephone number and State Bar number):*

Fill in court name and street address:

Superior Court of California, County of

(2) Name of person you want protection from:

Court fills in case number when form is filed.

Case Number:

(3) ☐ I ask the Court to reissue the Temporary Restraining Order specified on Form CH-120.

a. The last Temporary Restraining Order was issued on *(date):*

b. The last hearing date was *(date):*

c. The Order was reissued _____ times.

(4) ☐ I ask the court to reissue the Order because *(check one):*

a. ☐ I could not get the Order served before the hearing date.

b. ☐ The date of the hearing was changed because we were sent to mediation or other dispute resolution services.

c. ☐ Other *(specify):*

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

Type or print your name

Sign your name

This is a Court Order.

Clerk will fill out section below.

(5) The request to reissue the Temporary Restraining Orders is:

a. ☐ Granted b. ☐ Denied

The Order listed in (3) is reissued and reset for hearing in this court on the date and time below.

Unless the court extends the time, the Order will end on the date and time below.

Name and address of court if different from above:

Hearing Date → Date: Time:

Dept.: Room:

All orders in the Temporary Restraining Order stay in effect unless this order changes them.

(Continued on next page)

Print

Case Number:

Your Name: _____

6 If this Order is granted, a copy of this Order must be served on the person in ② before the hearing, along with the other documents requesting orders to stop harassment.

7 By the close of business on the date this Order is made, a copy of this Order and any proof of service forms must be delivered to the law enforcement agency listed in ⑧ by:

☐ the person in ①.

☐ the attorney of the person in ①.

8 The law enforcement agency listed below will serve the person in ② with a copy of this Order and any attached orders:

Name of law enforcement agency: _____

Address: _____

City: _____ State: _____ Zip: _____

Date: _____

▶ _____
Judicial Officer

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the hearing. Contact the clerk's office for *Request for Accommodations by Persons with Disabilities and Order* (form MC-410). *(Civil Code, § 54.8)*

(Clerk will fill out this part)

—Clerk's Certificate—

Clerk's Certificate
[seal]

I certify that this *Reissue Temporary Restraining Order* is a true and correct copy of the original on file in the court.

Date: _____

Clerk, by _____, Deputy

This is a Court Order.

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing is the optional Reissue Temporary Restraining Order (Civil Harassment) (Judicial Council Form CH-125). It should be used when plaintiff desires the reissuance of the order to show cause because defendant could not be served as required before the hearing date, the hearing was continued because the parties were referred to dispute resolution services or another mediation provider, or some other reason.

For Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150), see §32.168.

Note: Judicial Council forms are available on the Judicial Council website at www.courtinfo.ca.gov/forms or in the California Judicial Council Forms Manual (Cal CEB 1981).

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Source: Civil Litigation/California Civil Procedure Before Trial/32 Injunctions and Other Provisional Remedies/§32.168 9. Form: Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150)

§32.168 9. Form: Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150)

CH-150 Can a Civil Harassment Restraining Order Help Me?

What is a Civil Harassment Restraining Order?

It is a court order that helps protect people from harassment.

Can I get a Civil Harassment Restraining Order?

You can ask for one if you are worried about your safety because someone:

- Stalked
- Harassed
- Sexually assaulted *or*
- Threatened you with violence.

How will the order help me?

The court can order a person to:

- Not harass or threaten you
- Not contact or go near you *and*
- Not have a gun

You can also ask for protection for other family or household members.

What forms do I need to get the order?

Fill out Forms CH-100 and CH-120. Then file them with the court clerk.

Where can I get these forms?

You can get the forms at any courthouse or county law library at: *www.courtinfo.ca.gov/forms*

How soon can I get the order?

If you ask for a temporary restraining order (Form CH-120), the court will decide within 24 hours whether or not to make the order. Sometimes the court decides sooner.

How long does the order last?

If the court makes a temporary order, it will last until your hearing date. At that time, the court will decide to continue or cancel the order. The order could last for up to 3 years.

How will the person to be restrained know about the order?

Someone over 18 years of age—not you or anyone else protected by the order— must "serve" (give) the person to be restrained a copy of the order. For help with service, ask the court clerk for Form CH-135.

What if the restrained person does not obey the order?

Call the police. The restrained person can be arrested and charged with a crime.

How much does it cost?

That depends on the type of harassment. If the restrained person has used or threatened to use violence against you or has stalked you, you do not have to pay a filing fee.

If you cannot afford to pay the filing fee, ask the clerk how to apply for a fee waiver. Form FW-001 is available for this purpose.

You are entitled to free service of the court's order by a sheriff or marshal if the order is based on a credible threat of violence or stalking. Also, if you are eligible for a fee waiver, you can ask the sheriff or marshal to serve the order for free. If you are not eligible for free service, you may pay the sheriff or marshal to serve the order.

The court can make the person who loses the case pay all the court fees and the lawyer's fees for the other party.

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the hearing. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Order* (Form MC-410). (Civil Code, § 54.8.)

Print

CH-150 Can a Civil Harassment Restraining Order Help Me?

Do I have to go to court?

Yes. Go to court on the date the clerk gives you.

Do I need a lawyer?

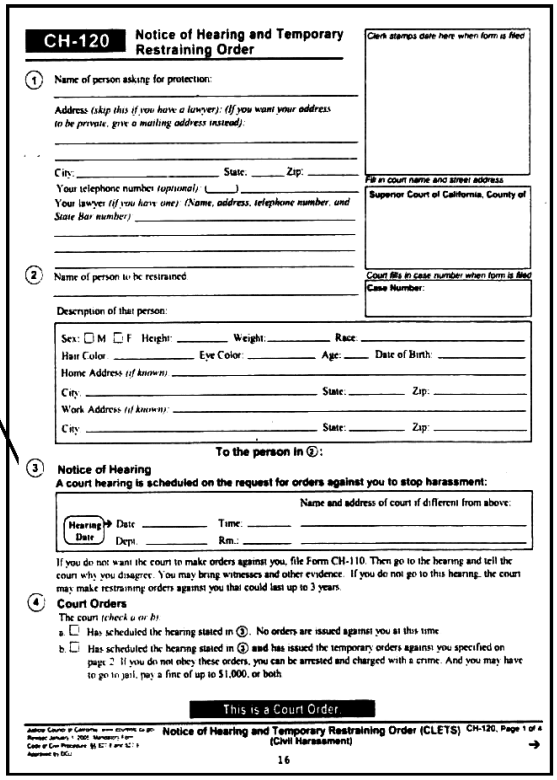
No. But it is a good idea. Ask the court clerk about free and low-cost legal services and self-help centers in your county.

Do I need to bring a witness to the court hearing?

No. But it helps to have proof of the harassment. You can bring:

- A written statement from witnesses made under oath
- Witnesses
- Photos
- Medical or police reports
- Damaged property
- Threatening letters, e-mails, or telephone messages

The court may or may not let witnesses speak at the hearing. So, if possible, you should bring witnesses' written statements under oath to the hearing. (You can use Form MC-030 for this.)



CH-120 Notice of Hearing and Temporary Restraining Order

Clerk stamps date here when form is filed

1. Name of person asking for protection:

Address (skip this if you have a lawyer): (If you want your address to be private, give a mailing address instead):

City: State: Zip:

Your telephone number (optional): ( )

Your lawyer (if you have one): (Name, address, telephone number, and State Bar number):

Fill in court name and street address:

Superior Court of California, County of

2. Name of person to be restrained

Court fills in case number when form is filed

Case Number:

Description of that person:

Sex: ☐ M ☐ F Height: Weight: Race:

Hair Color: Eye Color: Age: Date of Birth:

Home Address (if known):

City: State: Zip:

Work Address (if known):

City: State: Zip:

To the person in 2:

3. Notice of Hearing

A court hearing is scheduled on the request for orders against you to stop harassment:

Name and address of court if different from above:

Hearing Date → Date: Time:

Dept.: Rm.:

If you do not want the court to make orders against you, file Form CH-110. Then go to the hearing and tell the court why you disagree. You may bring witnesses and other evidence. If you do not go to this hearing, the court may make restraining orders against you that could last up to 3 years.

4. Court Orders

The court (check a or b):

a. ☐ Has scheduled the hearing stated in 3. No orders are issued against you at this time.

b. ☐ Has scheduled the hearing stated in 3 and has issued the temporary orders against you specified on page 2. If you do not obey these orders, you can be arrested and charged with a crime. And you may have to go to jail, pay a fine of up to $1,000, or both.

This is a Court Order.

Notice of Hearing and Temporary Restraining Order (CLETS) (Civil Harassment) CH-120, Page 1 of 4

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Will I see the restrained person at the court hearing?

If the person comes to the hearing, yes. But that person does not have the right to speak to you. If you are afraid, tell the court officer.

Can I bring someone with me to court?

Yes. You can bring someone to sit with you during the hearing. But that person cannot speak for you in court. Only you or your lawyer (if you have one) can speak for you.

What if I don't speak English?

When you file your papers, ask the clerk if a court interpreter is available. You may have to pay a fee for the interpreter. If the interpreter is not available for your court date, bring someone to interpret for you. You cannot ask a child under 18 to interpret for you.

What if I am deaf?

If you are deaf, contact the clerk at least 5 days before the hearing. Ask for an interpreter or other accommodation. (See information on Requests for Accommodations at the bottom of page 1.)

What if I move?

Your restraining order works anywhere in the United States. If you move out of California, contact your new local police so that they will know about your orders.

Need more information?

Ask the court clerk about free or low-cost legal help.

For help in your area, contact:

[Local information may be inserted.]

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The foregoing form is Can a Civil Harassment Restraining Order Help Me? (Civil Harassment) (Judicial Council Form CH-150).

Note: Judicial Council forms are available on the Judicial Council website at www.courtinfo.ca.gov/forms or in the California Judicial Council Forms Manual (Cal CEB 1981).

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33

Receivership

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I. INTRODUCTION

§33.1 A. Scope of Chapter

This chapter describes the strategies and cost factors involved in deciding to seek a receivership (see §§33.3-33.7), jurisdiction to appoint a receiver (see §§33.8-33.9), actions in which a pretrial receivership is authorized (see §§33.10-33.33), and the procedures for applying for (see §§33.34-33.55), opposing or challenging (see §§33.56-33.60), administering, (see §§33.61-33.70), and terminating a receivership (see §§33.71-33.73). Also included is a checklist (see §33.74) and forms (see §§33.75-33.82).

This chapter deals solely with the pretrial use of receivers. It does not discuss receivers appointed in aid of execution after judgment. See CCP §564(b)(3)-(4); *Olsan v Comora* (1977) 73 CA3d 642, 140 CR 835.

This chapter does not cover other provisional remedies, *e.g.,* attachment, that should be considered before applying for a receivership. Attachment is discussed in Debt Collection Practice in California §§6.1-6.110 (2d ed Cal CEB 1999). For a list of alternatives to consider before seeking a receivership, see §33.5.

Further, this chapter does not cover the use of receivership under CCP §564(c)-(e) to enforce rights of secured lenders under CC §2929.5 to enter and inspect for hazardous waste release. See California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 10 (4th ed Cal CEB 2009); California Real Property Sales Transactions §7.94 (4th ed Cal CEB 2007).

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§33.2 B. Governing Law

Receivership is governed CCP §§564-570 and is an equitable remedy. See §33.7.

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II. DECIDING TO SEEK RECEIVERSHIP

A. Understanding Nature of Receivership

§33.3 1. The Remedy

A receivership is a provisional remedy. It is usually very expensive and the courts consider it a "drastic" remedy. See *Morand v Superior Court* (1974) 38 CA3d 347, 351, 113 CR 281. For discussion of cost factors, see §33.6. On availability of alternatives, see §33.5.

The remedy is ancillary to or in aid of the action brought, and the court has no jurisdiction to appoint a receiver when the complaint fails to state a cause of action for other relief. There is no such thing as an action brought solely for appointment of a receiver. See *Frick v Calmin Mortgage Corp.* (1934) 220 C 746, 32 P2d 619; *La Societe Francaise d'Epargnes v District Court* (1879) 53 C 495; *In re Stein* (1936) 14 CA2d 303, 58 P2d 175; *Highland Sec. Co. v Superior Court* (1931) 119 CA 107, 112, 6 P2d 116.

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§33.4 2. The Job Description

A receiver is an officer or representative of the court, appointed to take charge of and manage property that is the subject of litigation, for the purpose of preserving the property pending its ultimate disposition according to the final judgment rendered in the action. *Kreling v Kreling* (1897) 118 C 421, 50 P 549. The receiver takes actual possession of the property, which distinguishes this remedy from court supervision, prohibition directed to a party, and other pretrial remedies.

The receiver is an individual, not a party to the action, appointed by the court for the benefit of all parties who may establish rights in the case. *Maggiora v Palo Alto Inn, Inc.* (1967) 249 CA2d 706, 57 CR 787; *Highland Sec. Co.,* 119 CA at 112. Accordingly, the receiver must not permit domination by any party or attorney and, if in doubt of the propriety of his or her acts, the receiver is required to seek instructions from the court. See CCP §568; *Steinberg v Goldstein* (1956) 145 CA2d 692, 303 P2d 80.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.5 B. Availability of Alternatives

§33.5 B. Availability of Alternatives

A receivership is a drastic remedy. It is, above all else, expensive (see §33.6). Counsel should always consider whether possession and control by an outsider are essential, if for no other reason than to avoid embarrassment when the trial judge asks why counsel did not seek some other, apparently available and applicable remedy. On court's selection of a less drastic remedy when it will suffice, see §33.7 (effect of court applying equitable principles).

The alternatives to consider before a decision is made to seek appointment of a receiver include the following:

- A temporary restraining order and preliminary injunction;
- Attachment;
- Claim and delivery (writ of possession);
- Appointment of a provisional director or partner or joint venturer;
- Appointment of a retired judge or other person as a "referee" to supervise the parties or the property, or both, without taking on the full responsibility of management and control;
- Limited purpose receivership, *e.g.,* where the receiver's duties are strictly limited to carefully defined duties such as management of books and collection of accounts;
- A stipulation acceptable to all parties;
- The recording of a lis pendens; or
- Federal equity receivership under Fed R Civ P 66 (when diversity of citizenship is present and either proper amount in controversy or some special basis for federal jurisdiction exists). See 13 Moore & Coquillette, Moore's Federal Practice §66.02 (3d ed 1997).

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§33.6 C. Cost Factors

Receivers are almost always paid on an hourly basis for their time and the time that the receiver's staff spends in managing the property, running the business, collecting the rents, or doing whatever may be required in the particular case. These fees and costs are paid out of the receivership estate, and it therefore follows that a receivership is uneconomical unless the amount of money involved is substantial enough to justify the expense, or the potential harm to the property is greater than the costs of the receivership.

Accountants and other experts may have to be retained to assist the receiver. Employing counsel, if that becomes necessary, is an added expense. As the need for additional expertise arises, the costs escalate exponentially. The court will always consider cost factors in deciding whether to appoint a receiver. *Hoover v Galbraith* (1972) 7 C3d 519, 102 CR 733. As noted in *Elson v Nyhan* (1941) 45 CA2d 1, 5, 113 P2d 474, "[r]eceivers are often legal luxuries, frequently representing an extravagant cost to a losing litigant. When it appears that no reasonably certain benefit will result to one litigant, and a distinct disadvantage will result to another, courts should weigh carefully the propriety of appointing a receiver."

PRACTICE TIP: The most practical way to find out what a receivership may cost in a particular situation is to discuss the case with an experienced receiver who may be willing to offer information about hourly rates and the time spent on similar cases. Most courts maintain lists of approved receivers and the clerk in the department that handles receiverships will usually be able to provide information as to which persons on the list are frequently nominated and appointed. Some receivers will charge for their time spent in evaluating a case; others will not.

On weighing the benefits and costs in mortgage foreclosure actions involving receivers, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 6 (4th ed Cal CEB 2009).

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§33.7 D. Effect of Court Applying Equity Principles

Even though governed by statute (see CCP §§564-570), a receivership is an equitable remedy. Accordingly, the rules and maxims of equity apply to receiverships and should be considered when deciding whether to seek this remedy. For example, a receiver will not be appointed when attachment, claim and delivery, a preliminary injunction, or some other less drastic remedy would suffice. *Tyler v Park Ridge Country Club* (1930) 103 CA 117, 284 P 247.

Similarly, a receiver will not be appointed punitively or for its coercive effect or when the applicant comes into court with unclean hands. See *Bennallack v Richards* (1899) 125 C 427, 433, 58 P 65.

The trial court has broad discretion to decide whether to appoint a receiver, and will not be reversed absent a showing that the order was an arbitrary exercise of power or a clear abuse of discretion. *Moore v Oberg* (1943) 61 CA2d 216, 221, 142 P2d 443. See §33.58 (standard of review). Indeed, the court has power to appoint a receiver on its own motion when it is necessary to accomplish a judicial objective. See, *e.g., McCarthy v Poulsen* (1985) 173 CA3d 1212, 1219, 219 CR 375 (receiver can be appointed to administer trust assets that trustee failed to manage). See §33.38 (appointment on court's own motion).

JUDICIAL PERSPECTIVE: It is safe to assume that, if there is any doubt about the need for a receiver, the appointment will not be made. On the other hand, if the applicant is able to persuade the court that a preliminary injunction is insufficient because it is essential for a neutral party to take possession of the property immediately to avoid loss or destruction of books and records or other items, or that an injunction would be difficult or impossible to enforce, a receiver will usually be appointed. In this situation, equitable concepts of unclean hands and laches may be given less weight, particularly if both parties' conduct is questionable, an unfortunately common situation.

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III. JURISDICTION TO APPOINT RECEIVER

§33.8 A. In General

In California, the principal statutory authority granting jurisdiction to a court to appoint a receiver is CCP §564, which provides that the court in which an action is pending may appoint a receiver in any case in which it is authorized by law to do so. CCP §564(a). Subdivision (b) provides that authority in a number of specified situations. See CCP §564(b). Other statutes also provide authority to appoint receivers. See, *e.g.,* CCP §1422 (escheat proceedings); CC §3439.07(a)(3)(B) (creditor's attack on fraudulent conveyance).

It is a well-established principle that a court has jurisdiction to appoint a receiver only as authorized by a statute in force at the time of the appointment. *A.G. Col Co. v Superior Court* (1925) 196 C 604, 620, 238 P 926. However, because the statutory scheme itself authorizes an appointment in all other cases not therein specified when necessary to preserve the property or rights of any party (CCP §564(b)(9)), case law also provides authority for appointing a receiver in situations not explicitly covered by CCP §564(b)(1)-(12).

Even though the parties' consent to a receiver's appointment cannot confer jurisdiction on a court (*McCutcheon v Superior Court* (1933) 134 CA 5, 24 P2d 911), it would be rare that the parties could not find an analogous reported case to support a stipulation. See CCP §564(b)(9). Even rarer would be the judge who would refuse to appoint a receiver when all parties agree that the appointment should be made. See *Baron v Fire Ins. Exch.* (2007) 154 CA4th 1184, 1190, 65 CR3d 502 (arbitrator's appointment of receiver later ratified by court).

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.9 B. In Limited Civil Cases

§33.9 B. In Limited Civil Cases

The court may appoint a receiver in a limited civil case. CCP §86(a)(8). For discussion of trial court unification, see chap 6.

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IV. ACTIONS IN WHICH PRETRIAL RECEIVERSHIPS AUTHORIZED

A. Actions to Prevent Loss of Specific Property or Funds

§33.10 1. Statutory Authority

The court may appoint a receiver under CCP §564(b)(1) in an action by (a) a vendor to vacate a fraudulent purchase of property, (b) a creditor to subject any property or fund to the creditor's claim, or (c) partners or others jointly owning or interested in any property or fund.

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§33.11 2. Showing Required

Generally, application for appointment of a receiver may be made by the plaintiff or any party whose right to or interest in the property or fund, or the proceeds thereof, is "probable." CCP §564(b)(1). The application must also show that the property or fund is in danger of being removed or materially injured. For case law exceptions to these requirements in the case of a vendor seeking to vacate a fraudulent purchase, see §33.12.

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3. Illustrative Cases

§33.12 a. Vendor

When the party seeking appointment of a receiver is a vendor of property and is seeking to vacate a fraudulent purchase, a right or an interest in the property or fund need not be established if fraud can be proved. A vendor who cannot establish fraud, and who has no right or interest in the property or fund, stands in the position of a general creditor and is not entitled to the appointment of a receiver. *California Delta Farms, Inc. v Chinese Am. Farms, Inc.* (1928) 204 C 524, 269 P 443.

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§33.13 b. Creditor

Under the terms of CCP §564(b)(1), when the party seeking appointment of a receiver is a creditor, both a probable property interest and a danger to that property interest must be shown. It is not enough to show just a probability of prevailing on the merits for other unrelated reasons. A failure to show both of these elements renders the court powerless to appoint a receiver and voids any such appointment. *Rondos v Superior Court* (1957) 151 CA2d 190, 195, 311 P2d 113; *In re Stein* (1936) 14 CA2d 303, 58 P2d 175.

Under CCP §564(b)(1), a typical general creditor is not entitled to appointment of a receiver, because normally there is neither an interest in specific property or a specific fund held by the responding party. In addition, an unsecured creditor may have an adequate remedy at law by attachment or by writ of possession.

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§33.14 c. Partner

Actions involving partners usually arise as suits for dissolution and accounting. The most common situation involves a loss of confidence by one or more partners in the controlling partner or partners and some facts tending to demonstrate an existing or imminent breach of fiduciary duty by the latter.

Although appointment of a receiver is not a matter of right in these cases (*McCaslin v Kenney* (1950) 100 CA2d 87, 95, 223 P2d 94), receivers are regularly appointed when the interest of the partner seeking appointment of a receiver is clear and the danger of removal or loss at the hands of the partner in possession is established. See, *e.g., Neider v Dardi* (1955) 130 CA2d 646, 649, 279 P2d 598; *Silbert v Shaver* (1952) 113 CA2d 19, 247 P2d 609; *Galich v Brkich* (1951) 103 CA2d 187, 190, 229 P2d 89; *Moore v Oberg* (1943) 61 CA2d 216, 220, 142 P2d 443; *Breedlove v Breedlove Excavating Co.* (1942) 56 CA2d 141, 132 P2d 239.

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B. Actions to Foreclose Mortgages

§33.15 1. Statutory Authority

A receiver may be appointed under CCP §564(b)(2) in an action by a secured lender for the foreclosure of a deed of trust or mortgage and sale of property on which there is a lien under a deed of trust or mortgage, when it appears that the property is in danger of being lost, removed, or materially injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge the deed of trust or mortgage debt.

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§33.16 2. Showing Required

To obtain appointment of a receiver under CCP §564(b)(2), it must be shown both that there is a default under the trust deed or mortgage and that there is also a risk of loss by insufficiency of the security, waste, or other danger. Mortgages and deeds of trust frequently contain provisions reciting the insufficiency of the security and the parties' agreement to the appointment of a receiver to collect rents and profits on default. Mere reference to such contractual language is not usually enough. Although the court may give such provisions substantial weight, the applicant should affirmatively establish the default, that the value of the property is less than the secured debt, and that there is a risk of loss or injury to the property. *Bank of Woodland v Stephens* (1904) 144 C 659, 79 P2d 379.

For cases upholding appointments based on contractual provisions, see *Turner v Superior Court* (1977) 72 CA3d 804, 811, 140 CR 475; *Barclays Bank v Superior Court* (1977) 69 CA3d 593, 600, 137 CR 743.

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3. Illustrative Cases

§33.17 a. Commercial Property

If the sole purpose of the receivership is to enforce an assignment of rents clause, the requisite showing must include proof of the assignment, of a default, and a refusal by the defendant voluntarily to permit the plaintiff to collect the rents and profits. *Mines v Superior Court* (1932) 216 C 776, 16 P2d 732; *Lovett v Point Loma Dev. Corp.* (1968) 266 CA2d 70, 71 CR 709. In these cases, the courts rely alternatively on CCP §564(b)(11) or §564(b)(12).

As a practical matter, a creditor will not seek the appointment of a receiver if the value of the property well exceeds the secured debt and there are likely buyers; when those facts exist, the creditor simply forecloses. It is only when these facts are absent or difficult to determine that the cost of a receiver is justified, *i.e.,* to have someone collect the rents to ensure at least partial satisfaction of the debt. In such a case, the most compelling showing the moving party can make is that the debtor is in a position to collect substantial rents and divert them to uses other than the reduction of the obligation, *e.g.,* to bleed the property and then abandon it to foreclosure.

When dealing with large commercial properties, the income during the foreclosure period may be substantial. In the residential context, these facts do not usually arise and the existence of a "rents and profits" clause in the deed of trust is irrelevant; if a receiver is appointed in a residential foreclosure, it will be for other reasons, and facts supporting those reasons must be provided. See §33.18.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.18 b. Residential Property

§33.18 b. Residential Property

Applications for appointment of a receiver in real property foreclosure proceedings in a single family residence are frequently made but not usually granted. In the typical residential foreclosure, the defaulting borrower is in possession of the property and there are no rents to collect.

JUDICIAL PERSPECTIVE: Despite the statutory requirements and case law, most judges will approach cases involving a single family residence from a different perspective than those involving commercial transactions or personal property. Unless there is a strong showing that the borrower may cause damage to the property, there usually is no need for a receiver; the borrower will be allowed to remain in possession pending the foreclosure sale and the lender will be left to the less drastic remedies of sale and, if necessary, unlawful detainer.

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C. Actions Involving Corporations

§33.19 1. Statutory Authority

The statute authorizes the appointment of a receiver in cases in which a corporation

- Is dissolved;
- Is insolvent;
- Is in imminent danger of insolvency; or
- Has forfeited its corporate rights.

CCP §564(b)(5)-(6).

If a corporation has been dissolved, CCP §565 provides that the superior court of a county in which the corporation transacts its business or has its principal place of business may appoint one or more persons to be receivers or trustees of the corporation. Any creditor or stockholder of the corporation may seek the appointment of a receiver. CCP §565. The receiver's duties under CCP §565 are to:

- Take charge of the estate and effects of the corporation;
- Collect the debts and property due and belonging to the corporation;
- Pay the corporation's outstanding debts; and
- Divide the money and other property that is left over among the stockholders.

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2. Illustrative Cases

§33.20 a. Insolvency Proceedings

In spite of the specific grant of authority to appoint a receiver on application of creditors of a corporation, a limitation has been judicially created that the legal remedies of judgment and unsuccessful attempt at execution first must be exhausted. *Stock & Bond Guar. Co. v Superior Court* (1930) 108 CA 360, 291 P 589; *Delaney Prod. & Ref. Co. v Crystal Petroleum Prods. Co.* (1928) 88 CA 784, 790, 264 P 521.

Even the consent of the corporation will not justify the appointment of a receiver on application of a simple contract creditor. *A.G. Col Co. v Superior Court* (1925) 196 C 604, 621, 238 P 926. However, when the creditor can establish, *e.g.,* that the corporation was fraudulently formed to prevent the collection of debts, the corporate existence may in essence be ignored and a receiver may be appointed to take charge of its assets. *Sunset Farms, Inc. v Superior Court* (1935) 9 CA2d 389, 401, 50 P2d 106. See also *Misita v Distillers Corp.* (1942) 54 CA2d 244, 128 P2d 888.

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§33.21 b. Fraud or Mismanagement

In general, courts are reluctant to appoint a receiver to operate an ongoing business, particularly when to do so would oust existing management. *Golden State Glass Corp. v Superior Court* (1939) 13 C2d 384, 395, 490 P2d 75; *Koshaba v Koshaba* (1942) 56 CA2d 302, 132 P2d 854; *Misita v Distillers Corp.* (1942) 54 CA2d 244, 251, 128 P2d 888.

On application of a minority shareholder, however, courts may appoint a receiver on a showing that the corporation is being injured by fraud or mismanagement. Typically, the courts rely on the "[i]n all other cases where necessary to preserve the property or rights of any party" provision of CCP §564(b)(9) in these situations. See, *e.g., Boyle v Superior Court* (1917) 176 C 671, 673, 170 P 1140; *Misita v Distillers Corp., supra*. See also §33.28.

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§33.22 c. Attorney General's Action Against Nonprofit Corporation

The Attorney General is authorized to institute such proceedings as are "necessary" to correct a defalcation by a nonprofit public benefit corporation. See Corp C §5250.

In *People v Riverside Univ.* (1973) 35 CA3d 572, 580, 111 CR 68, the court upheld the appointment of a receiver under the predecessor statute (former Corp C §9505), holding that a receiver appointed to supervise a charitable trust is vested with broad authority to do anything the corporation might have done to make the most of the assets in the receiver's hands.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.23 d. Corporate Dissolution Proceedings

§33.23 d. Corporate Dissolution Proceedings

If a court is persuaded that a receiver is necessary as part of an involuntary dissolution proceeding, the court is authorized by Corp C §1803 to make the appointment.

JUDICIAL PERSPECTIVE: As in most situations, there is judicial reluctance to appoint a receiver in this context, which is reinforced by the availability of other remedies. For example, a provisional director may be appointed under Corp C §308, or the dissolution may be one that simply can proceed under court supervision without the need for a receiver's assistance. The court must consider the usual question that arises when deciding whether to appoint a receiver, *i.e.,* whether actual custody and possession of the corporation and its assets are indicated, or whether court supervision will suffice. This determination usually turns on the identity, integrity, and loyalty of the persons responsible for the operation of the corporation. Factors for the court to consider include:

- Whether those in control are parties to the action;
- Whether they are owners of a minority or majority of the shares of the corporation; and
- Whether management has loyalties so strong to one side that ways might be sought and found to avoid, thwart, or disregard court-imposed directions or restraints.

While these factors will vary from case to case, they usually are among the determinative considerations for the court.

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D. Unlawful Detainer Actions

§33.24 1. Statutory Authority

The court has authority to appoint a receiver in an action for unlawful detainer. CCP §564(b)(7).

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2. Illustrative Cases

§33.25 a. Landlord

A landlord, on a clear factual showing, can obtain a receiver to collect rents and dispossess a holdover tenant or other party occupying the premises. *Stich v Gordon* (1932) 126 CA 434, 14 P2d 835.

JUDICIAL PERSPECTIVE: As a practical matter, most courts are reluctant to dispossess a tenant in possession when an unlawful detainer action is pending, on the ground that the entire matter will be litigated promptly on the merits and ought not to be decided by the summary procedure used for appointment of a receiver. If the landlord, however, can establish the probability of harm that may occur pending trial in the unlawful detainer action (*e.g.,* occupant alienating other tenants in a commercial building, or tenant causing waste to the property), a receiver is both necessary and appropriate, and will usually be appointed unless the cost outweighs the benefit.

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§33.26 b. Purchaser

A purchaser at a foreclosure sale under a mortgage or deed of trust may obtain a receiver if the debtor or party in possession refuses to surrender possession of the premises. *Pacific States Sav. & Loan Co. v Hoffman* (1933) 134 CA 601, 25 P2d 1006. However, the same judicial reluctance noted in §33.25 applies here. For a general discussion of the problems encountered in an unlawful detainer action brought by the purchaser at a foreclosure sale, see Regalia, *Receivers in California Litigation Involving Real Property*, 15 UCLA L Rev 896, 910 (1968).

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.27 E. Actions Involving Public Utilities Commission

§33.27 E. Actions Involving Public Utilities Commission

Code of Civil Procedure §564(b)(8) authorizes the appointment of a receiver at the request of the Public Utilities Commission under Pub Util C §855 or §5259.5. Section 855 provides for the appointment of a receiver to operate any water or sewer system corporation that (1) is unable or unwilling to adequately serve its rate payers, (2) has been actually or effectively abandoned by its owners, or (3) is unresponsive to the Commission's rules and orders. Section 5259.5 provides for the appointment of a receiver when the Commission determines that a household goods carrier has abandoned stored goods or property of any shipper under contract with the carrier. A receiver may be appointed to identify the stored items and to arrange for their return to their owners.

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F. When Necessary to Preserve Property or Rights and Miscellaneous Other Actions

§33.28 1. Statutory Authority; Judicial Limitation

Although the broadest grant of statutory authority is found in CCP §564(b)(9), which authorizes the appointment of a receiver "[i]n all other cases where necessary to preserve the property or rights of any party," the language of the statute has been restricted by case law. If the case is within one of the specific classes listed in the other subdivisions, the plaintiff must make a showing under the specific subsection. *Dabney Oil Co. v Providence Oil Co.* (1913) 22 CA 233, 133 P 1155.

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2. Illustrative Cases

§33.29 a. Actions for Partition

A cotenant bringing an action for partition may obtain appointment of a receiver on a showing of emergency or imminent harm to the property. *Mesnager v De Leonis* (1903) 140 C 402, 73 P 1052; *Blodgett v Haddock* (1949) 95 CA2d 17, 212 P2d 26.

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§33.30 b. Family Law Cases

A receiver may be appointed to preserve the community estate pending marital dissolution proceedings. *Nichols v Superior Court* (1934) 1 C2d 589, 36 P2d 380; *Rosenthal v Rosenthal* (1966) 240 CA2d 927, 933, 50 CR 385.

A receiver may also be appointed in filiation proceedings to preserve the defendant's property for the protection of the plaintiff's unborn child. *Guay v Superior Court* (1957) 147 CA2d 764, 767, 305 P2d 990.

A receiver may be appointed in an action for child support even before a support order is made. *Quaglino v Quaglino* (1979) 88 CA3d 542, 546, 152 CR 47. For other purposes for which a receiver may be appointed in family law actions, see generally Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§20.88-20.89 (Cal CEB Annual).

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§33.31 c. Escheat Proceedings

On application of the Attorney General and notice to the person claiming the estate, if known, a receiver may be appointed in escheat proceedings to take charge of an estate or to receive the rents, income, and profits of an estate until title is settled. CCP §1422.

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§33.32 G. Actions Under Health & S C §129173

The court has authority to appoint a receiver at the request of the Office of Statewide Health Planning and Development or the Attorney General under Health & S C §129173 (former Health & S C §436.222) when the financial status of a borrower under the California Health Facility Construction Loan Insurance Law jeopardizes the borrower's ability to meet its obligations under an insured loan transaction. CCP §564(b)(10).

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§33.33 H. Action for Assignment of Rents

A receiver may be appointed in an action by a secured lender for specific performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document. CCP §564(b)(11). The receiver's appointment may be continued after judgment for specific performance is entered if it is necessary to protect, operate, or maintain real property that is encumbered by the deed of trust or mortgage, or to collect any rents from the property while a nonjudicial foreclosure is being completed. CCP §564(b)(11).

A receiver also may be appointed in an action by an assignee under an assignment of leases, rents, issues, or profits under CC §2938(g). CCP §564(b)(12).

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V. PROCEDURES FOR APPOINTMENT OF RECEIVER

§33.34 A. Significance of California Rules of Court

There is no statutory scheme prescribing a particular procedure for appointing a receiver. See CCP §564. Before seeking appointment of a receiver in an action, counsel should become thoroughly familiar with Cal Rules of Ct 3.1175-3.1184, regulating appointments of receivers, confirmation proceedings, and miscellaneous matters relating to a receiver's powers and duties. These rules contain important procedures that must be followed. In addition, counsel should check for local practices on the appointment of receivers and the administration of receiverships.

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§33.35 B. Evidentiary Showing Required in All Cases

Specific facts, not speculation, possibilities, or conclusions of harm, must be developed and demonstrated by admissible evidence. Because a showing of genuine necessity is required in every instance (*Morand v Superior Court* (1974) 38 CA3d 347, 113 CR 281), the trial court will look closely at the evidence, and, if the bulk of it is subject to evidentiary objections, an application for a receiver will be denied.

PRACTICE TIP: When submitting evidence to persuade the court that the moving party is likely to prevail on the merits of the underlying case, declarations or affidavits are preferable to verified pleadings. See §33.46.

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C. Noticed Motion for Appointment of Receiver

§33.36 1. Preferred Procedure

Unless there is a genuine need for immediate relief (see §§33.41-33.45 on ex parte applications), the preferred procedure for appointment of a receiver is by noticed motion. The motion is subject to the rules of court applicable to motions generally. See chap 12 (noticed motions).

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§33.37 2. Who May Apply

The applicant need not be the plaintiff. A defendant or cross-complainant may obtain appointment of a receiver in a proper case. *McCaslin v Kenney* (1950) 100 CA2d 87, 94, 223 P2d 94; *Armbrust v Armbrust* (1946) 75 CA2d 272, 274, 171 P2d 75.

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§33.38 3. Court's Own Motion

The court may appoint a receiver on its own motion. *Venza v Venza* (1949) 94 CA2d 878, 211 P2d 913. Absent the consent of the parties, however, the court will give notice of its intent to appoint a receiver and provide the parties an opportunity to respond.

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§33.39 4. Hearing on Noticed Motion

Like other motions, the hearing on a motion to appoint a receiver is almost always a presentation of argument based on the evidence and memorandum previously submitted. The court in its discretion may hear oral testimony. For discussion on court hearings generally, see chap 12.

As with all hearings, a party seeking to present oral evidence, except in rebuttal to oral evidence presented by the other side, must submit a written request at least three court days before the hearing, setting forth the nature and extent of the evidence proposed to be presented, and a reasonable estimate of the time involved. Cal Rules of Ct 3.1306(b). If the application to present oral evidence is filed less than five court days before the hearing, the applicant must ensure that the application is delivered to the other parties at least two days before the hearing. Cal Rules of Ct 3.1306(b).

JUDICIAL PERSPECTIVE: Rarely will oral testimony be justified at a hearing on the appointment of a receiver. Counsel would have to have some extraordinary reason for explaining why the evidence could not be presented by declaration.

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§33.40 D. Order to Show Cause

If grounds for appointment of a receiver exist, but the defendant has not appeared and personal service is required, the plaintiff may apply for a receivership by an order to show cause. See Cal Rules of Ct 3.1177-3.1179. Under this method, the plaintiff makes an ex parte application for an order to show cause; the court sets the hearing date and directs the defendant to show cause on that date why a receiver should not be appointed. In a rents, issues, and profits receivership under CCP §564(b)(12), the optional forms of Order to Show Cause and Temporary Restraining Order (Judicial Council Form RC-300) and Order Appointing Receiver (Judicial Council Form RC-310) may be used. The application must be presented with the same papers required for a noticed motion (*i.e.,* OSC, supporting memorandum, declarations, and proposed order), although the plaintiff should use the OSC instead of a notice of motion.

For further discussion, see California Mortgages, Deeds of Trust, and Foreclosure Litigation §§6.38, 6.105-6.106 (4th ed Cal CEB 2009).

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§33.41 E. Ex Parte Application

As a practical matter, many of the circumstances giving rise to the need for appointment of a receiver justify an ex parte appointment. However, the standard for appointment of a receiver on ex parte application is stringent, requiring a showing that a "great emergency" exists so serious that a receiver must be appointed before the matter can be brought on notice. *Turner v Superior Court* (1977) 72 CA3d 804, 809 n2, 140 CR 475; *McCall v McCall Bros. Co.* (1933) 135 CA 558, 27 P2d 648.

PRACTICE TIP: An ex parte request for appointment of a receiver should almost always be accompanied by an alternative application for issuance of a temporary restraining order and order to show cause re preliminary injunction. However, counsel applying for the appointment should state facts showing that the emergency is so great that it cannot be obviated by a temporary restraining order or some other less harsh remedy.

For a rents, issues, and profits receivership, plaintiff may use the optional Judicial Council forms of Ex Parte Order Appointing Receiver and Order to Show Cause (RC-200) and Order Confirming Appointment of Receiver and Preliminary Injunction (RC-210). See California Mortgages, Deeds of Trust, and Forclosure Litigation §§6.38, 6.103-6.104 (4th ed Cal CEB 2009).

For notice requirements of ex parte application, see §33.44.

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§33.42 1. Application Outside Business Hours

If the need for a preliminary injunction arises on a weekend or holiday, most courts have a "duty judge" to cover genuine emergencies. Conceivably, the need for a receiver could arise suddenly during noncourt hours, although such a situation would be extremely unusual.

EXAMPLE: In Los Angeles, if an emergency arises during court hours, the supervising judge of the Law Departments should be given notice so that arrangements can be made for a judge and staff. If there is no advance warning, a judge can be reached through the county operator. There may be a substantial delay in obtaining a judge, clerk, and reporter, and a second or even a third judge may be necessary if one or more parties utilize a CCP §170.6 affidavit. Any misuse or abuse of this emergency procedure may (and probably will) result in a substantial award of sanctions against the responsible attorney.

NOTE: Under Govt C §68106 (b)(1), effective July 28, 2009, and operative through June 30, 2010, if a court is closed as the result of a budget reduction measure in response to the state fiscal crisis, the day is considered a holiday.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.43 2. Showing Required

§33.43 2. Showing Required

The applicant for an ex parte appointment of receiver must show, by verified complaint or declarations, all the following (Cal Rules of Ct 3.1175):

- The nature of the emergency and the reasons why "irreparable injury" would be suffered by the applicant during the time necessary for a hearing on notice;
- The names, addresses, and telephone numbers of the persons in actual possession of the property for which a receiver is requested, or of the president, manager, or principal agent of any corporation in possession of the property;
- The use being made of the property by the persons in possession;
- The nature and approximate size or extent of the business (if the property is a part of the plant, equipment or stock in trade of any business), and facts sufficient to show whether the taking of the property by a receiver would stop or seriously interfere with the operation of the business; and
- For any of the above matters that are unknown and cannot be ascertained by the exercise of due diligence, a factual showing of the efforts made to acquire the information.

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§33.44 3. Notice of Ex Parte Application

An application for an ex parte appointment of a receiver must be accompanied by a declaration showing that the applicant (Cal Rules of Ct 3.1200-3.1207):

- Informed the opposing party or the opposing party's attorney, by at least 10 a.m. on the court day before the ex parte appearance, when and where the application would be made;
- Made a good faith but unsuccessful attempt to give notice (specifying the efforts made to inform opposing party and opposing party's attorney); or
- Should not be required to give notice for specified reasons (*e.g.,* giving notice is likely to result in removal or transfer of assets to avoid the moving party's claim).

For further discussion of ex parte applications, see chap 13.

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§33.45 4. Hearing to Confirm Appointment; Timing

If a receiver is appointed ex parte, a hearing to confirm the appointment must be held within 15 days, or if good cause appears to the court, 22 days after the date the order is issued. Cal Rules of Ct 3.1176(a). The opposing party is entitled as a matter of right to one continuance to prepare opposition to the confirmation of the ex parte appointment. If a continuance is granted, the order to show cause remains in effect until the date of the continued hearing. Cal Rules of Ct 3.1176(d).

Counsel should check for any applicable local rules to ensure that there are no additional requirements regarding the hearing to confirm an ex parte appointment of a receiver. See §33.39 for discussion on other matters concerning the hearing on the appointment of a receiver.

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§33.46 F. Supporting Papers

An applicant seeking appointment of a receiver either by noticed motion (see §§33.36-33.39) or by ex parte application (see §§33.41-33.45) must present competent evidence on which the court may make its determination. Typically, this is done by declarations or affidavits, or by allegations in a verified pleading. *Republic of China v Chang* (1955) 134 CA2d 124, 285 P2d 351; *Armbrust v Armbrust* (1946) 75 CA2d 272, 171 P2d 75.

PRACTICE TIP: As a practical matter, it is not a good idea to rely on a verified pleading; a complaint is supposed to allege ultimate facts, whereas specific evidentiary facts (and not conclusions) are needed to support the appointment of a receiver. See *McCaslin v Kenney* (1950) 100 CA2d 87, 223 P2d 94. See also CCP §446 on verified pleadings filed by corporations and public agencies, and limitations on use of pleadings verified by a party's attorney.

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§33.47 G. Order Appointing Receiver

It is good practice for counsel to draft a comprehensive proposed order giving the receiver precise instructions, defining the receiver's powers and duties and, if the application for appointment is made ex parte, to include:

- An order to show cause why the appointment should not be confirmed, blanks for the hearing date and undertakings; and
- An order restraining the parties' interference with the receiver.

For sample forms of such orders, see §§33.76, 33.79.

The order should set out in detail all of the powers the receiver is to have. In most cases, the court tries to leave the receiver with fairly broad discretion to handle the receivership property, subject to court confirmation when the need arises. The court usually permits the receiver to accumulate funds sufficient to pay the costs and expenses of the receivership before making payments on encumbrances. In some instances, the income from the property is inadequate to pay the receivership expenses plus maintenance and operation costs. In these instances, the receiver is under no obligation to advance funds, and the moving party must do so or risk termination of the receivership. In some cases, the receiver may apply to the court for permission to borrow money (*e.g.,* to pay salaries of employees of a business). Permission to borrow will be granted only when it is demonstrated that a fund will exist to repay the loan (*e.g.,* from the sale of the business). If a receiver cannot secure the necessary funds to operate the receivership property, the receiver has no alternative but to request an order of the court terminating the receivership. For discussion of receiver's powers and duties, see §§33.61-33.70. On termination of the receivership, see §§33.71-33.73.

PRACTICE TIP: The specific provisions of the order should be responsive to the situation giving rise to the need for the receiver. For example, the order can authorize the receiver to pay taxes, make and pay for necessary repairs to the property, and make payments on encumbrances and liens clearly specifying the priority of payments. The order appointing receiver should also include a provision regarding the frequency of accountings. Counsel who becomes well-informed about the problems of the particular property can address as many contingencies as possible when drafting the order and eliminate the need to return to court for frequent amendments.

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H. Required Undertakings

§33.48 1. By Applicant

Before issuing an ex parte order appointing a receiver, the court must require from the applicant under CCP §566(b):

> an undertaking in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages the defendant may sustain by reason of the appointment of the receiver and the entry by the receiver upon the duties, in case the applicant shall have procured the appointment wrongfully, maliciously, or without sufficient cause.

Failure to require the applicant to post a bond renders the ex parte order void. *Sweins v Superior Court* (1936) 16 CA2d 336, 60 P2d 313. In setting the applicant's bond, the court will attempt to ascertain the amount sufficient to cover anticipated damages to the opposing party, including attorney's fees and costs necessary to oppose or secure vacation of the order of appointment.

PRACTICE TIP: Counsel should come to the ex parte hearing prepared to justify the amount of the applicant's bond. Note that if a receiver is appointed after *noticed* motion, the only bond required is the bond of the receiver. See CCP §§566(b), 567(b). See also local rules.

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§33.49 2. By Receiver

Before embarking on any duties, the receiver must give an undertaking to the State of California in an amount the court directs, "to the effect that the receiver will faithfully discharge the duties of receiver in the action and obey the orders of the court therein." CCP §567(b). Counsel should check local rules.

The receiver must be allowed the cost of the undertaking. CCP §567(b). That is, the premium paid by the receiver for the undertaking is a cost of administration, payable to the receiver out of the receivership estate when the receiver is discharged.

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§33.50 I. Receiver's Oath

Before discharging any duties, the receiver must be sworn to perform the duties faithfully (CCP §567(a)). For form of receiver's oath notarized and filed after appointment, see §33.80.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.51 J. Selecting the Receiver

§33.51 J. Selecting the Receiver

Any party may nominate one or more persons for appointment as receiver. Cal Rules of Ct 3.1177. Names may be suggested at the time of the ex parte application or in papers noticing or opposing the motion. Many courts have lists of approved receivers (see §33.53). If the receiver is appointed at an ex parte hearing, a substitute receiver may be recommended at the confirmation hearing. Unless there is a valid reason for a change, such a request will not receive serious consideration.

PRACTICE TIP: It is wise for counsel to check with the nominee in advance to ensure availability, and to be prepared with the name of an alternative nominee in the event of a conflict of interest.

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§33.52 1. Persons Not Eligible

No party or attorney for a party, or person interested in the action or related to any judge of the court by consanguinity or affinity within the third degree can be appointed receiver unless the parties file written consent with the clerk. CCP §566(a); *Davis v Custom Component Switches, Inc.* (1970) 13 CA3d 21, 91 CR 181.

However, it has been held that appointment of an unqualified person may be waived by failure to object at the hearing appointing the receiver or to appeal from the order of appointment. *Weygandt v Larson* (1933) 130 CA 304, 309, 19 P2d 852.

A corporation may not act as a receiver unless it is qualified to engage in the trust business. See Fin C §§106, 1500.

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§33.53 2. Court-Approved Lists of Receivers

In some counties, the court maintains a list of approved receivers and usually will not appoint someone who is not on the list without the consent of all parties. However, counsel can prepare declarations showing a nominee's qualifications and understanding of the role and duties of a receiver, even if that person's name does not appear on the court-approved list. If the court is asked to recommend a receiver, most judges simply provide counsel with a copy of the approved list. In other counties, a rotation system is followed.

The qualifications of persons who serve as receivers vary; a court-approved list generally includes attorneys, accountants, realtors, property managers, and combinations thereof. Charges, which vary according to the receiver's qualifications as well as to the work to be done, must be approved by the court.

EXAMPLE: Counsel should become familiar with the manner in which a particular court's list of "approved" receivers is compiled. In Los Angeles virtually anyone who wants to be included on the list will be added when the list is next revised; revisions are made quarterly. Applicants are asked to fill out a form indicating their areas of expertise and to provide the Court with a current resume. The burden is on counsel to determine whether a particular person's education and experience make that person an appropriate nominee in any given case. A person may be removed from the list if complaints about his or her performance are brought to the court's attention, but, as a general rule, removal occurs only when the person is no longer interested in serving as a receiver.

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§33.54 3. Undertaking, Oath, and Order

If the receiver has been appointed ex parte and the appointment is confirmed, the receiver's oath and undertaking, and the applicant's undertaking given at that time, may stand. See §§33.48-33.49. However, on a showing that the amount initially set was too high or too low, the court may increase or decrease either the applicant's or the receiver's undertaking at the confirmation hearing or thereafter. If the appointment is made for the first time at the hearing, the receiver's oath and undertakings must be given before the order becomes effective. See CCP §§566-567.

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§33.55 K. Review If Appointment Denied

An applicant must seek appellate relief by a petition for writ of mandate when a motion for appointment of a receiver is denied because the order denying appointment is not an appealable order. See CCP §904.2(h).

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VI. PROCEDURES OPPOSING OR CHALLENGING APPOINTMENT

§33.56 A. Opposition to Appointment of Receiver

To attack the appointment of a receiver at the hearing, either on a noticed motion or to confirm an appointment made ex parte, counsel must demonstrate that there is no genuine necessity for the receivership. See *Morand v Superior Court* (1974) 38 CA3d 347, 113 CR 281. Counsel should review the evidence presented by the applicant and raise as many legitimate objections as possible.

Specific facts in favor of the opposing party's position must be shown by admissible evidence, which is best presented in the form of declarations or affidavits. See §33.46. Facts establishing that the property is being responsibly managed, that the alleged harm is more imagined than real, and that the opposing parties are not likely to commit wrongful acts are the best defense. Where the facts are not helpful, counsel may want to advocate a less drastic alternative (see §33.3) or offer to stipulate to restraining orders to show good faith.

The opposition may also nominate a particular receiver in case the court grants the motion. This does not prejudice the opposing party's right to object to the appointment itself. Cal Rules of Ct 3.1177. On eligibility and procedures for selecting receiver, see §§33.52-33.54.

PRACTICE TIP: In a close case, particularly where it appears during argument that the judge is seriously considering the appointment of a receiver but has some serious doubts (either about the applicant's motive or the expense to the parties), opposing counsel might consider suggesting to the court that the expenses of the receivership be advanced by the party seeking the appointment, to be recovered if and when the party prevails on the merits. The applicant's reaction to the suggestion may be of interest in learning how strongly that party feels about the need for a receiver.

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B. Review After Appointment Ordered

§33.57 1. Appealable Order

The opposing party may appeal an order appointing a receiver. CCP §§904.1(a)(7), 904.2(h); *Brown v Memorial Nat'l Home Found.* (1958) 158 CA2d 448, 456, 322 P2d 600; *Pacific Broad. Co. v Superior Court* (1929) 100 CA 649, 280 P 991.

However, the propriety of an order appointing a receiver is not subject to review after discharge and settlement of the final account. *Kato v Busick* (1916) 174 C 118, 162 P 108.

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§33.58 2. Standard of Review

The power to appoint a receiver is within the trial court's discretion. If a sufficient showing is made for that appointment, the trial court's determination will not be overturned on appeal unless an abuse of discretion is established. *Maggiora v Palo Alto Inn, Inc.* (1967) 249 CA2d 706, 57 CR 787; *Snidow v Hill* (1948) 84 CA2d 702, 191 P2d 513.

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§33.59 C. Motion to Vacate Appointment

Instead of appealing, the opposing party may move in the trial court to vacate the order of appointment as void or unwarranted. *Haines v Commercial Mortgage Co.* (1928) 206 C 10, 273 P 10; *Lewis v Shaw* (1926) 77 CA 99, 246 P 86.

PRACTICE TIP: New facts must be shown to persuade the court to change its order, and as a practical matter, the longer the delay between the time of the appointment and the motion to vacate, the less likely that vacation will be granted.

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§33.60 D. Collateral Attack on Appointment of Receiver

If the appointment of the receiver is in some way in excess of the court's jurisdiction, the order is void and subject to collateral attack.

EXAMPLE: A person incarcerated for contempt for interfering with a receiver has been allowed, on habeas corpus, to show the invalidity of the order of appointment because disobedience of a void order cannot constitute contempt. *In re Carroll* (1933) 135 CA 672, 677, 28 P2d 84.

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VII. ADMINISTRATION OF RECEIVERSHIP

§33.61 A. Receiver's Powers and Duties

A receiver has only the powers given by statute under CCP §§568-570, by the order appointing him or her, and by any additional orders subsequently made by the court. A receiver is the agent of the court, not of the parties. *Turner v Superior Court* (1977) 72 CA3d 804, 813, 140 CR 475; Cal Rules of Ct 3.1179. A receiver's prohibited contracts, agreements, arrangements, and understandings are set forth in Cal Rules of Ct 3.1179(b).

A receiver is an officer of the court, subject to its continuing control and instructions. *Highland Sec. Co. v Superior Court* (1931) 119 CA 107, 112, 6 P2d 116. Because the statutes are general, the court has substantial discretion to fashion orders suitable to the particular case, and the variety of authorizations is great.

PRACTICE TIP: The proposed order appointing a receiver (see §33.47) should be drafted carefully with the particular needs of the situation in mind. For example, should the receiver, if appointed, have the task of selling certain real property, operating an ongoing business, or overseeing the dissolution of a corporation? The receiver's duties should be set forth in detail so that the receiver has the authority to perform the tasks needed.

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§33.62 1. General Powers Under Court Supervision

Under CCP §568, a receiver has power to act respecting the receivership property as the court may authorize, including:

- Bringing and defending actions in his or her own name;
- Taking and keeping possession of the property of the receivership estate;
- Receiving rents;
- Collecting and compromising claims; and
- Transferring property.

On power to bring and defend actions, see *Ostrowski v Miller* (1964) 226 CA2d 79, 37 CR 790. For discussion on employing counsel, see §33.66. See *Turner v Superior Court* (1977) 72 CA3d 804, 140 CR 475 ("rents and profits" receiver has no right to possession of property itself).

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§33.63 2. Deposit of Securities

Any securities in the receiver's possession may, by order of the court, be deposited in a securities depository as defined in Fin C §30004. CCP §568.1.

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§33.64 3. Sale of Property

A receiver may, by order of the court, sell real or personal property in the receiver's possession. CCP §568.5. The sale is subject to court approval, and is not final until confirmed. CCP §568.5. *Cal-American Income Prop. Fund VII v Brown Dev. Corp.* (1982) 138 CA3d 268, 274, 187 CR 703; *People v Riverside Univ.* (1973) 35 CA3d 572, 583, 111 CR 68.

The statute requires that a receiver selling real or personal property follow the notice and other procedural requirements set out in CCP §§701.510-701.680. CCP §568.5.

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§33.65 4. Investment of Funds

Under CCP §569, a receiver authorized to manage funds may invest them in interest-bearing accounts. *Miller v Fidelity & Deposit Co.* (1935) 3 CA2d 580, 583, 40 P2d 951. The statute allows such accounts to be established in multiple financial institutions, requires that they be held in the name and for the benefit of the receivership estate, and further requires that:

- The deposits be fully guaranteed or insured under federal law;
- The financial institutions in which the funds are deposited not be a party to the action in which the receiver was appointed; and
- The receiver not own one percent or more in value of the outstanding stock of any financial institution in which the funds are deposited, not be an officer, director, or employee of such a financial institution, and not be a sibling, half-sibling, spouse, aunt, uncle, nephew, niece, ancestor, or lineal descendant of an owner, officer, employee, or director of such a financial institution.

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§33.66 5. Employment of Counsel and Other Experts

A receiver must apply to the court for permission to retain an attorney. The application must be in writing and state (Cal Rules of Ct 3.1180):

- The necessity for the employment;
- The name of the attorney the receiver proposes to retain; and
- That the proposed attorney is not associated with or employed by an attorney for any party to the proceeding.

Attorney fees are subject to court approval. *Macmorris Sales Corp. v Kozak* (1967) 249 CA2d 998, 1005, 58 CR 92.

In complicated cases involving substantial assets, it is not unusual for the receiver to employ general counsel for advice, and, in addition, special counsel to prosecute and defend litigation involving the receivership estate.

Accountants and other experts may also be appointed. In every instance, prior court approval must be sought and obtained. For forms of application and order authorizing employment of counsel, see §§33.81-33.82.

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§33.67 6. Abandonment of Worthless Property

A receiver may, with court approval, abandon worthless property. *Helvey v United States Bldg. & Loan Ass'n* (1947) 81 CA2d 647, 650, 184 P2d 919.

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B. Other Duties

§33.68 1. Notices

The receiver must notify the State Franchise Tax Board (Rev & T C §§18650, 25672b) and the Internal Revenue Service of his or her appointment (IRC §6036). If the receivership involves a commercial operation, the receiver should probably also notify the State Board of Equalization in connection with sales tax obligations.

The receiver who is appointed to operate a licensed business must notify the licensing agency and confirm that the receivership is not in violation of licensing requirements in operating the business. If necessary, temporary licenses must be secured.

In cases involving receiverships of rental property, CC §1950.5(h) requires the landlord or the landlord's agent to give notice of the transfer of tenants' trust funds. If the business is a franchise, the franchisor should be notified.

A receiver who has funds belonging to a person whose whereabouts are unknown must publish notice in the manner prescribed by statute, and, if the funds remain unclaimed, must pay them into the state treasury on order of the court. See CCP §570.

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§33.69 2. Inventory; Accounts; Real Property Taxes

The receiver, in addition to carrying out the orders of the court (see CCP §567), has the following duties:

- To file an inventory within 10 days after appointment, listing all property in the receiver's possession (Cal Rules of Ct 3.1181), and thereafter to supplement the inventory as necessary (Cal Rules of Ct 3.1181(b)).
- To present accounts for settlement to the court on noticed motion or stipulation. If any allowance of compensation for the receiver or for an attorney is claimed in the account, it must state in detail what services have been performed by the receiver or the attorney, and whether previous allowances were made to the receiver or attorney and the amounts. Cal Rules of Ct 3.1184(a). Additional notice is required if service is by mail. See CCP §1013(a); §33.47 (frequency of accounts may be specified in order).
- To pay real property taxes that fall due during the period of the receivership. *Schreiber v Ditch Rd. Investors* (1980) 105 CA3d 675, 680, 164 CR 633.
- To provide monthly reports to the parties and if requested, to nonparty client lien holders. Cal Rules of Ct 3.1182 (also specifying contents of reports).

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§33.70 C. Other Receivership Matters

- **Receiver does not take title.** The receiver takes possession only; title to the property remains in those who had it at the time of the receiver's appointment. *North v Cecil B. DeMille Prods.* (1934) 2 C2d 55, 57, 39 P2d 199.
- **Court's permission necessary to sue receiver.** A receiver may be sued, in his or her official capacity, only by permission of the court. *Ostrowski v Miller* (1964) 226 CA2d 79, 37 CR 790. However, the receiver is not *personally* liable for torts committed in the performance of the receivership duties; liability is in the receiver's official capacity only, to be satisfied from receivership funds. *Chiesur v Superior Court* (1946) 76 CA2d 198, 202, 172 P2d 763.
- **Receiver as employer for workers' compensation purposes.** A receiver may be an employer for purposes of workers' compensation liability. *Pacific Indem. Co. v CAB* (1968) 258 CA2d 35, 40, 65 CR 429.
- **Interference with receiver as contempt.** Interference with the receivership is punishable as contempt. *Strain v Superior Court* (1914) 168 C 216, 220, 142 P 62; *In re Morello* (1932) 121 CA 480, 485, 9 P2d 565.

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VIII. TERMINATION OF RECEIVERSHIP

§33.71 A. Receiver's Accounts

When the receiver's duties are completed, either by a pretrial order of court or by entry of judgment, the receiver must present a report and account to the court on noticed motion or stipulation to all parties appearing in the action. Cal Rules of Ct 3.1185(a). Additional notice is required if service is by mail. See CCP §1013(a).

The court will require an itemized accounting, together with a report outlining the proceedings taken by the receiver throughout the receivership or at least since the last accounting. *Seccombe v Dionne* (1935) 3 CA2d 731, 734, 40 P2d 299.

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§33.72 B. Receiver's and Attorney's Compensation

The receiver's final report and accounting should include an itemization of compensation proposed to be paid to the receiver and to any attorneys or others employed under court order. The report must state in detail the services that have been performed by the receiver and the attorney, and whether previous payments have been made. Cal Rules of Ct 3.1184(d).

The receiver's compensation is payable out of the estate unless the appointment of the receiver is void. *Baldwin v Baldwin* (1947) 82 CA2d 851, 856, 187 P2d 429. On procedures for employing counsel, see §33.66.

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§33.73 C. Discharge of Receiver

When the receiver's final report and account are settled and approved and all funds disbursed, the receiver is ordered discharged and the bonds exonerated. Generally, after discharge a receiver has no official duties and is not a proper party to any action. *Brockway Land & Water Co. v County of Placer* (1954) 124 CA2d 371, 375, 268 P2d 524. The order discharging the receiver is res judicata and bars all claims against the receiver, both personally and on the bond, for failure to faithfully discharge his or her duties. *Aviation Brake Sys., Ltd. v Voorhis* (1982) 133 CA3d 230, 183 CR 766.

However, a discharge order is not a bar when the receiver fails (1) to inform the court of all claims affecting the receivership before obtaining the order, or (2) to give notice to plaintiffs in a pending lawsuit of the discharge proceedings. *Vitug v Griffin* (1989) 214 CA3d 488, 262 CR 588. The court noted that the receiver may incur personal liability for disbursing all receivership assets without giving notice to plaintiffs.

A court order discharging a receiver and exonerating the bond does not release the receiver or the receiver's surety from liability for acts or omissions during the receivership when a judgment is obtained against the receiver prior to the time of the receiver's discharge. *Administrative Mgmt. Servs. v Fidelity & Deposit Co.* (1979) 89 CA3d 532, 152 CR 620.

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§33.74 IX. RECEIVER'S CHECKLIST

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The following checklist covers information relevant to the receivership.

A. ACTION

1. Title of case _____
2. Case number _____
3. Date action filed _____
4. Counsel for plaintiff (name, address, telephone number)
   _____
5. Counsel for defendant (name, address, telephone number)
   _____

B. APPOINTMENT

1. Date receiver appointed _____
2. Date bond issued _____
3. Amount of bond _____
4. Bonding company (name, address, telephone number)
   _____
5. Date oath filed _____
6. Date notice of appointment given: _____
   a. Franchise Tax Board (Rev & T C §18650) _____
   b. Internal Revenue Service (IRC §6036) _____
   c. California Department of Human Resources Development (Un Ins C §1090)
   d. Alcoholic Beverage Control (Bus & P C §24075) _____
   e. Board of Equalization _____
   f. Utility companies: _____
      (1) Electric _____
      (2) Gas _____
      (3) Telephone _____
      (4) Other _____
      (5) Other _____

C. ADMINISTRATION OF RECEIVERSHIP

1. Important names, addresses, and telephone numbers:
   _____
   a. Counsel for receiver _____
   b. Accountant for debtor _____
   c. Trust deed holders: _____
      (1) _____
      (2) _____
   d. Insurers: _____

(1) Liability _____

(2) Comprehensive _____

(3) Fire _____

(4) Theft _____

(5) Workers' compensation _____

(6) Others _____

e. Employees of debtor: _____

(1) Apartment house managers _____

(2) Pool service _____

(3) Gardeners _____

(4) Others _____

2. Important dates and amounts: _____

a. Trust deeds: _____

(1) Payment date _____

(2) Delinquency date _____

(3) Amount _____

b. County real and personal taxes: _____

(1) Property taxes _____

(2) Due date _____

(3) Overdue date _____

(4) Amount _____

c. Insurance policies (list for each policy): _____

(1) Due date _____

(2) Amount _____

3. Important dates for filing with court: _____

a. Mandatory settlement conference date _____

b. Trial date _____

c. Inventory _____

d. Petition for instructions (if necessary): _____

(1) Instructions requested _____

(2) Date filed _____

(3) Date granted _____

e. Declaration and account for termination of receivership: _____

(1) Date filed _____

(2) Date termination granted _____

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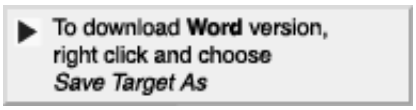
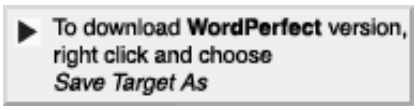
Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/ X. FORMS/ A. Motion Forms/§33.75 1. Form: Notice of Motion for Order Appointing Receiver

X. FORMS

A. Motion Forms

§33.75 1. Form: Notice of Motion for Order Appointing Receiver





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,**	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION FOR ORDER**
	)	**APPOINTING RECEIVER;**
_ _[*Name(s)*]_ _**,**	)	_ _[*SUPPORTING*
Defendant(s)	)	*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____)		**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court under** _ _[*e.g., Code of Civil Procedure §564*]_ _ **for an order appointing** _ _[*name of nominee*]_ _ **as receiver in the action to take possession and control of** _ _[*describe property*]_ _ **and to administer that property during the pendency of this action or until further court order. The grounds for issuance of this order are that** _ _[*e.g., the property that is the subject matter of the action is in danger of being lost or damaged; the rents, issues, and profits of the subject property must be collected in accordance with the provisions of the deed of trust*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §33.46 for contents of supporting papers. On formal requirements for noticed motions generally, see chap 12.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§33.76 2. Form: Order Appointing Receiver

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER APPOINTING RECEIVER**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, for an order appointing _ _[*name of receiver*]_ _ as receiver was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*Name of receiver*]_ _, whose address is _ _[*specify*]_ _, California, be appointed receiver of _ _[*describe property*]_ _, and be authorized and directed to take possession of, operate, and manage it until further court order.

2. _ _[*Specify receiver's powers and duties*]_ _.

3. This order will take effect on the receiver's giving an undertaking to the State of California in the amount of $_ _ _ _ _ _, and on the receiver's taking an oath to perform _ _[*his/her*]_ _ duties faithfully.

4. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §33.47 for discussion of contents of order appointing receiver. On undertakings required if order is issued ex parte, see §§33.48-33.49.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/ B. Ex Parte Forms/§33.77 1. Form: Application for Ex Parte Order Appointing Receiver and for Order to Show Cause re Confirmation of Appointment

B. Ex Parte Forms

§33.77 1. Form: Application for Ex Parte Order Appointing Receiver and for Order to Show Cause re Confirmation of Appointment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**APPLICATION FOR EX PARTE**
vs	)	**ORDER APPOINTING**
	)	**RECEIVER AND FOR ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**TO SHOW CAUSE RE**
	)	**CONFIRMATION OF**
_____	)	**APPOINTMENT**

_ _[*Name of, e.g., plaintiff*]_ _ **declares:**

1. I am the _ _[*e.g., plaintiff*]_ _ **in this action. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.**

2. On _ _[*date*]_ _**, this action was brought to** _ _[*specify nature of action as described in CCP §564*]_ _**.**

3. The property that is the subject matter of this action is _ _[*describe*]_ _ **and is in the actual possession of** _ _[*e.g., defendant*]_ _**,** _ _[*name*]_ _**, whose address and telephone number are** _ _[*specify*]_ _**.**

4. I am _ _[*state, e.g., plaintiff's interest in property, e.g., the owner*]_ _ **of the property.**

5. Contrary to my demands for _ _[*describe demands for change in, e.g., defendant's conduct*]_ _**,** _ _[*e.g., defendant*]_ _ **has** _ _[*describe actions taken with respect to property*]_ _**.**

6. A receiver must be appointed now because _ _[*state facts showing why, e.g., plaintiff would suffer irreparable injury by delay if matter proceeds on noticed motion*]_ _**.**

[*Add if property is part of plant, equipment, or stock and trade of business*]

7. _ _[*State nature and approximate size or extent of business and facts sufficient to show that appointment of receiver would not stop or seriously interfere with operation of business*]_ _**.**

[*Add if any matters in ¶¶3-7 are unknown*]

[8.]_ _[*Describe unknown fact*]_ _ **is unknown to me. I have exercised due diligence in attempting to acquire**

this information by _ _[*describe efforts*]_ _.

[*Continue*]

[9.] Based on this declaration, I request that the Court:

a. Appoint _ _[*name*]_ _ as receiver to take possession of the property described in paragraph 3; _ _[*and*]_ _

[*Add if appropriate*]

b. Authorize the receiver to _ _[*specify additional instructions*]_ _ in addition to the powers conferred by law; and

[*Continue*]

c. Cite _ _[*e.g., defendant*]_ _ to appear in this Court to show cause why the order appointing _ _[*name of receiver*]_ _ should not be confirmed.

[10.] If the Court does not appoint a receiver ex parte, I request that the Court:

a. Order _ _[*e.g., defendant*]_ _ to show cause, at a time and place designated by the Court, why _ _[*name of receiver*]_ _ should not then be appointed receiver;

b. Issue a temporary restraining order restraining _ _[*e.g., defendant*]_ _ from _ _[*describe conduct, e.g., transferring or encumbering the property or disposing of rents*]_ _ pending the hearing on an order to show cause; and

c. Order _ _[*e.g., defendant*]_ _ to show cause, at a time and place designated by the Court, why _ _[*he/she/it*]_ _ should not be enjoined, pending trial in this action, from _ _[*list acts to be enjoined*]_ _.

[11.]_ _[*Continue declarant's statements*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (present to judge with order; file with court clerk when order signed); ___ copies for service (one for each other party); ___ office copies.

Comment: On application for ex parte application of receiver, see §§33.41-33.45. For discussion of ex parte motions and orders to show cause generally, see chap 13.

For a rents, issues, and profits receivership, plaintiff may use the optional Judicial Council forms of Ex Parte Order Appointing Receiver and Order to Show Cause (RC-200). See California Mortgages, Deeds of Trust, and Foreclosure Litigation §6.103 (4th ed Cal CEB 2009).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.78 2. Form: Order Appointing Receiver and Order to Show Cause Why Ex Parte Appointment Should Not Be Confirmed; Temporary Restraining Order

§33.78 2. Form: Order Appointing Receiver and Order to Show Cause Why Ex Parte Appointment Should Not Be Confirmed; Temporary Restraining Order

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**ORDER APPOINTING**
vs	)	**RECEIVER AND ORDER TO**
	)	**SHOW CAUSE WHY EX**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**PARTE APPOINTMENT**
	)	**SHOULD NOT BE**
	)	**CONFIRMED/TEMPORARY**
	)	**RESTRAINING ORDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

[*Option 1: If receiver is appointed ex parte*]

After considering the verified complaint, declarations, and other evidence submitted, the Court finds that _ _[*name of receiver*]_ _ **is qualified to act as receiver, and irreparable injury would be suffered by** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, during the time necessary for hearing on notice for the appointment of a receiver.**

IT IS ORDERED that:

1. _ _[*Name of receiver*]_ _ **be appointed as receiver.**

2. _ _[*E.g., Plaintiff*]_ _ **give an undertaking in the amount of $**_ _ _ _ _ _**.**

3. _ _[*Name of receiver*]_ _ **take an oath to perform** _ _[*his/ her*]_ _ **duties faithfully and give an undertaking to the State of California for** _ _[*his/her*]_ _ **faithful performance subject to the orders of this Court in the amount of $**_ _ _ _ _ _**, the oath to be taken and the undertakings to be filed and approved by this Court before this order becomes effective.**

4. _ _[*Name of receiver*]_ _ **be authorized and directed to take possession of, to operate and manage** _ _[*describe property*]_ _**, and to** _ _[*describe any additional duties to be performed pending hearing on the order to show cause re confirmation*]_ _**.**

5. _ _[*E.g., Defendant*]_ _, _ _[*name*]_ _**, on receipt of a copy of this order and copies of the complaint, affidavits, and other supporting papers, deliver possession of the property to the receiver no later than** _ _[*date*]_ _**.**

6. _ _[*E.g., Defendant*]_ _ **appear before this Court on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, in Department** _ _**, to show cause why the appointment of this receiver should not be confirmed.**

7. _ _[*State any additional orders*]_ _**.**

[*Option 2: If receiver is not appointed ex parte but court is persuaded to issue temporary restraining order*]

It appearing to the Court that all parties can be protected pending hearing by the issuance of appropriate restraining orders,

IT IS ORDERED that:

1. _ _[*E.g., Defendant*]_ _ be enjoined from transferring or encumbering the _ _[*describe property*]_ _ and from permitting any harm to come to the property.

2. _ _[*State additional restraints*]_ _.

3. _ _[*E.g., Defendant*]_ _ appear before this Court on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _, to show cause why _ _[*name of proposed receiver*]_ _ should not be appointed as receiver or why a preliminary injunction should not issue in the following terms: _ _[*Set out proposed injunction*]_ _.

4. _ _[*State any additional orders*]_ _.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: On undertakings required by both applicant and receiver before ex parte order may be issued, see §§33.48-33.49. The alternative provisions for a temporary restraining order and order to show cause should almost always be included in a proposed ex parte order. The court will strike the parts of the proposed order that do not reflect its rulings. On procedures for injunctions generally, see chap 32.

In a rents, issues, and profits receivership, the optional forms of Order to Show Cause and Temporary Restraining Order (Judicial Council Form RC-300) and Order Appointing Receiver (Judicial Council Form RC-310) may be used. See California Mortgages, Deeds of Trust, and Foreclosure Litigation §§6.105-6.106 (4th ed Cal CEB 2009).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.79 3. Form: Order Confirming Ex Parte Appointment of Receiver

§33.79 3. Form: Order Confirming Ex Parte Appointment of Receiver

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No. _ _ _ _ _ _**
vs	**ORDER CONFIRMING EX PARTE APPOINTMENT OF RECEIVER**
_ _[*Name(s)*]_ _, **Defendant(s)**	

On _ _[*date*]_ _, on the ex parte application of _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, this Court appointed _ _[*name of receiver*]_ _ receiver in this action, directed _ _[*him/her*]_ _ to take charge of _ _[*describe property*]_ _, and ordered _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, to show cause why the appointment should not be confirmed.

This matter was heard on _ _[*date*]_ _. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. The appointment of _ _[*name*]_ _ as receiver be confirmed.

2. _ _[*E.g., plaintiff's*]_ _ undertaking in the amount of $_ _ _ _ _ _ _ _[*stand/be increased/be decreased*]_ _.

3. The receiver's undertaking in the amount of $_ _ _ _ _ _ _ _[*stand/be increased/be decreased*]_ _.

4. The receiver be granted the following additional powers: _ _[*Itemize*]_ _.

5. The receiver account to the Court _ _[*specify this and other duties*]_ _.

6. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of contents of order detailing receiver's powers and duties, see §33.47.

For a rents, issues, and profits receivership, plaintiff may use the optional Judicial Council form of Order Confirming Appointment of Receiver and Preliminary Injunction (RC-210). See California Mortgages, Deeds of Trust, and Foreclosure Litigation §6.104 (4th ed Cal CEB 2009).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details

required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/ C. Miscellaneous Forms/§33.80 1. Form: Oath of Receiver

C. Miscellaneous Forms

§33.80 1. Form: Oath of Receiver

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**OATH OF RECEIVER**
vs	)	
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

I, _ _[*name of receiver*]_ _**, having been appointed receiver in this action, do hereby solemnly** _ _[*swear/affirm*]_ _ **that I will support the Constitutions of the United States of America and the State of California and that I will perform the duties of receiver faithfully, in accordance with the law, and to the best of my ability.**

Date: _ _ _ _ _ _ __[*Signature of receiver*]__
_ _[*Typed name*]_ _

Copies: Original (present to judge with order; file with court clerk when order signed); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of receiver's oath, see §33.50.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/33 Receivership/§33.81 2. Form: Declaration of Receiver Supporting Order Authorizing Employment of Counsel

§33.81 2. Form: Declaration of Receiver Supporting Order Authorizing Employment of Counsel

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	**RECEIVER,** _ _[*NAME*]_ _,
	)	**SUPPORTING ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**AUTHORIZING EMPLOYMENT**
	)	**OF COUNSEL**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I was appointed receiver in this action by order of this Court dated _ _[*specify*]_ _**, a copy of which is attached as Exhibit** _ _**. My oath and undertaking were immediately filed with the Court.**

2. _ _[*Summarize what case involves*]_ _**.**

3. I require the aid of legal counsel to advise me on the following matters involved in this proceeding: _ _[*State nature of legal services to be performed*]_ _**.**

4. I wish to employ the law firm of _ _[*state name of firm, address, and telephone number*]_ _ **to represent me in my capacity as receiver in this proceeding. No member of this law firm is associated with, or attorney for, any party to this proceeding. The employment of counsel is necessary for me to properly discharge my duties because** _ _[*state facts justifying hiring of legal counsel*]_ _**.**

5. _ _[*Name of law firm*]_ _ **will provide services at the rate of $**_ _ _ _ _ _ **per hour and will submit monthly statements to me.** _ _[*Name of law firm*]_ _ **understands that its fees and costs are subject to confirmation by the Court, as reflected in the declaration of** _ _[*name of attorney*]_ _ **filed with this application.**

6. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (present to judge with order; file with court clerk when order signed); ___ copies for service (one for each other party); ___ office copies.

Comment: Usually, a receiver's application for an order authorizing employment of counsel should be on noticed motion, and a notice of the hearing should accompany the application. A brief memorandum should also be filed and served. On noticed motions generally, see chap 12. For discussion, see §33.66.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§33.82 3. Form: Order Authorizing Receiver to Employ General Counsel

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER AUTHORIZING**
vs	)	**RECEIVER TO EMPLOY**
	)	**GENERAL COUNSEL**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*name*]_ _, receiver, for an order authorizing _ _[*him/her*]_ _ to employ general counsel was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*Name*]_ _ be authorized to employ the law firm of _ _[*name of firm*]_ _ as counsel to represent _ _[*him/her*]_ _ in this proceeding for the purposes set forth in the application of the receiver for authorization to employ counsel.

2. The fees to be paid to _ _[*name of firm*]_ _ for services and expenses be itemized in the receiver's _ _[*final/periodic*]_ _ report and account, and not be paid until approved by the Court.

3. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion, see §33.66.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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34

Deposit in Court

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I. INTRODUCTION

§34.1 A. Scope of Chapter

This chapter discusses deposit in court, which is a provisional remedy used to preserve a fund of money or items of property during litigation. It first sets forth an overview (see §§34.3-34.10), then discusses the statutory requirements and constitutionality (see §34.10), and then discusses procedure (see §§34.11-34.23).

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§34.2 B. Governing Law

Deposit in court is governed by CCP §572.

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II. OVERVIEW

§34.3 A. Deposit in Court as Provisional Remedy

Deposit in court is a provisional remedy used to preserve a fund of money or items of property during litigation. A party seeking to obtain possession of the fund or item uses this remedy when the holder of the fund or item, who has been made a party in the suit, has admitted, in the pleadings or on examination, that he or she is not legally entitled to ultimate ownership. See §34.10 on requirements.

EXAMPLE: (1) A person who receives rents from tenants may be required to deposit them until the true owner of the property is determined, and (2) a trustee, designated or constructive, may be ordered to deposit the trust res until the identity and shares of beneficiaries are determined.

In addition to preventing loss of assets during a lawsuit, the remedy may also be used to obtain an early court ruling on entitlement to money or property (see §34.11).

NOTE: Formerly under CCP §995.710, a party who had been required to give a surety bond or undertaking in a civil action could instead deposit money or specified kinds of securities. Although any such deposit made before January 1, 1999, may continue to be used, former CCP §995.710 is not available after that date. CCP §995.710(a), (e).

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B. Other Procedures Compared

§34.4 1. Interpleader

A holder of money or property who asserts no claim to it and against whom multiple claims have been, or may be, made, may use interpleader to avoid further involvement. The interpleading party deposits the asset with the court and leaves it to the interpleaded parties to assert and prove their claims to it. See chap 28.

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§34.5 2. Attachment

A creditor seeking the payment of money may use the attachment procedure to secure collectibility of the expected judgment by preventing the defendant from disposing of specified assets until the judgment can be obtained. The affected assets are not deposited with the court. For procedures, see Debt Collection Practice in California §§6.1-6.110 (2d ed Cal CEB 1999).

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§34.6 3. Claim and Delivery

A creditor seeking possession of tangible personal property may use the writ of possession procedure to require the sheriff to seize the property and deliver it to the creditor or, if it is perishable or depreciating, sell it and deposit the proceeds with the court. For procedures, see Debt Collection Practice in California §§6.111-6.166 (2d ed Cal CEB 1999).

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§34.7 4. Defendant's Deposit of Previously Tendered Amount

A defendant who is sued for the recovery of money only and who had, before the suit was filed, tendered the full amount then owed, may, under CCP §1025:

- Prevent the plaintiff from obtaining a judgment for a larger amount than was tendered;
- Prevent the plaintiff from recovering costs; and
- Require the plaintiff to pay the defendant's costs.

The defendant's answer must allege the tender of the full amount to which the plaintiff was entitled on a date that preceded the date the plaintiff's suit was filed, and may allege that the deposit of that amount in court has been, or is being, made. This procedure is useful to a defendant who has the money and willingness to make the deposit.

A defendant who is unable or unwilling to deposit the amount tendered may still allege and prove the amount, date, and place of a prior tender as a basis for defending the suit. See CC §1485; 1 Witkin, Summary of California Law, *Contracts* §§769-775 (10th ed 2005).

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§34.8 5. Offer of Judgment Under CCP §998

A defendant in any action may serve on the plaintiff an offer in writing to allow judgment to be taken in accordance with the terms and conditions stated in the offer. CCP §998. A plaintiff who does not accept a properly made offer, and who fails to obtain a more favorable judgment, may not recover costs and must pay the defendant's costs from the time of the offer. See chap 47 for procedure and discussion.

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§34.9 III. STATUTORY REQUIREMENTS; CONSTITUTIONALITY

Code of Civil Procedure §572, which governs the procedure for deposit in court, lists the following requirements:

> *If* it is admitted by the pleadings or shown on the examination of a party to the action, *that the party has* possession or control *of* any money or other thing capable of delivery, *which is the subject of the litigation and* is held by the party as trustee for another party, belongs to another party, is due to another party, or should, under the circumstances of the case, be held by the court, pending final disposition of the action, then *the court may, on motion, order the money or property to be* deposited in court or delivered to the other party, on just conditions, subject to further direction of the court.

Cases have interpreted §572 to require that the moving party establish that he or she has an immediate right to the money or property and that the party who has or controls it asserts no right to retain it and admits, free of any condition, that the moving party is entitled to it or at least has an absolute interest in it. *Green v Duvergey* (1905) 146 C 379, 385, 80 P 234; *F`rey v Superior Court* (1913) 22 CA 421, 425, 134 P 733. If the holding party has not admitted the moving party's right, or claims title to any part of it, the question of title must be resolved by a judicial determination after an evidentiary hearing, not by a summary procedure. *Ex parte Casey* (1886) 71 C 269, 12 P 118; *In re Elias* (1962) 209 CA2d 262, 273, 25 CR 739.

NOTE: Without an admission or appropriate proof the court has no jurisdiction to order the defendant to deposit funds or money, and subsequent contempt proceedings for failure to do so are void. *In re Elias, supra.*

Constitutional restrictions against the taking of property without a hearing, discussed in *Sniadach v Family Fin. Corp.* (1969) 395 US 337, 23 L Ed 2d 349, 89 S Ct 1820, appear to be obviated if the moving party meets the CCP §572 requirement that there has been a showing in the pleadings or by examination of the holding party that the property is held in trust or belongs to, or is owed to, another party.

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IV. PROCEDURE

§34.10 A. Timing

The deposit in court remedy is invoked by filing a notice of motion after the defendant (1) has answered the complaint, if the answer admits the required facts (see §34.10), or (2) has been examined and the examination shows the required facts.

Two advantages in moving for deposit in court early in the case are:

- The earlier the order is obtained, the more likely the money or property will be preserved.
- The evidentiary showing made to obtain the order for deposit may sufficiently show the moving party's entitlement to the money or property to obviate the need for investigation, discovery, or trial.

At least 16 court days' notice is required, which is increased if the notice of motion is served by mail. CCP §1005(b). The amount of the increase depends on the location from which and to which the notice is mailed. If the notice is mailed from a California address to another California address, the notice period is increased by at least 5 calendar days before the date set for the hearing. If the notice is mailed to or from an address outside California but in the United States, the period is increased by 10 calendar days. If the notice is mailed to or from an address outside the United States, the time is increased by 20 calendar days. These time requirements may be shortened by court order. CCP §1005(b). See generally chap 12.

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§34.11 B. Need for Noticed Motion

Constitutional strictures on the use of provisional remedies (see §34.10) strongly suggest that there must be a noticed motion to obtain an order under CCP §572. A noticed motion is required even when the moving party intends to rely not on testimony but on an express admission in verified pleadings.

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§34.12 C. Moving Party's Papers

The party who seeks to require another party to deposit money or property in court must file with the court, and serve on all other parties in the lawsuit, the following papers:

- Notice of motion and motion for the order (see §34.14 and form in §34.25);
- Supporting memorandum (see §34.17);
- Declaration supporting the motion (see §34.15 and form in §34.26);
- Exhibits (see §34.16);
- The proposed order (see §34.20 and form in §34.27); and
- Proof of service (see chap 17).

For discussion of filing and service of motion papers, see chap 12.

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§34.13 1. Notice of Motion

As in all notices of motion, the "nature of the order being sought" and the "grounds for issuance of the order" must be stated in the first paragraph of the notice of motion. See generally chap 12. Examples of "the nature" and "the grounds" are shown in the form in §34.25.

The papers on which the motion is based, which should be described briefly in the second paragraph of the notice of motion, may include:

- A certified copy of the reporter's transcript of a previous examination or hearing; and
- A copy of the transcript of deposition testimony.

A moving party who intends to examine a witness at the hearing on the motion should so state in the second paragraph of the notice of motion.

NOTE: Under Cal Rules of Ct 3.1306(a), oral testimony is permitted only at the court's discretion, for good cause (which may be shown in a supporting declaration, and after timely submission of a summary of the expected testimony). See §34.19.

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§34.14 2. Declaration Supporting Motion

The notice of motion for deposit in court is normally accompanied by the declaration of the moving party that states, under penalty of perjury, facts showing that:

- The defendant has possession or control of a described sum of money or of described depositable property;
- The defendant holds or controls the money or property as a trustee for a named person, if such is the case;
- The money or property is the subject of the lawsuit;
- The moving party is entitled to possession of the money or property; and
- Under the prevailing described circumstances, the money or property should be held by the court or delivered to the moving party until final disposition of the lawsuit.

The declaration should refer to the parts of the pleadings, or of the defendant's testimony in an examination, that constitute an admission of the above facts by the defendant. Copies of relevant pages of the pleadings or transcript should be attached as exhibits. See form in §34.26.

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§34.15 3. Exhibits

Exhibits supporting the motion may be attached to the packet of motion papers or to a particular paper, such as a declaration or a memorandum. See generally chap 12.

If testimony recorded at a prior hearing is relied on, it can be furnished in the form of a reporter's transcript, certified by the reporter as a true and correct report of the witness's testimony.

Pages from a deposition transcript can be referred to in a declaration or memorandum to which copies of the pages are attached. If the original deposition has been filed with the court, the court may be requested to take judicial notice of the deposition. If the original deposition has not been filed with the court, arrangements can be made for it to be present at the hearing. The court at the hearing will decide both the authenticity of previous testimony and whether it constitutes the required proof.

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§34.16 4. Supporting Memorandum

The memorandum in support of the motion that must accompany the notice of motion (Cal Rules of Ct 3.1112(a), 3.1113(a)) should cite CCP §572, singling out the particular grounds for invoking the remedy. For example:

THE COURT MAY ORDER PROPERTY THAT IS CAPABLE OF DELIVERY TO BE DEPOSITED IN COURT, PENDING FINAL DETERMINATION OF THE ACTION WHEN THE PROPERTY IS THE SUBJECT OF THE LITIGATION, AND THAT IS HELD BY THE DEFENDANT AS A TRUSTEE FOR ANOTHER PARTY.

Code of Civil Procedure §572.

The memorandum should continue with any other applicable points and authorities.

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§34.17 D. Opposition to Motion

A respondent who wishes to oppose the motion for deposit in court should file an opposing declaration, stating the reasons deposit should not be made and facts supporting those reasons. For example, a defendant can use a declaration to show that money or property in his or her possession, or under his or her control, is not the subject of the litigation, does not belong to and is not owed to another party, or is not held by him or her as trustee for another party.

If the moving party contends that there is an admission in a pleading, or in previous testimony, on which the moving party relies, the declaration in opposition may controvert this contention. However, if the moving party's contention rests on an interpretation of the statement constituting the alleged admission, there may be no need to controvert in an opposing declaration.

When the moving party prevails, the court may order the deposit to be made on such conditions as may be just, subject to further direction of the court. CCP §572. Therefore, it may be desirable for an opposing declaration to state any facts that may support a request that the court make its order conditional or subject to future review.

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Source: Civil Litigation/California Civil Procedure Before Trial/34 Deposit in Court/§34.18 E. Evidentiary Showing Required

§34.18 E. Evidentiary Showing Required

For the moving party to prevail, counsel must show that the property is:

- In the possession or under the control of a party to the action;
- Money or another thing capable of delivery;
- The subject of litigation; and
- Held as trustee for another party or belongs or is due to another party.

Frey v Superior Court (1913) 22 CA 421, 425, 134 P 733; *Burke v Superior Court* (1907) 7 CA 178, 93 P 1058.

These facts must be shown by examination or admission in the pleadings by the party holding the property. CCP §572; *In re Elias* (1962) 209 CA2d 262, 25 CR 739; *Burke v Superior Court, supra.*

WARNING: The facts may not be shown by testimony of the moving party or third party witnesses. *Green v Duvergey* (1905) 146 C 379, 80 P 234; *In re Elias, supra.*

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§34.19 F. Effect of Order; Court's Duties

An order under CCP §572 puts the property in custody of law; without an order even funds deposited with the court clerk are not technically in custody of law. *Union Bank & Trust Co. v County of Los Angeles* (1934) 2 CA2d 600, 38 P2d 442, disapproved on other grounds in *Minsky v City of Los Angeles* (1974) 11 C3d 113, 123, 113 CR 102.

If the property is held in custody of law, the court has the duty to administer the funds. This duty includes requiring payment of money in conformance with its direction (*Michal v Adair* (1944) 66 CA2d 382, 152 P2d 490) and distributing funds to those shown to be entitled after final judgment (*Vallelunga v Gomes* (1951) 102 CA2d 374, 227 P2d 550). The court's custody and jurisdiction over the deposit may continue past entry of judgment or dismissal of the action. *Vallelunga v Gomes, supra.* The court's control, however, does not give it the right to make use of the funds; it can only hold them for safekeeping. *Metropolitan Water Dist. v Adams* (1948) 32 C2d 620, 197 P2d 543.

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Source: Civil Litigation/California Civil Procedure Before Trial/34 Deposit in Court/§34.20 G. Procedure for Deposit or Delivery

§34.20 G. Procedure for Deposit or Delivery

Money paid into or deposited in the court under CCP §572 must be deposited with the court's treasurer according to the procedures set forth in Govt C §68084. CCP §573.

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§34.21 H. Application for Enforcement Order Under CCP §574 After Party's Refusal to Deposit or Deliver

When a court has ordered the deposit or delivery of money or other property and the order is disobeyed, the court, besides punishing the disobedience, may render an order requiring the sheriff, constable, or marshal to take the money or property in deposit or deliver it as the court directs. CCP §574.

To obtain such an enforcement order, an application for the order under §574 must be filed and presented to the court together with a proposed order directing the sheriff, constable, or marshal to enforce the CCP §572 order. See CCP §1003. The application may be in the form of the declaration for the order. In some counties, the sheriff's office wishes to have the fee for the service stated on the order.

The court may take judicial notice of the existence of its earlier order. Evid C §452(d). It is important that this order include:

- A specific description of the levying officer, including the officer's county;
- A specific description of the property, *e.g.,* the make, model, and name of the registered and legal owner of an automobile;
- A specific direction concerning disposal of the property; and
- The exact caption and case number.

The order given to the levying officer must be the original or a certified copy. See §34.27 for form of order.

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§34.22 I. Notice and Order for Obtaining Disbursement of Funds

The court that made a deposit in custody of law (see §34.20) has the power, after notice to all interested parties and after a proper hearing, to distribute the deposit to one who can show entitlement to it. *Lord v Superior Court* (1946) 27 C2d 855, 168 P2d 14. The motion for an order for distribution is usually made in the original action, although it may be made after the final judgment has been entered. *Vallelunga v Gomes* (1951) 102 CA2d 374, 227 P2d 550. Certain courts have local rules on obtaining disbursement of deposits. See, *e.g.*, Los Angeles Ct R 3.1(a)-(b).

Distribution must be made from the funds deposited in the original case. No order can be made to disburse funds deposited in a suit that does not include the same parties. See *City of Los Angeles v Knapp* (1937) 22 CA2d 211, 70 P2d 643. If the money has been deposited with the county treasurer (see §34.21), the order must direct the auditor to draw a warrant and the treasurer to pay it. Govt C §68084.

The order may provide for a disbursement not only of the principal amount but also of interest on the deposit earned while the treasurer had the funds deposited in a bank. See Govt C §§53630-53681; *Ostly v Saper* (1957) 147 CA2d 671, 675, 305 P2d 946. Costs of protecting money while it is on deposit are deducted from the deposit. *Adair v Bank of America* (1938) 303 US 350, 82 L Ed 889, 58 S Ct 594.

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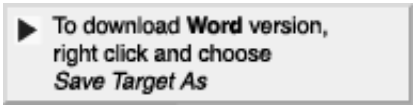
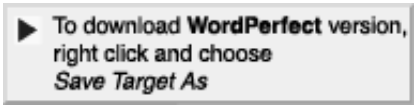
Source: Civil Litigation/California Civil Procedure Before Trial/34 Deposit in Court/§34.23 V. CHECKLIST: PROCEDURE FOR DEPOSIT IN COURT

§34.23 V. CHECKLIST: PROCEDURE FOR DEPOSIT IN COURT





Moving Party

- Depose or examine holder to establish that holder has no right to fund or property (if not admitted in pleadings)
- File and serve notice of motion and motion with supporting papers:
- Declaration (see §34.14)
- Memorandum (see §34.16)
- Pleadings, transcript, or other exhibit (see §34.15)
- Proposed order
- Attend hearing and obtain signed order
- Serve signed order on holder
- Attach directions for how to deposit (CCP §573; Govt C §68084; see §34.20)
- If, after checking with court, deposit was not made
- Move ex parte for order requiring sheriff to seize fund or property and deposit it and for sanction (CCP §574; see §34.21)
- At conclusion of lawsuit (see §34.22)
- Attend hearing and obtain signed order
- Move for disbursal of money or property

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Source: Civil Litigation/California Civil Procedure Before Trial/34 Deposit in Court/ VI. FORMS/§34.24 A. Form: Notice of Motion for Deposit in Court or Delivery of Property

VI. FORMS

§34.24 A. Form: Notice of Motion for Deposit in Court or Delivery of Property

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR ORDER UNDER CCP §572 FOR** _ _[*DEPOSIT IN COURT/DELIVERY OF PROPERTY*]_ _**;** _ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §572 for an order requiring** _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, to** _ _[*deposit in this Court/deliver to* _ _[*name of party entitled to property*]_ _]_ _ _ _[*$_ _ _ _ _ _/describe property*]_ _**. The grounds for this motion are that** _ _[*e.g., this property is the subject of litigation in this action and* _ _[*e.g., defendant*]_ _ *holds it as a trustee for* _ _[*e.g., plaintiff*]_ _*. Under the circumstances of this case, the property should be held by the Court pending final determination of this action*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.
Comment: See §34.13.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/34 Deposit in Court/§34.25 B. Form: Declaration Supporting Motion for Deposit in Court or Delivery of Property

§34.25 B. Form: Declaration Supporting Motion for Deposit in Court or Delivery of Property

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _**, SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	**ORDER UNDER CCP §572**
	)	**FOR** _ _[*DEPOSIT IN COURT/*
	)	*DELIVERY OF PROPERTY*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*plaintiff/defendant/attorney for plaintiff/attorney for defendant*]_ _ **in this action. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.**

2. _ _[*Name of party against whom motion brought*]_ _ **has** _ _[*in* _ _[*his/her/its*]_ _ *possession/under* _ _[*his/her/its*]_ _ *control*]_ _ _ _[*describe property or state amount of money*]_ _**.**

3. This property was acquired by _ _[*name*]_ _ **in the following manner:** _ _[*Specify*]_ _**.**

4. This property is the subject of the pending litigation.

5. This property is held by _ _[*name of party against whom motion is brought*]_ _ _ _[*state capacity, e.g., as trustee, as bailee*]_ _ **but** _ _[*belongs/is due*]_ _ **to** _ _[*name of person entitled to property*]_ _**, as shown by** _ _[*state evidentiary basis for statement, e.g., admission in answer on file in this action*]_ _**.**

6. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §34.14.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/34 Deposit in Court/§34.26 C. Form: Order for Deposit in Court or Delivery of Property

§34.26 C. Form: Order for Deposit in Court or Delivery of Property

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER UNDER CCP §572 FOR** _ _[*DEPOSIT IN COURT/ DELIVERY OF PROPERTY*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, for an order requiring** _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, to** _ _[*deposit $_ _ _ _ _ _ in Court/deliver property to* _ _[*name of person entitled to property*]_ _]_ _ **was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. _ _[*E.g., Defendant*]_ _ _ _[*deposit in Court/deliver to* _ _[*name of person entitled to property*]_ _]_ _ _ _[*$_ _ _ _ _ _/describe property*]_ _ **on or before** _ _[*date*]_ _**.**

2. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §34.19. This order should be served personally on the party and on his or her attorney so that a contempt order will lie if further enforcement procedures become necessary. See CCP §574. The order may specify the period within which deposit or delivery must be made. A 10-day period is common.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/34 Deposit in Court/§34.27 D. Form: Declaration for CCP §574 Enforcement Order

§34.27 D. Form: Declaration for CCP §574 Enforcement Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**DECLARATION FOR ORDER UNDER CCP §574 DIRECTING** _ _[*SHERIFF/CONSTABLE/MARSHAL*]_ _ **TO ENFORCE ORDER FOR** _ _[*DEPOSIT IN COURT/DELIVERY OF PROPERTY*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, in this action. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.**

2. On _ _[*date*]_ _**, this Court issued an order requiring** _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, to** _ _[*deposit in this Court/deliver to* _ _[*name of party entitled to property*]_ _]_ _ _ _[*$_ _ _ _ _ _/describe property*]_ _**.**

3. _ _[*E.g., Defendant*]_ _ **has failed and continues to fail to comply with the order.**

4. To ensure compliance with the order, this Court must issue an order directing the _ _[*sheriff/constable/marshal*]_ _ **to enforce its order.**

5. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §34.21.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§34.28 E. Form: Enforcement Order Under CCP §574

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER UNDER CCP §574 DIRECTING** _ _[*SHERIFF/ CONSTABLE/MARSHAL*]_ _ **TO ENFORCE ORDER FOR** _ _[*DEPOSIT IN COURT/ DELIVERY OF PROPERTY*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	

Satisfactory proof having been made that (1) this Court on _ _[*date*]_ _**, issued an order to** _ _[*e.g., defendant*]_ _**,** _ _[*name*]_ _**, to** _ _[*deposit in this Court/deliver to* _ _[*name of party entitled to property*]_ _]_ _ _ _[*$_ _ _ _ _ _/describe property*]_ _**, and (2)** _ _[*e.g., defendant*]_ _ **failed to comply with that order, and good cause appearing,**

IT IS ORDERED that:

1. The _ _[*sheriff/constable/marshal*]_ _ **of** _ _ _ _ _ _ **County, California, remove the property from** _ _[*e.g., defendant*]_ _ **and** _ _[*deposit it in this Court/deliver it*]_ _ **as directed in the Court's order of** _ _[*date*]_ _**.**

2. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature); ___ copies for service (one for each other party); one conformed copy for levying officer; ___ office copies.

Comment: The order given to the levying officer must be the original or a certified copy. In some counties, the sheriff's office wishes to have the fee for the service stated on the order. See §34.21.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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35

Declaratory Relief

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I. INTRODUCTION

§35.1 A. Scope of Chapter

This chapter discusses the rules and procedures applicable to declaratory relief actions in state court, including factors to consider before seeking declaratory relief (see §§35.16-35.22) and procedures (see §§35.30-35.49). It also contains a checklist (see §35.50) and forms (see §§35.51-35.53).

Federal declaratory relief practice is not discussed. For federal statutory authority concerning declaratory relief, see 28 USC §2201. See also Fed R Civ P 57.

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Source: Civil Litigation/California Civil Procedure Before Trial/35 Declaratory Relief/§35.2 B. Governing Law: The Declaratory Judgment Act

§35.2 B. Governing Law: The Declaratory Judgment Act

The California Declaratory Judgment Act is set forth in CCP §§1060-1062.5. Section 1060 provides as follows:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

NOTE: The court may grant declaratory relief in a limited civil case only when (CCP §86(a)(7)):

- A litigant brings a cross-complaint as to a right of indemnity with respect to the relief sought in the action; and
- A party to nonbinding attorney fee arbitration seeks a trial under Bus & P C §6204, and the total amount in controversy is $25,000 or less.

Two specific types of declaratory relief actions are authorized in CCP §§1060.5 and 1062.5. Section 1060.5 permits an individual claiming to be a nonresident of California for the purposes of the Personal Income Tax Law to commence a declaratory relief action to determine his or her residence within California under the conditions and circumstances specified in Rev & T C §19381. Section 1062.5 authorizes declaratory relief action concerning rights, duties, and obligations under policies of professional liability insurance issued to health care providers for professional negligence.

For discussion of CCP §1061, see §§35.21-35.22. For discussion of CCP §1062, see §35.16. For discussion of CCP §1062.3, see §35.43.

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II. OVERVIEW

§35.3 A. Purpose of Declaratory Judgment Procedure

The declaratory relief procedure is designed to provide a vehicle for preventive justice. It operates prospectively rather than to redress merely past wrongs. Its purpose is to "set controversies at rest before they lead to repudiation of obligations, invasions of rights or commissions of wrongs." *Travers v Louden* (1967) 254 CA2d 926, 931, 62 CR 654. The procedure enables the parties to adjudicate their respective rights and obligations to relieve them from uncertainty or insecurity respecting "rights, status and other legal relations." *Lortz v Connell* (1969) 273 CA2d 286, 301, 78 CR 6. See *Babb v Superior Court* (1971) 3 C3d 841, 848, 92 CR 179 (purpose of judicial declaration of rights in advance of tortious incident is to enable parties to shape conduct to avoid breach); *Fagerstedt v Continental Ins. Co.* (1968) 266 CA2d 370, 72 CR 126 (purpose to liquidate uncertainties and controversies that might result in future litigation).

Although the form of declaratory relief varies depending on the case, the essence of declaratory relief is that when an actual controversy exists (see §§35.11-35.15) a party may bring an action seeking an authoritative determination and declaration of "the jural relationships between parties to a controversy" before the occurrence of actual breach or harm. Comment, *Developments in the Law, Declaratory Judgments—1941-1949*, 62 Harv L Rev 787 (1949). Under the procedure the court declares rights rather than executing them. *Travers v Louden, supra*.

NOTE: Because of the prospective nature of declaratory relief, CCP §§426.10-426.70, requiring a defendant to assert in a cross-complaint any related cause of action against plaintiff, are not applicable to actions for declaratory judgment. CCP §426.60(c).

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§35.4 B. Applicability of Equitable Principles

Declaratory relief actions have at times been characterized as in the nature of equitable proceedings. See *Westerholm v Twentieth Century Ins. Co.* (1976) 58 CA3d 628, 632 n1, 130 CR 164; *Merigan v Bauer* (1962) 206 CA2d 616, 23 CR 872. See also *Adams v Cook* (1940) 15 C2d 352, 362, 101 P2d 484 (action under CCP §1060 for declaratory relief is an equitable proceeding). Declaratory relief has also been characterized as not being strictly legal or equitable, but as being sui generis in nature. *Moss v Moss* (1942) 20 C2d 640, 643, 128 P2d 526.

In any event, in all declaratory relief actions courts exercise the same wide latitude in the formulation of judgments that is exercised in equitable actions (*City of Los Angeles v City of Glendale* (1943) 23 C2d 68, 81, 142 P2d 289; *Munson v Linnick* (1967) 255 CA2d 589, 595, 63 CR 340, disapproved on other grounds in *Babb v Superior Court* (1971) 3 C3d 841, 92 CR 179), and consider and apply equitable principles and doctrines (*Hollenbeck Lodge v Wilshire Blvd. Temple* (1959) 175 CA2d 469, 346 P2d 422; *Beeler v Plastic Stamping, Inc.* (1956) 144 CA2d 306, 300 P2d 852; *Merigan v Bauer, supra*).

On the other hand, a declaratory relief action is not subject to requirements of equity actions such as irreparable injury or inadequacy of a legal remedy, even though equitable defenses, *e.g.,* in pari delicto, unclean hands, or laches, may induce a court to exercise its discretion not to issue a declaration. See *Moss v Moss, supra*.

Moreover, a party is entitled to a trial by jury as to those issues of fact normally triable to a jury. *State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 431, 304 P2d 13. See §35.44.

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Source: Civil Litigation/California Civil Procedure Before Trial/35 Declaratory Relief/§35.5 C. Advantages of the Declaratory Judgment Procedure

§35.5 C. Advantages of the Declaratory Judgment Procedure

When a dispute is capable of resolution by an action for declaratory relief, such an action under the Declaratory Judgment Act (see §35.2) can provide certain advantages to the party desiring to bring it. Some of them are listed below:

- Code of Civil Procedure §1062.3 provides for trial-setting preference over all other civil actions with certain exceptions (see §35.43);
- The parties can resolve disputes before actual damage occurs or irreversible damage is caused by the repudiation of an agreement;
- Such actions allow a party to seek the resolution of a contract dispute before being forced to act on an interpretation that would create a breach of that contract;
- Competing interests of several parties over property can be resolved in one action;
- The application or validity of a statute, ordinance or regulation may be clarified or resolved;
- Certain disputes that would normally be determined in successive actions may be determined in one action, *e.g.,* questions of indemnification; and
- Under CCP §1062, a declaratory judgment under the California Declaratory Judgment Act does not preclude a party from obtaining other appropriate relief. See §35.16.

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§35.6 D. Other Statutory Authority Providing for Some Type of Declaratory Relief

In addition to the California Declaratory Judgment Act (see §35.2), there are some statutes that in certain instances either authorize a specific type of declaratory relief action or authorize an action seeking what amounts to a type of declaratory relief. Some of those statutes are noted in §§35.7-35.8.

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§35.7 1. Government Code

Some Government Code sections authorizing declaratory relief actions or what amounts to declaratory relief in certain instances are noted below:

- Govt C §§11350-11350.3 (to challenge the validity of any administrative regulation, or to declare valid regulations disapproved by the Office of Administrative Law).
- Govt C §§11130-11130.3 (to prevent or challenge actions by a state governmental body in violation of the open meeting laws).
- Govt C §§6258, 9076 (to enforce the right to inspect or receive public records or to inspect legislative records).

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Source: Civil Litigation/California Civil Procedure Before Trial/35 Declaratory Relief/§35.8 2. Other Statutes

§35.8 2. Other Statutes

Statutes other than those referred to in §35.7 may provide for declaratory relief or what amounts to declaratory relief in specific instances. Some examples of such statutes are:

- CC §1203 (to correct or prove an instrument).
- CCP §§751.02, 760.020, 801.2 (to declare and determine various property interests).
- CCP §803 (quo warranto actions).
- CCP §860 (validation proceedings by or against public agencies).
- CCP §§1240.690-1240.700 (to determine which is best and most necessary public use of property sought to be acquired for state, county, and city highways, roads, and streets).
- Corp C §709 (to determine the validity of corporate elections).
- Corp C §1904 (to determine matters concerning the winding up of a corporation).
- Elec C §2142 (to determine the right of a person to be registered to vote).
- Elec C §§16000-16940 (to challenge election results or to settle contested elections).
- Elec C §21504 (to challenge census data used for legislative redistricting).
- Fam C §309 (to determine and declare the validity of a marriage).
- Fam C §§7630-7634 (to determine the existence of the father-child relationship).
- Fam C §7650 (to determine the existence of the mother-child relationship).
- Prob C §200 (to establish fact of death).
- Pub Res C §21167 (to challenge acts or decisions of public agencies regarding environmental impact reports).
- Pub Res C §30803 (declaratory and equitable relief to restrain violations of the California Coastal Conservation Act).
- Rev & T C §4808 (taxpayer challenge to property tax assessment).

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III. REQUIREMENTS

A. Who May Obtain Relief

§35.9 1. Standing Generally; Class Actions

The concept of standing to bring a declaratory relief action must be considered in conjunction with the requirement that an actual controversy between the parties be present. Absent an actual controversy over a matter subject to a declaratory relief action, there is no justiciability and therefore no standing. See *California Water & Tel. Co. v County of Los Angeles* (1967) 253 CA2d 16, 61 CR 618. "The concept of justiciability involves the intertwined criteria of ripeness and standing." 253 CA2d at 22. On the "actual controversy" requirement, see §§35.11-35.15.

Under CCP §1060, any person may seek declaratory relief who is interested under a contract or under a written instrument, excluding a trust or will, or who desires a declaration of his or her rights concerning (a) another, (b) property, or (c) the location of the natural channel of a watercourse. The word "person" includes corporations and other entities (CCP §17(a); *Oil Workers Int'l Union v Superior Court* (1951) 103 CA2d 512, 570, 230 P2d 71), and the word "property" includes both real and personal property (CCP §17(b)(1)).

Thus, a party must be "interested" in order to bring a declaratory relief action. See *Residents of Beverly Glen, Inc. v City of Los Angeles* (1973) 34 CA3d 117, 125, 109 CR 724. Presumably, the term "interested person" as used in CCP §1160 is construed to be identical with that used in Govt C §§11350-11350.3 (see §35.10). See *Residents of Beverly Glen, Inc. v City of Los Angeles, supra* (construing former Govt C §11440). See also *Pacific Legal Found. v Unemployment Ins. Appeals Bd.* (1977) 74 CA3d 150, 154, 141 CR 474 (construing terms "interested person" or "interested organization" in Un Ins C §409.2 as similar to term "interested person" in CCP §1160 and former Govt C §11440). A party does not have standing to bring a declaratory relief action if the party, or those whom the party represents, "does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." *California Water & Tel. Co.,* 253 CA2d at 23. For further discussion of concept of "interested person," see §35.10.

It is not necessary that there be a written legal instrument between the parties to support standing. In *Siciliano v Fireman's Fund Ins. Co.* (1976) 62 CA3d 745, 753, 133 CR 376, the court stated that "section 1060 does not require the existence of a legal instrument between parties as a predicate for declaratory relief." In that case, an attorney who was discharged by the client filed a declaratory relief action against an insurance company that had settled directly with the attorney's client, knowing that the attorney had a contingent fee contract with the client that provided for a lien. See *Gardiner v Gaither* (1958) 162 CA2d 607, 621, 329 P2d 22 (person having "rights flowing from a contract has an 'interest' in that contract" and should be able to obtain declaration of the character and extent of such rights; creditors of one party to contract could seek declaration construing contract as creating partnership).

On an intended third-party beneficiary under an insurance policy between other parties having a sufficient interest to have standing to seek declaratory relief when the insurer denied coverage, see *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 258 CR 66 (general liability policy).

NOTE: A declaratory relief action may be brought on behalf of a class. See, *e.g., Serrano v Priest* (1971) 5 C3d 584, 96 CR 601. To bring such a suit, however, "[o]rdinarily, the plaintiff must be a member of the class [the plaintiff] claims to represent." 4 Witkin, California Procedure, *Pleading* §298 (5th ed 2008). See CCP §382; *Residents of Beverly Glen, Inc. v City of Los Angeles* (1973) 34 CA3d 117, 126, 109 CR 724. The plaintiff must be able to fairly protect the rights of the group that plaintiff purports to represent. *Residents of Beverly Glen, Inc. v City of Los Angeles, supra;* 4 Witkin, Procedure, *Pleading* §264. Whether plaintiff can do this is a question of fact for the court which depends on the facts and circumstances of each case. See *Residents of Beverly Glen, Inc. v City of Los Angeles, supra*; 4 Witkin, Procedure, *Pleading* §298. Moreover, there must be a common or general interest between the class members concerning the questions of law or fact involved. See CCP §382; *Residents of*

Beverly Glen, Inc., 34 CA3d at 126 n10; 4 Witkin, Procedure, *Pleading* §281. On class actions generally, see 4 Witkin, Procedure, *Pleading* §§267-331.

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Source: Civil Litigation/California Civil Procedure Before Trial/35 Declaratory Relief/§35.10 2. Challenges Concerning Governmental Action: Statutes, Ordinances, Charters, Regulations

§35.10 2. Challenges Concerning Governmental Action: Statutes, Ordinances, Charters, Regulations

The validity or interpretation of statutes, ordinances, charters, and regulations in an appropriate case may be the subject of a declaratory relief action. See *Cardellini v Casey* (1986) 181 CA3d 389, 397, 226 CR 659; *California Water & Tel. Co. v County of Los Angeles* (1967) 253 CA2d 16, 24, 61 CR 618. The constitutionality of a statute may also be challenged by seeking declaratory relief. See *Wolfe v George* (9th Cir 2007) 486 F3d 1120 (declaratory relief challenged constitutionality of California's vexatious litigant law (CCP §391)). A party is not required to violate the provisions of such a statute, ordinance, charter, or regulation and subject itself to a criminal prosecution, disciplinary proceedings, or other liability. See *Chas. L. Harney, Inc. v Contractors' State License Bd.* (1952) 39 C2d 561, 247 P2d 913 (administrative regulation); *California Water & Tel. Co. v County of Los Angeles, supra* (penal statutes, ordinances). See also *K. & W. Pharmacy, Inc. v State Dep't of Soc. Welfare* (1969) 275 CA2d 139, 79 CR 598 (administrative regulations). Similarly, in certain instances, the validity of an administrative appeals board precedent-making decision may be subject to a declaratory relief action. See, *e.g., Pacific Legal Found. v Unemployment Ins. Appeals Bd.* (1977) 74 CA3d 150, 141 CR 474 (Unemployment Appeals Board precedent decision finding eligibility for benefits; Board's precedent decision equated with administrative regulation).

Government Code §11350 provides that "[a]ny interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure." See Govt C §11350.3 containing similar language concerning regulations or orders of repeal disapproved under Govt C §11349.3 or §11349.6, or regulations ordered repealed under §11349.7. Presumably, the term "interested person" as used in the above Government Code sections is identical with that term as used in CCP §1060. See *Residents of Beverly Glen, Inc. v City of Los Angeles* (1973) 34 CA3d 117, 125, 109 CR 724 (term "interested person" in former Govt C §11440 (now Govt C §11350) construed as same as in CCP §1060; includes either the plaintiff organization or its members who might be impacted by challenged action); *Pacific Legal Found.,* 74 CA3d at 154 (terms "interested person" and "interested organization" in Un Ins C §409.2 interchangeable and subject to prior judicial interpretation under CCP §1060 and former Govt C §11440). By its express terms, a declaratory relief action under Govt C §11350 proceeds under the provisions of the Code of Civil Procedure dealing with declaratory relief. See *K. & W. Pharmacy, Inc. v State Dep't of Soc. Welfare, supra.*

Thus, a party may be an "interested person" under Govt C §11350 if it or its members may be affected by or subject to the challenged regulation. *Environmental Protection Info. Ctr. v Department of Forestry & Fire Protection* (1996) 43 CA4th 1011, 50 CR2d 892 (plaintiff organization with members in three timber producing counties had standing to contest regulation exempting certain timber operations from preparing timber harvest plan); *Pacific Legal Found.,* 74 CA3d at 154 (plaintiff, a nonprofit corporation, deemed interested organization under Un Ins C §409.2 to bring declaratory relief action to determine validity of Unemployment Insurance Appeal Board's decision granting benefits, although the decision was not directly addressed to plaintiff, because its effect may be applicable in the future in the event of termination of employment of an employee of plaintiff). Similarly, a person or entity challenging the validity or interpretation of a statute, ordinance, or charter must have a real interest in the ultimate adjudication of the matter (see *California Water & Tel. Co. v County of Los Angeles, supra*) and the general rules applicable to standing apply. See §35.9. The party must have sustained or be in immediate danger of sustaining some direct injury as a result of enforcement of the statute, as opposed to merely suffering "in some indefinite way in common with people generally" for the party to have standing. *Zetterberg v State Dep't of Pub. Health* (1974) 43 CA3d 657, 663, 118 CR 100.

NOTE: Declaratory relief is inappropriate to review an adjudicatory administrative decision. *State v Superior Court (Veta Co.)* (1974) 12 C3d 237, 249, 115 CR 497. Administrative mandamus under CCP §1094.5 is the appropriate procedure to accomplish this. See *Selby Realty Co. v City of San Buenaventura* (1973) 10 C3d 110, 123, 109 CR 799. On administrative mandamus generally, see California Administrative Mandamus (3d ed Cal CEB 2003). On traditional mandate under CCP §1085 being the appropriate remedy to compel administrative agencies to issue regulations and standing requirements, see *Newland v Kizer* (1989) 209 CA3d 647, 652, 257 CR 450. On traditional mandate generally, see California Civil Writ Practice (4th ed Cal CEB 2008).

The exclusive procedure for litigating the issue of a public agency's obligation to disclose records to a member of the public is found within the Public Records Act (Govt C §§6250-6268). These provisions contemplate a declaratory relief action being brought by the person seeking disclosure of the public records; they do not authorize a public agency to initiate a proceeding under the Act to determine its duty to a member of the public. Thus, a trial court abused its discretion by bypassing the procedures set forth in the Act and granting declaratory relief in an action brought by a public agency. *Filarsky v Superior Court* (2002) 28 C4th 419, 121 CR2d 844. See also *County of Santa Clara v Superior Court* (2009) 171 CA4th 119, 89 CR3d 520 (neither Public Records Act nor *Filarsky* precluded petitioners from seeking declaratory and injunctive relief under CCP §526a).

On when the constitutionality of an ordinance must first be attacked in an agency, see §35.18.

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§35.11 B. Actual Controversy Requirement

Under CCP §1060, declaratory relief is available only "in cases of actual controversy relating to the legal rights and duties of the respective parties." The controversy must be real, involving justiciable questions that relate to the parties' rights and obligations. *Wilson v Transit Auth.* (1962) 199 CA2d 716, 722, 19 CR 59. A plaintiff may bring an action for declaratory relief before an actual invasion of rights has occurred. However, the action must be based on an actual controversy with known parameters. If the parameters are as yet unknown, the controversy is not ripe for declaratory relief. *Sanctity of Human Life Network v California Highway Patrol* (2003) 105 CA4th 858, 872, 129 CR2d 708 (plaintiffs' claim that they had First Amendment right to display signs on freeway overpasses presented no actual controversy and was not ripe for declaratory relief).

A difference of opinion does not constitute an actual controversy. A difference of opinion must ripen into an actual concrete controversy to give rise to a justiciable case for which declaratory relief is appropriate. *Wilson v Transit Auth., supra.*

Moreover, declaratory relief is not available to determine hypothetical or abstract questions. "The 'actual controversy' requirement referred to in [CCP §1060] is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion based upon a particular or hypothetical state of facts." *Selby Realty Co. v City of San Buenaventura* (1973) 10 C3d 110, 117, 109 CR 799. The controversy must be such as to be capable of resolution by a judgment that decrees, rather than suggests, what the parties can or cannot do. *Selby Realty Co. v City of San Buenaventura, supra.*

On actual controversy requirement in relation to past or future conduct, see §§35.12-35.13.

NOTE: When a client seeks to challenge certain governmental action, counsel must distinguish between cases involving an actual controversy in which declaratory relief may be appropriate, *e.g.,* when the validity of a statute, regulation, or ordinance is involved, with those in which a citizen is merely dissatisfied with the performance of either the legislative or executive branches or disagrees with their policies. In the latter instance a justiciable controversy does not arise and declaratory relief is not appropriate. *Zetterberg v State Dep't of Pub. Health* (1974) 43 CA3d 657, 662, 118 CR 100. In *Zetterberg,* the court further noted that a difference of opinion concerning the interpretation of statute "between a citizen and a governmental agency does not give rise to a justiciable controversy." See *Newland v Kizer* (1989) 209 CA3d 647, 257 CR 450. But see *Redwood Coast Watersheds Alliance v State Bd. of Forestry & Fire Protection* (1999) 70 CA4th 962, 83 CR2d 24 (declaratory relief proper to determine whether State Board of Forestry and Fire Protection had *mandatory* or *discretionary* duty to issue regulations concerning sustainable timber harvesting, despite fact that Board had already issued regulations).

Declaratory relief is inappropriate to review an adjudicatory administrative decision. *State v Superior Court (Veta Co.)* (1974) 12 C3d 237, 249, 115 CR 497. Administrative mandamus under CCP §1094.5 is the appropriate procedure to accomplish this. See *Selby Realty Co.,* 10 C3d at 123. On administrative mandamus generally, see California Administrative Mandamus (3d ed Cal CEB 2003). On traditional mandate under CCP §1085 being the appropriate remedy to compel administrative agencies to issue regulations and standing requirements, see *Newland v Kizer,* 209 CA3d at 652. On traditional mandate generally, see California Civil Writ Practice §§2.3, 15.2-15.13 (4th ed Cal CEB 2008).

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§35.12 1. No Redress for Only Past Wrongs

Code of Civil Procedure §1060 concludes by stating that declaratory relief "may be had before there has been any breach of the obligation in respect to which said declaration is sought."

Declaratory relief "operates prospectively, and not merely for the redress of past wrongs." *Travers v Louden* (1967) 254 CA2d 926, 931, 62 CR 654. When the complaining party's rights have crystallized into a cause of action for past wrongs and there is no further relationship between the parties and no conduct of the parties subject to court regulation, the declaratory relief procedure has been held inappropriate. *Travers v Louden, supra.* See *California Union Ins. Co. v Trinity River Land* (1980) 105 CA3d 104, 110, 163 CR 802 (no basis for declaratory relief when only past wrongs involved); *K. & W. Pharmacy, Inc. v State Dep't of Soc. Welfare* (1969) 275 CA2d 139, 141, 79 CR 598 (accrued cause of action for actual breach is ground for denial of declaratory relief). See also 5 Witkin, California Procedure, *Pleading* §869 (5th ed 2008). But see §35.17 on effect of accrued cause of action.

On the other hand, "redress for past wrongs may be had in a proper action for declaratory relief." *Travers v Louden, supra.* See 5 Witkin, Procedure, *Pleading* §§861-864 (if controversy calls for declaration of rights, no objection that past wrongs also to be redressed). Under CCP §1060, a party "may ask for a declaration of rights or duties, either alone or with other relief." Thus, *e.g.,* if a contract has some time to run and there is a need to define respective rights under it to govern the parties' future conduct, a declaratory relief action which also redresses past breaches is appropriate. See *Travers,* 254 CA2d at 932; §35.13. See also *Alhambra Mun. Court Dist. v Bloodgood* (1982) 137 CA3d 29, 44, 186 CR 807 (money due and owing may be granted in connection with declaratory relief action). If there is no occasion to define respective rights that will govern the parties' future conduct, however, redress for past wrongs may not be had by declaratory relief. *Travers v Louden, supra.* See *Cardellini v Casey* (1986) 181 CA3d 389, 396, 226 CR 659 (no continuing relationship to justify declaration of future rights).

NOTE: With regard to insurance policies, an insurer's declaratory relief action to determine its liability for coverage under an insurance policy has been held proper although it requires a determination of past wrongs. *California Union Ins. Co.,* 105 CA3d at 110 (declaration of nonliability or limited liability under insurance policy sought because of insured's alleged responsibility for fire). In *California Union Ins. Co.,* the court concluded that a present controversy as to plaintiff's liability, if any, under the insurance contracts in question existed and thus the fundamental basis for declaratory relief was present.

On effect on trial calendar when relief in addition to a declaration of rights and duties is sought, see §35.43.

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§35.13 2. Effect When Probability of Future Controversy Exists

Although an "actual present controversy" is usually required as a basis for a declaratory relief action (5 Witkin, California Procedure, *Pleading* §§861-864 (5th ed 2008); see §35.11), a declaratory relief action is also appropriate if a probable future controversy exists between the parties relating to their legal rights and duties (*Reiner v Danial* (1989) 211 CA3d 682, 688, 259 CR 570). See generally *Sherwyn v Department of Soc. Servs.* (1985) 173 CA3d 52, 58, 218 CR 778 (essence of declaratory relief is existence of actual present, or future, controversy relating to parties' legal rights and duties, coupled with request that court adjudge those rights and duties). Thus, *e.g.,* it has been held appropriate for a prospective purchaser of land who had entered into a land sales contract to test the enforceability of covenants or servitudes asserted against the property by a declaratory relief action without first having to violate the restrictions before initiating the action. *Reiner v Danial, supra.* See *Chas. L. Harney, Inc. v Contractors' State License Bd.* (1952) 39 C2d 561, 247 P2d 913 (licensed contractor entitled to declaratory relief under former Govt C §11440 (now Govt C §§11350, 11350.3) in accordance with CCP §1060 with respect to a regulation requiring specialty license even though it did not allege it had bid or intended to bid on particular job; plaintiff need not first violate regulation and face possible criminal prosecution or disciplinary action).

When a breach of contract has occurred and the parties have a continuing relationship, a breach of contract action may not be speedy or adequate and declaratory relief may be appropriate to (a) guide the parties in their future conduct or (b) avoid a multiplicity of suits that would ensue if another remedy were pursued. *Alhambra Mun. Court Dist. v Bloodgood* (1982) 137 CA3d 29, 44, 186 CR 807. On effect of accrued cause of action generally, see §35.17.

For a probable future controversy to constitute an actual controversy subject to the declaratory judgment procedure, however, the controversy must be ripe for adjudication (*Newland v Kizer* (1989) 209 CA3d 647, 657, 257 CR 450) and not involve a hypothetical situation (*Reiner v Danial* (1989) 211 CA3d 682, 688, 259 CR 570). See *Environmental Defense Project of Sierra County v County of Sierra* (2008) 158 CA4th 877, 884, 70 CR3d 474 (actual controversy whether streamlined zoning violates Planning and Zoning Law because of different interpretations of Government Code). On prohibition against advisory opinions, see §35.11.

A controversy is ripe for adjudication when it "has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." *California Water & Tel. Co. v County of Los Angeles* (1967) 253 CA2d 16, 22, 61 CR 618 (private water utility could seek declaration of validity of application of county water ordinance, even though it had complied with such ordinances, because to plan for future it needed to know if it must comply with specifications of ordinance). The controversy must be such as to be capable of definite and conclusive relief. *Reiner v Danial, supra; Sherwyn v Department of Soc. Servs.* (1985) 173 CA3d 52, 58, 218 CR 778. See *California Water & Tel. Co. v County of Los Angeles, supra.*

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§35.14 3. Examples of Actual Controversy

Courts have found actual controversies in the following cases:

- *Redwood Coast Watersheds Alliance v State Bd. of Forestry & Fire Protection* (1999) 70 CA4th 962, 83 CR2d 24 (whether State Board of Forestry and Fire Protection had *mandatory* or *discretionary* duty to issue regulations concerning sustainable timber harvesting, despite fact that Board had already issued regulations);
- *Southern Counties Gas Co. v Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 381, 96 CR 825 (declaration of rights under indemnification sections of series of contracts when there was "prospect, if not likelihood," that future disputes would arise as result of gas leaks due to corrosion in improperly wrapped pipes);
- *Schafer v Wholesale Frozen Foods, Inc.* (1959) 171 CA2d 232, 340 P2d 308 (dispute over whether landlord, tenant, or subtenant responsible for damage to property);
- *Western Motors Corp. v Land Dev. & Inv. Co.* (1957) 152 CA2d 509, 313 P2d 927 (dispute over lessor's duty to replace certain worn-out elevator parts under provisions of written lease); and
- *Talcott v Talcott* (1942) 54 CA2d 743, 129 P2d 946 (dispute over testator's widow's right to sell certain property without deceased son's widow's consent despite agreement and decree of distribution conditioning such sale on deceased son's consent).

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§35.15 4. Examples of No Actual Controversy

The following are examples of cases holding that no actual controversy existed:

- *Meyer v Sprint Spectrum L.P.* (2009) 45 C4th 634, 646, 88 CR3d 859 (no actual controversy existed when declaratory judgment concerning contractual remedies had no current practical consequences, given that no dispute had yet arisen between parties and continuation of parties' contractual relationship did not depend on resolution of questions presented).
- *Otay Land Co. v Royal Indem. Co.* (2008) 169 CA4th 556, 86 CR3d 408 (no certainty that conflict would arise between property owner and insurer until pending litigation between plaintiff and the former insured was resolved).
- *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 188 CR 104 (facial challenge on statutory and constitutional grounds to public access guidelines adopted by Coastal Commission by itself, without specific application of guidelines being involved, did not create actual controversy subject to declaratory relief because controversy was not ripe in that issues raised were not sufficiently concrete to allow judicial resolution in absence of precise factual context; court invited in essence to speculate as to type of developments for which access conditions might be imposed and then to express opinion on such hypothetical exactions).
- *State v Superior Court (Veta Co.)* (1974) 12 C3d 237, 115 CR 497 (contention of real parties in interest that they had right to develop land without permit from Coastal Zone Conservation Commission did not create actual controversy because they had made no effort to obtain vested right determination from Commission).
- *Selby Realty Co. v City of San Buenaventura* (1973) 10 C3d 110, 109 CR 799 (declaration with respect to validity of general plan adopted by county; such relief could be obtained only if and when plan was implemented so as to affect plaintiff's free use of its property).
- *Fracasse v Brent* (1972) 6 C3d 784, 100 CR 385 (no present controversy with respect to discharged attorney's claim for compensation for services rendered under contingent fee contract when contingency of recovery had not yet occurred).
- *Burke v City & County of San Francisco* (1968) 258 CA2d 32, 65 CR 539 (no present actual controversy with respect to future tax assessments because it was only conjecture that such assessments would be improperly made).
- *Wilson v Transit Auth.* (1962) 199 CA2d 716, 19 CR 59 (union officers' claim that public agency could legally include compulsory arbitration clause in collective bargaining agreement does not create actual controversy because there was no allegation of any dispute under existing agreement and no claim that defendant transit authority had to include such clause in ensuing contract).

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IV. FACTORS TO CONSIDER BEFORE SEEKING DECLARATORY RELIEF

A. Effect of Other Available Remedies

§35.16 1. Remedies Cumulative

Code of Civil Procedure §1060 provides that a plaintiff "may ask for a declaration of rights or duties, either alone or with other relief." Thus, a plaintiff in a declaratory relief action may also seek in an appropriate case coercive relief, *e.g.,* an injunction, executory relief, money damages. See *Alhambra Mun. Court Dist. v Bloodgood* (1982) 137 CA3d 29, 44, 186 CR 807 (money damages); *Staley v Board of Med. Exam'rs* (1952) 109 CA2d 1, 240 P2d 61 (coercive or executory relief).

Moreover, CCP §1062 provides that the remedies set forth in the declaratory relief sections are "cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action," and that no declaratory judgment "shall preclude any party from obtaining relief based upon the same facts." Thus, the remedy of declaratory relief is in addition to other remedies provided by law. *Walker v Munro* (1960) 178 CA2d 67, 72, 2 CR 737. For example, if a party obtains declaratory relief the party is not thereafter precluded from obtaining coercive relief. See *Dills v Delira Corp.* (1956) 145 CA2d 124, 130, 302 P2d 397. If in the declaratory relief action, however, it is determined that plaintiff has no rights, plaintiff is thereafter barred from relitigating the claim by pursuing different relief. *Dills v Delira Corp., supra.*

On when availability of another remedy may preclude declaratory relief, see §35.17.

NOTE: The remedy of declaratory relief is not exclusive. *Employers Mut. Liab. Ins. Co. v Pacific Indem. Co.* (1959) 167 CA2d 369, 382, 334 P2d 658. Simply because a party may have a right to declaratory relief does not mean that such an action must be filed when ripe. The party may await the accrual of another appropriate cause of action and then seek appropriate relief in that action. *State Farm Fire & Cas. Co. v Co-Op of Am. Physicians* (1984) 163 CA3d 199, 205, 209 CR 251 (insurer's failure to initiate declaratory relief action before settlement did not preclude later action for equitable subrogation against another insurer of insured).

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§35.17 2. Availability of Another Remedy May Preclude Relief

By virtue of CCP §1062 (see §35.16), the existence of an accrued cause of action does not necessarily preclude declaratory relief. In *Ermolieff v R.K.O. Radio Pictures, Inc.* (1942) 19 C2d 543, 547, 122 P2d 3, the court noted that a court may make a binding declaration of rights whether other relief is or could be claimed or obtained and that the remedy is cumulative. In *Jones v Robertson* (1947) 79 CA2d 813, 819, 180 P2d 929, quoting from Borchard, Declaratory Judgments 302 (2d ed 1941), it was stated:

> [I]t is wrong for courts to decline a declaration on the mere ground that another remedy was available, for declaratory relief was not intended to be exclusive or extraordinary, but alternative and optional. It is only where the court believes that *more* effective relief can and should be obtained by another procedure and that for that reason a declaration will not serve a useful purpose, that it is justified in refusing a declaration because of the availability of another remedy.

Thus, the fact that a cause of action has accrued and that other adequate relief may be available to plaintiff are factors to be considered by the court in granting or denying declaratory relief. *Columbia Pictures Corp. v DeToth* (1945) 26 C2d 753, 161 P2d 217. Before the court may properly exercise its discretion to deny declaratory relief based on the availability of other remedies, however, "it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief." *Maguire v Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 732, 146 P2d 673; *Warren v Kaiser Found. Health Plan, Inc.* (1975) 47 CA3d 678, 683, 121 CR 19.

More cases have granted the right to declaratory relief despite the existence of another remedy than have denied it. 5 Witkin, California Procedure, *Pleading* §871 (5th ed 2008). When declaratory relief is sought to redress merely past wrongs, however, because the rights of the party seeking declaratory relief have crystallized into a cause of action for such past wrongs (*i.e.,* an accrued cause of action), there is no further relationship between the parties and no conduct of the parties subject to further court regulation, and declaratory relief has been denied. See *Travers v Louden* (1967) 254 CA2d 926, 62 CR 654. See also §35.12. On availability of declaratory relief when the probability of future controversy between the parties exists, see §35.13. Similarly, when special statutory authority has been provided for the particular type of case, declaratory relief has been denied. See, *e.g., Communist Party v Peek* (1942) 20 C2d 536, 127 P2d 889 (not an abuse of discretion for trial court to deny declaratory relief with respect to constitutionality of Election Code provisions because sections of that code provided speedy and adequate remedy). The following are examples of cases in which declaratory relief has been denied:

- *Holden v Arnebergh* (1968) 265 CA2d 87, 71 CR 401 (affirmed sustaining of demurrer because other remedies were available in criminal proceedings);
- *Barber v Irving* (1964) 226 CA2d 560, 38 CR 142 (declaratory relief action not proper to decree nonexistence of corporation, which can be done only in quo warranto action);
- *Rapaport v Forer* (1937) 20 CA2d 271, 66 P2d 1242 (trial court properly exercised discretion in sustaining demurrer to declaratory relief action because plaintiff had right under former CCP §689 (now CCP §§720.110-720.170) to speedy hearing to determine ownership of subject matter of purported levy);
- *Fritz v Superior Court* (1936) 18 CA2d 232, 63 P2d 872 (declaratory relief not necessary to determine claims of plaintiffs that they are directors because another statutory remedy available under Corp C §709 (former CC §315)); and
- *Stenzel v Kronick* (1929) 102 CA 507, 283 P 93 (plaintiff, judgment creditor, not entitled to declaratory relief with respect to rights in certain property because remedy of levying in execution available which would result in proceeding testing lien's validity if question arose).

For further discussion concerning other available remedies, see 5 Witkin, Procedure, *Pleading* §§868-871.

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§35.18 3. Exclusivity of Certain Other Remedies or Forums

Declaratory relief may be an inappropriate remedy to redress the particular alleged wrong. For example, declaratory relief is inappropriate to review an adjudicatory administrative decision. *State v Superior Court (Veta Co.)* (1974) 12 C3d 237, 249, 115 CR 497. Administrative mandamus under CCP §1094.5 is the appropriate procedure to accomplish this. See *Selby Realty Co. v City of San Buenaventura* (1973) 10 C3d 110, 123, 109 CR 799. Note *Subriar v City of Bakersfield* (1976) 59 CA3d 175, 194, 130 CR 853, in which the court recognized that declaratory relief is appropriate to challenge the constitutionality of an ordinance, but held that when a plaintiff submits to the jurisdiction of an agency by applying for a permit or license under an act which the plaintiff does not attack in its entirety (*i.e.,* "does not attack the validity of the existence of the granting agency itself under the ordinance"), the proper method to attack the constitutionality of the specific portion of the act claimed to be invalid is by judicial review under CCP §1094.5 (*i.e.,* by administrative mandamus). See also *Taylor v Swanson* (1982) 137 CA3d 416, 187 CR 111 (declaratory relief appropriate remedy to attack overall constitutionality of zoning ordinance that impedes desired use of property as party cannot attack very existence of agency from which party seeks favor; however, if landowner concedes legal existence of administrative agency and seeks to obtain ruling that regulation as applied to party's property is unconstitutional, that issue properly raised before agency and its adverse decision reviewable by administrative mandamus).

An expedited form of administrative mandamus is also available through CCP §1094.8 to obtain judicial review of a decision by a local public agency regarding the issuance, revocation, suspension, or denial of a permit involving expressive conduct protected by the First Amendment; in light of this expedited procedure, it is possible that declaratory relief may not be appropriate to review such decisions. On administrative mandamus generally, see California Administrative Mandamus (3d ed Cal CEB 2003).

Similarly, declaratory relief cannot be used to circumvent statutory provisions prohibiting injunctive or mandamus relief to prevent collection of a tax. *Rickley v County of Los Angeles* (2004) 114 CA4th 1002, 1014, 8 CR3d 406 (declaratory relief not available to challenge amount of property tax assessed; under Rev & T C §5141, plaintiff must pay disputed amount, exhaust administrative remedies, and then sue for refund); *Valley Fair Fashions, Inc. v Valley Fair* (1966) 245 CA2d 614, 54 CR 306. In addition, declaratory relief cannot be used to circumvent other prohibitions against the maintenance of actions. See, *e.g., Cooper v Leslie Salt Co.* (1969) 70 C2d 627, 634, 75 CR 766 (declaratory relief not appropriate to challenge existence of municipal entity when quo warranto not available); *Faix, Ltd. v County of Los Angeles* (1976) 54 CA3d 992, 127 CR 182 (landowner not entitled to sue for declaratory relief respecting validity of tax assessment when statutory condition precedent of payment in full not satisfied). Moreover, declaratory relief may be inappropriate because another court has exclusive jurisdiction over the matter. See, *e.g., Independent Laundry v Railroad Comm'n* (1945) 70 CA2d 816, 161 P2d 827 (decided under former Pub Util C §67 (now Pub Util C §1759); orders and regulations of Public Utilities Commission reviewable only in Supreme Court). Furthermore, declaratory relief may not be available because matters within the exclusive province of another governmental branch or agency are involved. See, *e.g., Monahan v Department of Water & Power* (1941) 48 CA2d 746, 120 P2d 730 (declaratory relief not available with respect to matter within exclusive province of executive branch).

NOTE: Code of Civil Procedure §1060 no longer provides for a declaration of rights by any person interested under a will. Rights under a will are adjudicated in the course of the proceedings of the probate court. See *Howard v Bennett* (1942) 53 CA2d 546, 127 P2d 1012, and *Colden v Costello* (1942) 50 CA2d 363, 122 P2d 959, in which it was held that declaratory relief did not lie, because the probate court could give complete relief and therefore had exclusive jurisdiction. See also §35.27.

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§35.19 B. What Limitation Period Applies

There is no statute of limitations specifically applicable to declaratory relief actions. The periods of limitations applicable to ordinary actions at law and suits in equity are applicable to actions for declaratory relief. *Maguire v Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 734, 146 P2d 673; *Liberty Mut. Ins. Co. v Colonial Ins. Co.* (1970) 8 CA3d 427, 87 CR 348. The courts determine whether a statute of limitations bars a declaratory relief action by ascertaining whether the underlying controversy involves a breach of an obligation.

Thus, if a party seeks declaratory relief on an obligation that has been breached and the right to commence an action for coercive relief on the cause of action is barred, the right to declaratory relief is also barred. *Maguire v Hibernia Sav. & Loan Soc'y, supra*. On the other hand, if the statute of limitations on the coercive accrued right of action has not yet expired, a declaratory relief action is not time barred. The right to bring a declaratory relief action continues concurrently with the right to proceed with the coercive right of action. See *United Pacific-Reliance Ins. Co. v DiDomenico* (1985) 173 CA3d 673, 676, 219 CR 119.

If, however, a party seeks declaratory relief *before* there has been a breach of the obligation, the right to relief is not barred by any period of limitations. *Maguire v Hibernia Sav. & Loan Soc'y, supra; United Pacific-Reliance Ins. Co. v DiDomenico, supra*. The limitation period does not begin to run at the time the "right" to institute a declaratory relief action accrues, but when the breach occurs. *United Pacific-Reliance Ins. Co. v DiDomenico, supra*.

If the underlying claim is equitable in nature, the doctrine of laches can be applied under appropriate circumstances. See *Empire W. Side Irrig. Dist. v Stratford Irrig. Dist.* (1937) 10 C2d 376, 74 P2d 248 (held laches applicable, although unclear if there was any underlying equitable claim); *Rivieccio v Bothan* (1946) 27 C2d 621, 165 P2d 677 (upholding trial court's decision that facts in particular case did not support application of laches).

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§35.20 C. Applicability of Doctrine of Exhaustion of Administrative Remedies

Under the doctrine of exhaustion of administrative remedies, unless an exception applies a party must exhaust whatever administrative remedies are available before that party may resort to the court for judicial review or relief in any manner. This requirement is a condition precedent for obtaining judicial relief, and a court violating the rule acts in excess of its jurisdiction. See *Economic Empowerment Found. v Quackenbush* (1997) 57 CA4th 677, 67 CR2d 323 (general rule and discussion of cases falling within futility exception); *Mountain View Chamber of Commerce v City of Mountain View* (1978) 77 CA3d 82, 143 CR 441 (general rule and some exceptions specified). For a discussion of the doctrine of exhaustion of administrative remedies and exceptions, see California Administrative Mandamus §§3.10-3.46 (3d ed Cal CEB 2003); California Administrative Hearing Practice §§4.13-4.16 (2d ed Cal CEB 1997).

A party cannot circumvent the requirement for exhaustion of administrative remedies by bringing a declaratory relief action. See *Bleeck v State Bd. of Optometry* (1971) 18 CA3d 415, 432, 95 CR 860 (doctrine cannot be circumvented by bringing action such as for declaratory relief or for injunction); *Walker v Munro* (1960) 178 CA2d 67, 2 CR 737 (declaratory relief denied). See *Louis Eckert Brewing Co. v Unemployment Reserves Comm'n* (1941) 47 CA2d 844, 119 P2d 227 (declaratory relief denied).

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D. Judicial Discretion to Deny Relief

§35.21 1. When Not Necessary or Proper

Under CCP §1061 "[t]he court may refuse to exercise the power granted by [the declaratory relief provisions] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." Thus, a court has broad discretion to deny declaratory relief. A judgment denying declaratory relief is not reviewable on appeal except for an abuse of discretion. *Orloff v Metropolitan Trust Co.* (1941) 17 C2d 484, 489, 110 P2d 396.

The court's broad discretion under CCP §1061 to deny declaratory relief, however, is not unlimited. The court's discretion to deny declaratory relief "may be exercised only when there is a basis in fact for the conclusion that the declaration is not necessary or proper." *Warren v Kaiser Found. Health Plan, Inc.* (1975) 47 CA3d 678, 683, 121 CR 19. In *Columbia Pictures Corp. v DeToth* (1945) 26 C2d 753, 762, 161 P2d 217, the court stated that "[d]eclaratory relief must be granted when the facts justifying that course are sufficiently alleged." See *International Ass'n of Fire Fighters v City of Palo Alto* (1963) 60 C2d 295, 301, 32 CR 842 (power under CCP §1061 is discretionary power which should not be exercised when declaration of rights clearly called for). Any doubt that the court may have should be resolved in favor of granting declaratory relief. *Warren v Kaiser Found. Health Plan, Inc., supra.*

Courts have invoked CCP §1061 in denying declaratory relief when the issues have already been or can be disposed of in other proceedings which are pending (see, *e.g., Allstate Ins. Co. v Fisher* (1973) 31 CA3d 391, 107 CR 251; *Fagerstedt v Continental Ins. Co.* (1968) 266 CA2d 370, 72 CR 126) and when another speedy and adequate remedy is available (see, *e.g., City of Alturas v Gloster* (1940) 16 C2d 46, 104 P2d 810; *General Ins. Co. of Am. v Lilly* (1968) 258 CA2d 465, 65 CR 750; see also §§35.16-35.18).

In some instances the courts have considered equitable defenses in determining whether to refuse to entertain a declaratory relief action. See *Moss v Moss* (1942) 20 C2d 640, 128 P2d 526, in which the court held that the trial court did not abuse its discretion in denying declaratory relief when the parties were in pari delicto. See also *Fay Sec. Co. v Mortgage Guar. Co.* (1940) 37 CA2d 637, 100 P2d 344, indicating that laches might support refusal to grant declaratory relief.

In *California Water & Tel. Co. v County of Los Angeles* (1967) 253 CA2d 16, 61 CR 618, dealing with the validity of an ordinance, the court set forth the following factors as affecting the exercise of judicial discretion:

- The penal nature of the ordinance or statute attacked;
- The present need for a declaration;
- The character of the parties' and the public's interest in the subject matter; and
- The existence of alternative remedies to test the ordinance's validity statute.

The court added that declaratory relief "is properly denied, for example, if the factual matrix is insufficiently set to permit a useful and intelligent adjudication to be made." 253 CA2d at 24.

NOTE: Although the exercise of the court's discretion under CCP §1061 to deny declaratory relief depends on the facts and circum stances of each case, it appears that when plaintiff adequately pleads a cause of action for declaratory relief and states facts showing that other remedies would not be as speedy or as adequate as declaratory relief, a refusal to entertain an action under CCP §1061 will be considered an abuse of discretion.

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§35.22 2. Whether Court Must Declare Rights If Facts Alleged Do Not Entitle Plaintiff to Favorable Declaration

Although some uncertainty exists, if a complaint sets forth facts showing the existence of an actual controversy relating to the parties' legal rights and duties (see §§35.11-35.15), it appears that the trial court must declare their rights "whether or not the facts alleged establish that plaintiff is entitled to a favorable declaration." *Bennett v Hibernia Bank* (1956) 47 C2d 540, 550, 305 P2d 20. A plaintiff is entitled to a declaration of plaintiff's rights whether the declaration is in favor of or adverse to plaintiff's position. *Los Angeles County Democratic Cent. Comm. v County of Los Angeles* (1976) 61 CA3d 335, 338, 132 CR 43. See *Loupias v Rosen* (1951) 102 CA2d 781, 784, 228 P2d 611, in which the court noted that a party may seek a declaratory judgment as distinguished from declaratory relief even though the party's pleading shows affirmatively that he or she is not entitled to any relief. Thus, a trial's court's sustaining of a general demurrer (see §§35.35-35.36) has been held error under the above circumstances. *Los Angeles County Democratic Cent. Comm. v County of Los Angeles, supra*; *Loupias v Rosen, supra.*

On the other hand some cases have held that when a complaint "makes no case on the merits and a declaratory relief action would merely produce a useless trial," a trial court's order sustaining a general demurrer without leave to amend is not an abuse of discretion and dismissal is proper. *Silver v City of Los Angeles* (1963) 217 CA2d 134, 141, 31 CR 545. See *Konecko v Konecko* (1958) 164 CA2d 249, 253, 330 P2d 393 (when facts alleged entitle plaintiff to no relief, court not required to permit useless trial and plaintiff cannot be prejudiced by dismissal of action). See also *People v Ray* (1960) 181 CA2d 64, 67, 5 CR 113 (no abuse of discretion by dismissal of declaratory relief action; complaint made no case on the merits).

In *Los Angeles County Democratic Cent. Comm. v County of Los Angeles* (1976) 61 CA3d 335, 338, 132 CR 43, the court noted that when a plaintiff is entitled only to an adverse declaration and the appellate opinion expressly so holds, demurrers have been sustained by the appellate court on the theory that the appellate opinion gave plaintiff the declaration that plaintiff sought. See *Western Homes, Inc. v Herbert Ketell, Inc.* (1965) 236 CA2d 142, 146, 45 CR 856 (judgment of dismissal on order sustaining general demurrer sustained when allegations of complaint showed no cause of action; appellate court declaration accomplishes declaratory relief). See also §35.49.

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V. TYPICAL USES

A. Oral or Written Contracts

§35.23 1. In General

Code of Civil Procedure §1060 authorizes the resolution of disputes under both written and oral contracts. Questions such as the construction, validity, interpretation or effect of contracts may be resolved by declaratory relief. See, *e.g., Columbia Pictures Corp. v DeToth* (1945) 26 C2d 753, 161 P2d 217 (oral employment agreement and renewal options); *Ermolieff v R.K.O. Radio Pictures, Inc.* (1942) 19 C2d 543, 122 P2d 3 (territory covered by written motion picture distribution agreement); *Karbelnig v Brothwell* (1966) 244 CA2d 333, 53 CR 335 (lease agreement); *Retail Clerks Union, Local 428, AFL-CIO v L. Bloom Sons Co.* (1959) 173 CA2d 701, 344 P2d 51 (labor agreement); *Curl v Pacific Home* (1952) 108 CA2d 655, 239 P2d 481 (lifetime nursing home care).

Similarly, questions relating to a contract's formation, excuses for nonperformance and termination, are also proper subjects for declaratory relief. *Foster v Masters Pontiac Co.* (1958) 158 CA2d 481, 486, 322 P2d 592. Thus, the court may determine whether or not a contract exists. *Howard v Howard* (1955) 131 CA2d 308, 280 P2d 802.

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§35.24 2. Insurance Contracts

Declaratory relief is available to the parties to an insurance contract under CCP §§1060-1062.5 for a determination of the rights and duties of the parties. Declaratory relief is frequently sought when there is a question of coverage for a claim made under the policy and the insurer wants to avoid exposure to bad faith. See generally *General Ins. Co. of Am. v Whitmore* (1965) 235 CA2d 670, 45 CR 556 (coverage under insurance policy).

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§35.25 a. Liability Insurance (Third Party)

Standard liability insurance contracts generally provide for a defense and indemnification of the insured by the insurer up to the policy's limits of liability if an action is brought against the insured by a third party. The underlying action must allege the insured's liability for damages potentially covered under the policy, or the complaint must be amendable so that it alleges a liability that would be covered under the policy before the insurer owes a defense or indemnification to its insured. *Montrose Chem. Corp. v Superior Court* (1993) 6 C4th 287, 24 CR2d 467; *Gray v Zurich Ins. Co.* (1966) 65 C2d 263, 54 CR 104.

When there is a question about either the insurer's duty to defend, or the insurer's liability to indemnify its insured, or both, the parties can seek declaratory relief from the court for a determination of coverage. See, *e.g., Royal Globe Ins. Co. v Whitaker* (1986) 181 CA3d 532, 226 CR 435 (duty to defend and indemnify); *California Union Ins. Co. v Club Aquarius* (1980) 113 CA3d 243, 247, 169 CR 685 (duty to defend). See also *Great Am. Ins. Co. v Superior Court* (2009) 178 CA4th 221, 100 CR3d 258 (discussing insured's motion to stay insurer's declaratory relief action).

PRACTICE TIP: To avoid the risk of being found in bad faith (*i.e.,* breaching the implied covenant of good faith and fair dealing) for refusing to defend an insured in a lawsuit on the grounds of noncoverage, an insurer in an appropriate case can assume the insured's defense in the underlying action on a "reservation of rights" basis without waiving its rights to assert coverage defenses against the insured and then file a declaratory relief action for a judicial determination of coverage. See, *e.g., Atlas Assur. Co. v McCombs Corp.* (1983) 146 CA3d 135, 194 CR 66. Absent other facts, the mere filing of a declaratory relief action by the insurer to have the court declare its rights and duties under the policy cannot form the basis of breach of the duty of good faith and fair dealing by the insurer. 146 CA3d at 135. The court noted in *Atlas Assur. Co. v McCombs Corp., supra,* that a declaratory relief action does not frustrate the insured's enjoyment of its contract rights in any way, assuming that the insurer has not otherwise abandoned, compromised, or rejected the insured's claim, and that any breach of the insurer's duty of good faith and fair dealing must arise from alleged vacillations in conducting the defense. 146 CA3d at 135. The insurer must clearly reserve its rights and give notice of reservation of rights to the insured before assuming defense of the underlying action. *Miller v Elite Ins. Co.* (1980) 100 CA3d 739, 754, 161 CR 322. Counsel should note that an insurer who proceeds in the above manner can be subject to liability for malicious prosecution if the declaratory relief action terminates in the insured's favor and it is determined that the action was brought without probable cause and with malice. See *Camarena v Sequoia Ins. Co.* (1987) 190 CA3d 1089, 235 CR 820. Alternatively, in an appropriate case, the insurer may defend the underlying action under a reservation of rights and if the insured prevails in that action and thereafter makes a claim against the insurer, the insurer can then raise the noncoverage defense that was previously reserved. See *Gray,* 65 C2d at 279.

On the insurer's duty to defend being broader than its duty to indemnify, see *Montrose Chem. Corp. v Superior Court, supra*; *Nichols v Great Am. Ins. Cos.* (1985) 169 CA3d 766, 772, 215 CR 416. See also *California Union Ins. Co. v Club Aquarius* (1980) 113 CA3d 243, 247, 169 CR 685 (duty to defend action exists if potential liability to pay exists even if potential liability to pay is remote).

On the insurer's duty to settle when it assumes the defense of an action against a policy holder, reserves its rights to litigate the coverage issue, and brings a declaratory relief action on the coverage issue, see *Johansen v California State Auto. Ass'n Inter-Ins. Bureau* (1975) 15 C3d 9, 123 CR 288.

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§35.26 b. First-Party Coverage

When there is a question of coverage for a loss under the first-party portion of an insurance policy, the insurer can file a declaratory relief action under CCP §1060 and seek a judicial determination of coverage before making a decision on the claim. On the mere filing of a declaratory relief action, absent other facts, not constituting a breach of the duty of good faith and fair dealing, see *Atlas Assur. Co. v McCombs Corp.* (1983) 146 CA3d 135, 150, 194 CR 66 (discussed in §35.25).

When an insurer has filed a declaratory relief action, an insured might file a cross-complaint, *e.g.,* for breach of contract and bad faith (*i.e.,* breach of the implied covenant of good faith and fair dealing). See, *e.g., California State Auto. Ass'n v Superior Court* (1986) 184 CA3d 1428, 1433, 229 CR 409 (no prohibition to filing cross-complaint in declaratory relief action). In this event, the declaratory relief action may be bifurcated and tried before the causes of action brought by way of the cross-complaint. See *Equitable Life Assur. Soc'y v Berry* (1989) 212 CA3d 832, 836, 260 CR 819; *California State Auto. Ass'n v Superior Court, supra*. A judicial determination of no coverage for claims brought on the policy may obviate the need to adjudicate the remaining breach of contract and bad faith causes of action against the insurer. For further discussion of bifurcation, see §35.42.

NOTE: Even when an insured initially files a bad faith action, the insurer may cross-complain for declaratory relief. See, *e.g., Equitable Life Assur. Soc'y v Berry, supra*.

On when an insurer may be liable for malicious prosecution by filing a declaratory relief action, see *Camarena v Sequoia Ins. Co.* (1987) 190 CA3d 1089, 235 CR 820 (discussed in §35.25).

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§35.27 B. Other Instruments

Code of Civil Procedure §1060 specifically provides for a declaration of rights by any person "interested under a written instrument, excluding a will or a trust." Reported cases cover declaration of rights in connection with a number of different types of instruments.

- *Holt v College of Osteopathic Physicians & Surgeons* (1964) 61 C2d 750, 40 CR 244 (charitable purposes of trust and whether certain conduct by trustees would be breach of trust);
- *Lomanto v Bank of America* (1972) 22 CA3d 663, 99 CR 442 (rights under trust deed);
- *Ross v Harootunian* (1967) 257 CA2d 292, 64 CR 537 (enforceability of covenants or servitudes asserted against property);
- *Thompson v Boyd* (1963) 217 CA2d 365, 32 CR 513 (whether spouses had entered into agreement not to revoke joint and mutual will);
- *Marden v Bailard* (1954) 124 CA2d 458, 268 P2d 809 (deed and building restrictions);
- *Sullivan v San Francisco Art Ass'n* (1950) 101 CA2d 449, 225 P2d 993 (rights under decree of distribution);
- *Talcott v Talcott* (1942) 54 CA2d 743, 129 P2d 946 (rights under decree of distribution); and
- *Chaplin v Chaplin* (1935) 9 CA2d 182, 49 P2d 296 (interpretation of property settlement agreement incorporated into final divorce decree).

NOTE: Code of Civil Procedure §1060 no longer provides for a declaration of rights by any person interested under a will. Rights under a will are adjudicated in the course of the proceedings of the probate court. See *Howard v Bennett* (1942) 53 CA2d 546, 127 P2d 1012 (holding that superior court sitting in probate, which can give full relief, has exclusive jurisdiction to construe terms of will in estate it is administering so as to preclude declaratory relief action for that purpose); *Colden v Costello* (1942) 50 CA2d 363, 122 P2d 959 (holding that because probate court has jurisdiction to determine, as between decedent's widow and other claimants, what part of estate is community property and what part is separate property, it is improper to grant her the right to bring separate declaratory relief action).

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Source: Civil Litigation/California Civil Procedure Before Trial/35 Declaratory Relief/§35.28 C. Other Uses Under CCP §1060 and Govt C §§11350, 11350.3

§35.28 C. Other Uses Under CCP §1060 and Govt C §§11350, 11350.3

Code of Civil Procedure §1060 provides for a declaration of rights or duties "with respect to another, or in respect to, in, over or upon property, or with respect to the natural channel of a watercourse." Government Code §§11350 and 11350.3 authorize any interested person to bring a declaratory relief action in accordance with the Code of Civil Procedure to obtain a judicial declaration as to the validity of any regulation or the repeal of a regulation.

Under the above broad language of CCP §1060 and Govt C §§11350 and 11350.3, declaratory relief is available in a variety of situations, some of which are indicated below. Note that some of the cited cases were decided under former Govt C §11440 (now Govt C §11350).

- To determine constitutionality and validity of statutes and ordinances. *City of Carmel-By-The-Sea v Young* (1970) 2 C3d 259, 85 CR 1; *Walker v County of Los Angeles* (1961) 55 C2d 626, 12 CR 671; *Abbott v City of Los Angeles* (1960) 53 C2d 674, 678 n2, 3 CR 158.
- To construe statutes, ordinances, and charters. *LePage v City of Oakland* (1970) 13 CA3d 689, 91 CR 806; *Squire v City & County of San Francisco* (1970) 12 CA3d 974, 91 CR 347; *City of San Joaquin v State Bd. of Equalization* (1970) 9 CA3d 365, 88 CR 12.
- To determine validity of administrative regulations. *Chas. L. Harney, Inc. v Contractors' State License Bd.* (1952) 39 C2d 561, 247 P2d 913. Note, however, that declaratory relief is inappropriate to review an adjudicatory administrative decision. See §35.11.
- To determine power of regulatory agencies to resolve rights among various water users (*Orange County Water Dist. v City of Riverside* (1959) 173 CA2d 137, 343 P2d 450), and to determine the rights of various parties to water (*Tehachapi-Cummings County Water Dist. v Armstrong* (1975) 49 CA3d 992, 122 CR 918).
- To determine certain tax questions. *Maxwell v City of Santa Rosa* (1959) 53 C2d 274, 1 CR 334 (fraudulent local property tax assessment); *Pacific Motor Transp. Co. v State Bd. of Equalization* (1972) 28 CA3d 230, 236, 104 CR 558 (validity of administrative tax regulations even though statute barred injunctive relief or mandamus to prevent collection of a tax); *Valley Fair Fashions, Inc. v Valley Fair* (1966) 245 CA2d 614, 54 CR 306 (ultimate liability as between lessor and lessee for tax increase for improvements to property); *Whittell v Franchise Tax Bd.* (1964) 231 CA2d 278, 41 CR 673 (under CCP §1060.5, an individual claiming to be a nonresident of California may bring an action against the Franchise Tax Board to determine the fact of residency for income tax purposes). But see *Faix, Ltd. v County of Los Angeles* (1976) 54 CA3d 992, 1002, 127 CR 182 (plaintiff which had not paid tax in full could not challenge validity of assessment); *Honeywell, Inc. v State Bd. of Equalization* (1975) 48 CA3d 907, 912, 122 CR 243 (declaratory relief will not lie to ascertain whether a transaction is taxable after transaction has been completed or when a statute such as Rev & T C §6931 bars an injunction or mandamus to prevent collection of a tax).
- To test validity of labor union constitution. *Weber v Marine Cooks' & Stewards' Ass'n* (1949) 93 CA2d 327, 208 P2d 1009.
- To determine rights of labor union members. *Miller v International Union of Operating Eng'rs* (1953) 118 CA2d 66, 257 P2d 85; *Taylor v Marine Cooks' & Stewards' Ass'n* (1953) 117 CA2d 556, 256 P2d 595.
- To determine rights of shareholders in a corporation. *Maguire v Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 146 P2d 673.
- To determine ownership of stock. *East Coalinga Oil Fields Corp. v Robinson* (1948) 86 CA2d 153, 194 P2d 554.
- To determine validity of divorce decree and rights and duties under it. *Klinker v Klinker* (1955) 132 CA2d 687, 283 P2d 83.
- To determine parental relationship. *Tomasello v Tomasello* (1952) 113 CA2d 23, 247 P2d 612; *Smith v Bank of Cal.* (1937) 19 CA2d 579, 65 P2d 1361 (relationships and rights under a trust).
- To determine in cross-complaint that cross-defendant is liable or must indemnify cross-complainant if latter held liable in action brought by third party. *Postley v Harvey* (1984) 153 CA3d 280, 285, 200 CR 354 (equitable indemnity); *Brokate v Hehr Mfg. Co.* (1966) 243 CA2d 133, 52 CR 672 (slander action). See *J.C. Penney Co. v*

Westinghouse Elec. Corp. (1963) 217 CA2d 834, 32 CR 172 (personal injury action; cross-complaint for indemnity against party who installed escalator); *Indenco, Inc. v Evans* (1962) 201 CA2d 369, 20 CR 90 (contractor-subcontractor).

- To determine a person's right to vote. *Ferreira v Keller* (1970) 4 CA3d 292, 84 CR 253.
- To determine whether a redevelopment plan violated residents' statutory and constitutional rights to enjoy free access to the ocean. *Lane v City of Redondo Beach* (1975) 49 CA3d 251, 122 CR 189.

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§35.29 D. Penal Statutes

The declaratory relief procedure has been held appropriate "to challenge the constitutionality of penal statutes and ordinances." *Hooper v Deukmejian* (1981) 122 CA3d 987, 1016, 176 CR 569 (declaratory relief also appropriate to test non-penal statutes). See *Abbott v City of Los Angeles* (1960) 53 C2d 674, 678 n2, 3 CR 158. Similarly, in an appropriate case, the applicability of a penal statute may be the subject of a declaratory relief action if constitutional rights are involved. For example, in the context of obscenity laws, declaratory relief to determine the alleged obscenity of a book (or other material, *e.g.,* a film) under an applicable penal statute has been held appropriate because the vendor faces possible prosecution which may have the effect of de facto censorship and the would-be reader, in the absence of a declaration, would be deprived of a constitutional right. *Zeitlin v Arnebergh* (1963) 59 C2d 901, 906, 31 CR 800. But see *Holden v Arnebergh* (1968) 265 CA2d 87, 91, 71 CR 401 (arrest and seizure of obscene material; declaratory relief denied because another adequate remedy available).

On the other hand, declaratory relief has been held inappropriate when no constitutional rights have been involved and the only effect of such a declaration would be to decide a matter that could be better decided in criminal court. See *Manchel v County of Los Angeles* (1966) 245 CA2d 501, 507, 54 CR 53 (injunctive and declaratory relief denied; court refused declaration that specified card game is not game of chance and thus that gambling ordinance could not be enforced against those who play game for money).

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VI. PROCEDURE

A. Commencing Action

1. Determining Proper Court

§35.30 a. Jurisdiction

Actions for declaratory relief do not enlarge the court's jurisdiction over parties or subject matter. Rather, they "involve matters of practice and procedure only." *Hoyt v Board of Civil Serv. Comm'rs* (1942) 21 C2d 399, 403, 132 P2d 804. Thus, a declaratory relief action does not confer jurisdiction over a matter in which the court would not otherwise have jurisdiction. *Harmon v Pacific Tel. & Tel. Co.* (1960) 183 CA2d 1, 6 CR 542 (court has no right to interfere with disputes within power of PUC). See *San Ysidro Irrig. Dist. v Superior Court* (1961) 56 C2d 708, 715, 16 CR 609 (statute authorizing declaratory relief intended to provide additional procedure using court's existing jurisdiction).

Except in the circumstances defined by CCP §86(a)(7) (see §35.2), the court may not grant declaratory relief in a limited civil case. Thus, ordinarily a complaint or cross-complaint for declaratory relief is not eligible to be tried under the less costly procedures applicable to these cases (see CCP §§90-100) even when the amount in controversy is $25,000 or less. See *Southern Counties Gas Co. v Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 377, 96 CR 825 (under former law, genuine complaint for declaratory judgment properly brought in superior court regardless of amount in controversy).

Conversely, the courts have been careful to prevent the availability of declaratory relief from becoming a vehicle for forum shopping; jurisdictional amount-in-controversy limitations can not be circumvented by labeling a fully matured cause of action an action for declaratory relief. See *Watson v Sansone* (1971) 19 CA3d 1, 4, 96 CR 387 (superior court lacked jurisdiction over mature claim for money within jurisdictional amount of municipal court; only payment of money remained to be done; and no future declaration of rights or obligations was sought or was necessary or proper).

NOTE: With the advent of the unified trial court, amount-in-controversy no longer determines subject-matter jurisdiction. The term "limited civil case" is, however, a jurisdictional classification (CCP §32.5), and many procedural distinctions between these cases and cases coming within the general trial jurisdiction of the superior court have been retained. Code of Civil Procedure §§403.010-403.090 set forth the rules for reclassification of civil actions and proceedings. Presumably, under current law a defendant or cross-defendant will still be able to move for reclassification of an action seeking declaratory relief on the ground that the action is fully matured. For discussion of trial court unification and limited civil cases, see chap 6.

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§35.31 b. Venue

Venue in a declaratory relief action "is determined by reference to the nature of the subject matter of the action." *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 930, 184 CR 296. The venue provisions contained in CCP §§392-402 apply (unless another specific venue statute is appropriate concerning the subject matter of the particular action). Thus, *e.g.,* if the dispute involves the interpretation of a contract, venue for the declaratory relief action is determined by the contract venue provisions (see CCP §395). *Mission Imports, Inc. v Superior Court, supra.*

When a plaintiff, in the declaratory relief action, seeks to be exonerated from an alleged liability shown to be asserted by the defendant, however, the complaint for venue purposes is viewed as if the defendant is a plaintiff seeking to enforce the obligation. *Shores v Chip Steak Co.* (1955) 130 CA2d 620, 624, 279 P2d 591. Venue is determined by "reference to the subject matter of the defendant's accrued cause of action." *Mission Imports, Inc.,* 31 C3d at 930.

NOTE: When each party to a dispute files an action in different counties in which the superior court has concurrent jurisdiction over the subject matter and the parties, the court in which process is first served has priority of jurisdiction, *i.e.,* exclusive and continuing jurisdiction over the matter. *California Union Ins. Co. v Trinity River Land* (1980) 105 CA3d 104, 163 CR 802 (court in which plaintiff's declaratory relief action had been filed and served first had exclusive jurisdiction over court in which defendant had later filed another action concerning same subject matter).

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§35.32 2. Determining Appropriate Parties

A party must be sufficiently interested in the matter to be able to bring a declaratory relief action. Parties who can bring such an action are discussed in §§35.9-35.10. Moreover, the party proceeding with the declaratory relief action must determine whom to proceed against.

A declaratory relief action does not enlarge the court's jurisdiction over the parties. *Hoyt v Board of Civil Serv. Comm'rs* (1942) 21 C2d 399, 403, 132 P2d 804. The same rules regarding necessary, indispensable and proper parties that apply in civil actions generally apply in declaratory relief actions. Thus, CCP §389, controlling mandatory joinder of parties, applies to actions for declaratory relief.

A person is an indispensable party if the party's absence will prevent the court from granting a complete determination of the matter, or will seriously prejudice any party before the court, or if a judgment rendered will inequitably affect or jeopardize the party's interest. *Hebbard v Colgrove* (1972) 28 CA3d 1017, 1026, 105 CR 172. Although failure to name an indispensable party is not a jurisdictional defect in the fundamental sense, in that the court still has power to render a decision, the court should not proceed with the case when an indispensable party is absent and cannot be joined. *Sierra Club, Inc. v California Coastal Comm'n* (1979) 95 CA3d 495, 500, 157 CR 190.

Thus, failure to name a party whose presence is required for a complete and definitive declaration of all the parties' rights subjects an action for declaratory relief to a demurrer under CCP §430.10(d). See, *e.g., Beresford Neighborhood Ass'n v City of San Mateo* (1989) 207 CA3d 1180, 255 CR 434, in which an association sued the City of San Mateo seeking declaratory relief, an injunction, and a writ of mandate, in a dispute over a land purchase and the potential zoning and uses of the property. The court sustained the city's demurrer without leave to amend because of the association's failure to join the proposed developer of the property, who was held under the facts to be an indispensable party. On failure to name an indispensable party invalidating a declaratory judgment, see *Carpenters 46 N. Cal. Counties Conf. Bd. v Zweigle* (1982) 130 CA3d 337, 347, 181 CR 805 (declaratory judgment invalid as to corporation even though its owner and president was joined as individual party to action). On factors relevant to determining whether an unjoined party is indispensable, see *Planning & Conserv. League v Department of Water Resources* (2000) 83 CA4th 892, 100 CR2d 173.

Declaratory relief may be sought against any "person" who can otherwise be sued. Thus, in *Hoyt,* 21 C2d at 403, the court stated that the right to bring an action for declaratory relief against a governmental agency exists "if an acceptance of liability and subjection to suit on the part of a sovereign body is found elsewhere in the statutes of the state and the declaratory judgment procedure is not barred by the provisions of the waiver of immunity." See *Lord v Garland* (1946) 27 C2d 840, 852, 168 P2d 5 (declaratory relief available remedy against state). See also *Sperry & Hutchinson Co. v California State Bd. of Pharmacy* (1966) 241 CA2d 229, 236, 50 CR 489, in which the court held under the facts of the case that the California State Board of Pharmacy, not its executive secretary or individual members, was the appropriate defendant when the gravamen of the complaint was official rather than personal action, and that the individuals' demurrers should have been sustained.

On actual and potential claimants under an insurance policy being proper parties to a declaratory action, see *General Ins. Co. of Am. v Whitmore* (1965) 235 CA2d 670, 45 CR 556.

On joinder of defendants generally, see chap 14.

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3. Drafting Complaint

§35.33 a. Allegations

Generally, the ordinary rules of pleading apply to declaratory relief actions. *Mackay v Whitaker* (1953) 116 CA2d 504, 510, 253 P2d 1021. The plaintiff, to state a cause of action for declaratory relief under CCP §1060, must allege facts that show that there is either an actual present, or probable future, controversy that relates to the legal rights and duties of the parties, and request that the court adjudge those rights and duties. *Maguire v Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 728, 146 P2d 673; *Sherwyn v Department of Soc. Servs.* (1985) 173 CA3d 52, 58, 218 CR 778. See *City of Tiburon v Northwestern Pac. R.R.* (1970) 4 CA3d 160, 170, 84 CR 469. On standing and actual controversy requirements, see §§35.9-35.15.

Facts, rather than conclusions of law, "must be pleaded which show a controversy of concrete actuality as opposed to one which is merely academic or hypothetical." *Wilson v Transit Auth.* (1962) 199 CA2d 716, 722, 19 CR 59. Merely alleging a conclusion that there is a controversy, rather than the facts that show the controversy, is insufficient. See *City of Alturas v Gloster* (1940) 16 C2d 46, 104 P2d 810 (bare conclusion that controversy existed insufficient); *Loupias v Rosen* (1951) 102 CA2d 781, 784, 228 P2d 611 (plaintiff should plead facts showing that "the controversy is real and not merely illusory"); *Hagan v Fairfield* (1965) 238 CA2d 197, 202, 47 CR 600 ("must plead facts rather than conclusions of law"). See also *American Mission Army v City of Lynwood* (1956) 138 CA2d 817, 292 P2d 533 (failure of plaintiff to allege with particularity details of ordinance which it contended were invalid or act of city official which it contended was unlawful precluded declaratory relief); *E. M. Cotton Appliance, Inc. v Felton Aluminum Co.* (1954) 124 CA2d 546, 548, 269 P2d 64 (plaintiff's failure to set forth defendant's claim with particularity precluded declaratory relief). "General statements about a controversy are useless; the facts of the respective claims concerning the subject must be given." 5 Witkin, California Procedure, *Pleading* §862 (5th ed 2008).

In asking for declaratory relief, the pleader need not specify the relief sought. The court will make the appropriate declaration. *California Canning Peach Growers v Corcoran* (1936) 14 CA2d 264, 267, 57 P2d 1360. It is better practice, however, to set forth the desired declaration.

On sample forms of complaint for declaratory relief, see §§35.51-35.52.

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§35.34 b. Joinder of Causes of Action

Declaratory relief actions may be brought either alone or in combination with causes of action for other types of relief. CCP §1062. Thus, plaintiff may seek coercive relief (*e.g.,* damages, an accounting) and declaratory relief in the same complaint. See §35.48. Plaintiff is not required to set forth claims for coercive and declaratory relief in separate counts when both claims arise out of the same transaction, because a single cause of action may call for more than one remedy. *Marden v Bailard* (1954) 124 CA2d 458, 268 P2d 809. Nevertheless, for clarity, it is usually advisable to set forth the claims for coercive relief and declaratory relief in different counts.

PRACTICE TIP: Often, a declaratory relief cause of action is joined with a cause of action seeking other relief. Joinder of a claim for declaratory relief with a claim for other relief has certain advantages for plaintiff. For example, if plaintiff cannot establish an immediate right to coercive relief, a declaration may establish future rights so that a subsequent action will not be necessary. An action for coercive relief alone may not resolve the entire controversy between the parties. If a declaratory relief cause of action is joined with other causes of action, however, and the declaratory relief cause of action relies on all the same facts as the other causes of action, should the other causes of action be found insufficient, the court may also deny declaratory relief under CCP §1061 as not being necessary or proper under the circumstances, and dismiss the entire action. See *Girard v Miller* (1963) 214 CA2d 266, 29 CR 359.

The failure to include a claim for coercive relief does not preclude a party from seeking such relief in a new action. *Lortz v Connell* (1969) 273 CA2d 286, 300, 78 CR 6 (consequential or incidental relief may be obtained in the declaratory relief action or in a separate suit thereafter predicated on the declaration of rights set forth in the declaratory judgment). On effect on trial calendar when relief in addition to a declaration of rights and duties is sought, see §35.43.

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B. Filing Response

1. Responsive Pleadings

§35.35 a. Demurrer

At the pleading stage, a complaint is broadly construed to allow declaratory relief before the breach of a legal obligation, and "any set of facts setting forth the existence of an actual controversy needing resolution will render a complaint sufficient." *Newby v Alto Riviera Apts.* (1976) 60 CA3d 288, 303, 131 CR 547, disapproved on other grounds in *Marina Point, Ltd. v Wolfson* (1982) 30 C3d 721, 180 CR 496. Nevertheless, in appropriate cases, a court may sustain a demurrer and dismiss the declaratory relief action. See §§35.36-35.37. On demurrers generally, see chap 23.

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Source: Civil Litigation/California Civil Procedure Before Trial/35 Declaratory Relief/§35.36 (1) In General

§35.36 (1) In General

A general demurrer to a complaint may be sustained when the necessary requisites to state a cause of action for declaratory relief are not alleged. See, *e.g., Fracasse v Brent* (1972) 6 C3d 784, 100 CR 385 (no actual controversy); *Rowland Sch. Dist. v State Bd. of Educ.* (1968) 264 CA2d 589, 593, 70 CR 504 (failure to allege fact showing that plaintiff had standing). On requisites to state cause of action, see §§35.9-35.15, 35.30-35.34.

A court may also sustain a general demurrer when facts appear on the face of the complaint that justify the court in concluding that its determination is not necessary or proper. *Moss v Moss* (1942) 20 C2d 640, 642, 128 P2d 526. Thus, a general demurrer may be sustained when the complaint shows on its face that all relief is barred by the statute of limitations or that the entire controversy has been settled by an earlier judgment. *Bennett v Hibernia Bank* (1956) 47 C2d 540, 550, 305 P2d 20. Similarly, a demurrer may be sustained when declaratory relief is an inappropriate remedy, or when complete relief would be more properly given in another forum. See, *e.g., State v Superior Court (Veta Co.)* (1974) 12 C3d 237, 249, 115 CR 497 (declaratory relief inappropriate to review adjudicatory administrative decision; appropriate procedure is administrative mandamus under CCP §1094.5); *West Coast Poultry Co. v Glasner* (1965) 231 CA2d 747, 752, 42 CR 297 (declaratory relief inappropriate; State Civil Service and Personnel Board appropriate forum to determine qualification for public employment and discipline); *Monahan v Department of Water & Power* (1941) 48 CA2d 746, 120 P2d 730 (declaratory relief inappropriate; matter within exclusive province of executive branch). For further discussion concerning exclusivity of other remedies or forums, and prohibition against using declaratory relief to circumvent other prohibitions against maintenance of actions, see §35.18.

Moreover, a demurrer may be sustained when there is another speedy and adequate remedy available to plaintiff that is as well suited to plaintiff's needs as declaratory relief. See, *e.g., Holden v Arnebergh* (1968) 265 CA2d 87, 71 CR 401 (affirmed sustaining of demurrer because other remedies were available in criminal proceedings). For further discussion, see §35.17.

Additionally, a court may sustain a demurrer when the court lacks jurisdiction over the subject matter of the controversy. See, *e.g., Harmon v Pacific Tel. & Tel. Co.* (1960) 183 CA2d 1, 6 CR 542. See also *Watson v Sansone* (1971) 19 CA3d 1, 96 CR 387; §35.18. On jurisdiction concerning declaratory relief actions, see §35.30.

In some instances, when the courts have found that nondeclaratory relief causes of action failed to set forth sufficient facts to constitute a cause of action, they have also sustained a general demurrer to the declaratory relief cause of action based on the same facts. See *Monolith Portland Cement Co. v Tendler* (1962) 206 CA2d 800, 808, 24 CR 38. See also *Bos v United States Rubber Co.* (1950) 100 CA2d 565, 224 P2d 386. Sustaining a demurrer to a declaratory relief cause of action because other causes of action are defective may be based, under CCP §1061, on the court's exercise of discretion. See §35.21; *Girard v Miller* (1963) 214 CA2d 266, 29 CR 359.

Counsel should note, however, that if the complaint alleges the existence of an actual controversy, "the court should not sustain a general demurrer on the theory that any declaration would necessarily be adverse to the plaintiff." *Teachers Mgmt. & Inv. Corp. v City of Santa Cruz* (1976) 64 CA3d 438, 449, 134 CR 523. Nevertheless, if the court sustains a general demurrer and it is clear that the order sustaining the demurrer amounts to a correct decision on the merits, the appellate court may simply modify the judgment of dismissal "to declare that plaintiff was entitled to no relief." *Teachers Mgmt. & Inv. Corp. v City of Santa Cruz, supra*. See *Wilson v Civil Serv. Comm'n* (1964) 224 CA2d 340, 344, 36 CR 559, in which the court noted that when a good declaratory relief cause of action is stated in the complaint, instead of entering an order of dismissal, the court should make a declaration even if not in accord with the declaration sought by the plaintiff. The court also noted that such a decision is more normally done in connection with a motion for judgment on the pleadings (see §35.40), although there appears no reason why it could not also be done in connection with a demurrer. See also *Dohrmann Co. v Security Sav. & Loan Ass'n* (1970) 8 CA3d 655, 661, 87 CR 792 (proper and desirable in declaratory relief action to enter judgment on the pleadings rather than sustain demurrers without leave to amend and enter judgment of dismissal). For further discussion of the court's duty to declare rights when the complaint alleges facts showing an actual controversy relating to the parties' legal rights and duties, whether or not the facts alleged entitle plaintiff to a favorable declaration, see §35.22.

For further discussion of the court's discretion to deny declaratory relief, see §§35.21-35.22.

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§35.37 (2) Another Action Pending

To demur to a complaint seeking declaratory relief on the grounds that there is another action pending under CCP §430.10(c), "the defendant must show that the parties, cause of action, and issues are identical, and the same evidence would support the judgment in each case." *California Union Ins. Co. v Trinity River Land* (1980) 105 CA3d 104, 108, 163 CR 802 (demurrer overruled; parties not same in both actions). The pendency of another action growing out of the same transaction is grounds to abate the second action, but never the first action. *California Union Ins. Co. v Trinity River Land, supra.*

Under the rule of exclusive concurrent jurisdiction, when two superior courts have concurrent jurisdiction over the parties and the subject matter, the first superior court to assume jurisdiction has exclusive and continuing jurisdiction over the parties and subject matter until the resolution of all necessarily related matters. The court where process was first served has priority of jurisdiction. 105 CA3d at 109.

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§35.38 b. Answer

The general rules of pleading in civil actions apply to the answer in declaratory relief actions. See *Mackay v Whitaker* (1953) 116 CA2d 504, 510, 253 P2d 1021. The defendant can, by denial in the answer, put in issue, *e.g.,* whether there is a justiciable controversy or a controversy at all. On answers generally, see chap 25.

If the complaint seeking declaratory relief is well pleaded and defendant does not contest the appropriateness of the remedy and desires a favorable declaration, the defendant's answer should not deny the allegation that there is justiciable controversy and should not pray that the complaint be dismissed or that plaintiff take nothing. Instead, the answer should contain specific denials rather than a general denial (which will have the effect of denying that there is an actual controversy between the parties assuming the complaint is unverified; see CCP §431.30(d)) with a prayer for specific relief. It is improper for the trial court simply to adjudge that plaintiff take nothing by the complaint for declaratory relief alleging an actual controversy when plaintiff has prayed for a declaration of rights. See *Kroff v Kroff* (1954) 127 CA2d 404, 274 P2d 45. But see *Boyar v Krech* (1937) 10 C2d 207, 73 P2d 1218, holding that a judgment that plaintiff take nothing was not reversible error when the findings and conclusions (now statement of decision) amounted to a declaration.

If plaintiff incorrectly sets forth or omits some or all of defendant's contentions, defendant can deny plaintiffs' allegations in connection with those contentions. It is also good practice for defendant to set forth accurately defendant's actual contentions, at least in general terms, although there appears no requirement to do so. See *California Canning Peach Growers v Corcoran* (1936) 14 CA2d 264, 267, 57 P2d 1360, in which the court said that the court's declaration

> will be in response to the allegations contained in the complaint, some in response to the new matter contained in the answers and some, perhaps, in response to the new matter, if any, introduced by the plaintiff in avoidance of new matter set forth in the answer, that is, matter introduced in the nature of a replication to the defendants' plea.

The defendant should also set forth in the answer any applicable affirmative defenses that the defendant has with respect to the controversy.

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§35.39 c. Cross-Complaint

A defendant may file a cross-complaint seeking, *e.g.,* indemnification from a cross-defendant or new third party, if the defendant is found liable to the plaintiff in the underlying action. See, *e.g., Lewis Ave. Parent Teachers' Ass'n v Hussey* (1967) 250 CA2d 232, 58 CR 499 (cross-complaint against codefendants for declaration for indemnification in personal injury action proper); *Brokate v Hehr Mfg. Co.* (1966) 243 CA2d 133, 52 CR 672 (cross-complaint for declaration of corporation's duty to indemnify defendant director under former Corp C §830 (now Corp C §317) in slander action proper); *J.C. Penney Co. v Westinghouse Elec. Corp.* (1963) 217 CA2d 834, 32 CR 172 (store being sued by person injured on escalator entitled to declaratory relief on cross-complaint that it is entitled to indemnification, if found liable to injured party, from party that installed escalator and warranted it). On a concurrent tortfeasor being able to obtain partial indemnity on a comparative fault basis, see *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 146 CR 182; *Paragon Real Estate Group of San Francisco, Inc. v Hansen* (2009) 178 CA4th 177, 100 CR3d 234.

Defendants often file cross-complaints seeking indemnity. Such a cross-complaint properly takes the form of an action for declaratory relief. *Valley Circle Estates v VTN Consol.* (1983) 33 C3d 604, 612, 189 CR 871; *Lewis Ave. Parent Teachers' Ass'n v Hussey, supra*.

The same rules of pleading that apply to complaints also apply to a cross-complaint for declaratory relief. See *Mackay v Whitaker* (1953) 116 CA2d 504, 510, 253 P2d 1021. Moreover, a court may exercise its discretion to deny declaratory relief (see §§35.21-35.22) sought in a cross-complaint if "the issues and evidence produced in the main case are substantially the same as would be produced under the cross-complaint [citations]." *International Ass'n of Fire Fighters v City of Palo Alto* (1963) 60 C2d 295, 301, 32 CR 842 (declaration on validity of statute sought in cross-complaint denied because issue would be resolved in main action).

NOTE: If the *only* relief sought in the main action is declaratory relief under CCP §§1060-1062.5, the compulsory cross-complaint provisions of CCP §§426.10-426.70 do not apply. CCP §426.60(c); *Russo v Scrambler Motorcycles* (1976) 56 CA3d 112, 117, 127 CR 913. Similarly, the compulsory cross-complaint provisions of CCP §§426.10-426.70 do not apply to any cross-complaint filed by a defendant seeking only declaratory relief. CCP §426.60(c).

A defendant who files an unsuccessful cross-complaint for indemnification is not prohibited from later seeking contribution if the statutory requirements of CCP §875 are met. *Coca-Cola Bottling Co. v Lucky Stores, Inc.* (1992) 11 CA4th 1372, 14 CR2d 673.

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2. Motions

§35.40 a. Judgment on the Pleadings

A motion for judgment on the pleadings is appropriate in a declaratory relief action to obtain a declaration of the rights of the parties, provided those rights can be determined as a matter of law from the face of the pleadings and from matters of which the court may take judicial notice. *Silver v Beverly Hills Nat'l Bank* (1967) 253 CA2d 1000, 1005, 61 CR 751. See also *Wolfe v George* (9th Cir 2007) 486 F3d 1120 (declaratory judgment action raised constitutionality of California's vexatious litigant law (CCP §391)). Such a motion is in the nature of a general demurrer (*Silver v Beverly Hills Nat'l Bank, supra*) in that it attacks the complaint on the ground that it fails to state a cause of action. See *Wilson v Board of Retirement* (1957) 156 CA2d 195, 200, 319 P2d 426. The motion is generally subject to and evaluated by the same rules that apply to a general demurrer. See *Colberg, Inc. v State ex rel Dep't of Pub. Works* (1967) 67 C2d 408, 411, 62 CR 401; *Allstate Ins. Co. v Kim W.* (1984) 160 CA3d 326, 330, 206 CR 609. See also *Silver v Beverly Hills Nat'l Bank, supra* (in ruling on motion averments of pleadings against which motion is directed are deemed true and moving party, insofar as its allegations have been controverted, admits their untruthfulness). Unlike a general demurrer, however, there is no time limitation and the motion may be made, *e.g.,* at any time before trial, at the start of trial, or before final judgment is rendered. See *Shabrick v Moore* (1961) 195 CA2d 56, 59, 15 CR 310; 6 Witkin, California Procedure, *Proceedings Without Trial* §193 (5th ed 2008).

The motion is not limited to use by defendants. Plaintiffs can also make the motion, which "is analogous to a plaintiff's [general] demurrer to an answer and is evaluated by the same standards." *Allstate Ins. Co. v Kim W., supra* (insurer brought action seeking declaration that policy did not cover insured's intentional acts; answer admitting that insured sexually assaulted minor fatal to coverage issue entitling insurer to judgment on pleadings).

The motion can be made although the party has not previously filed a general demurrer, or the party's demurrer has been overruled. 6 Witkin, Procedure, *Proc Without Trial* §§187, 194-195. On a party's being entitled to leave to amend pleading if motion granted at time of trial without a general demurrer having earlier been filed, see 6 Witkin, Procedure, *Proc Without Trial* §194.

It has been held error for a court to merely enter judgment on the pleadings for the defendants when a "complaint is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is appropriate." *Chas. L. Harney, Inc. v Contractors' State License Bd.* (1952) 39 C2d 561, 565, 247 P2d 913.

On demurrers, see §§35.35-35.37.

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§35.41 b. Summary Judgment

A summary judgment motion is an appropriate procedure to obtain a judgment declaring the rights of the parties if there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CCP §437c(c); *Arroyo v Regents of Univ. of Cal.* (1975) 48 CA3d 793, 796, 121 CR 918, 920; *National Exhibition Co. v City & County of San Francisco* (1972) 24 CA3d 1, 10, 100 CR 757. For discussion of summary judgment motions, see chap 36.

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§35.42 c. Other Motions; Bifurcation

All other motions that are available in other types of actions, *e.g.,* motions to strike, motions to amend the pleadings or to file supplementary pleadings, and discovery motions, are available in declaratory relief actions. See generally *Mackay v Whitaker* (1953) 116 CA2d 504, 510, 253 P2d 1021.

Counsel should note that in an appropriate case, *e.g.,* when a defendant has filed a cross-complaint for declaratory relief that would be dispositive of the entire action, counsel should consider moving under CCP §§598 and 1048(b) to have the issues raised in the declaratory relief action tried before other issues raised in other causes of action. See *Equitable Life Assur. Soc'y v Berry* (1989) 212 CA3d 832, 260 CR 819 (order of bifurcation severing insurer's declaratory relief cross-complaint to try coverage issue first before bad faith claim alleged against insurer upheld). See also *California State Auto. Ass'n v Superior Court* (1986) 184 CA3d 1428, 1433, 229 CR 409 (trial court has power to determine order in which issues are tried and may order declaratory relief complaint tried before cross-complaint). This is often called severance or bifurcation. Counsel should consult local court rules to determine if there are any special requirements under the Trial Court Delay Reduction Act (Govt C §§68600-68620) or any other local rule on severance or bifurcation. On motion to try special defenses first, see CCP §§597, 597.5.

For further discussion of severance and bifurcation, see chap 43. See also California Trial Practice: Civil Procedure During Trial §§6.99-6.104 (3d ed Cal CEB 1995).

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C. Particular Trial Aspects

§35.43 1. Precedence on Calendar

Under CCP §1062.3(a), except as provided in CCP §1062.3(b), declaratory relief actions brought under CCP §§1060-1062.5 must be set for trial "at the earliest possible date." Such actions take precedence on the calendar over all cases except older matters of the same character and those matters given special precedence by law (see, *e.g.,* CCP §36). CCP §1062.3(b).

Under CCP §1062.3(b), the preference provided by CCP §1062.3(a) is limited to actions in which no relief in addition to a declaration of rights and duties is sought. If any additional relief is sought, the action will not have precedence on the calendar. CCP §1062.3(b). For an action seeking relief in addition to a declaration of rights and duties to precedence on the calendar, a noticed motion must be filed that shows that the action requires a speedy trial. CCP §1062.3(b).

It has been stated that "courts should not temporize with the improper use of the declaratory procedure to gain a preferred position on the trial calendar." *Travers v Louden* (1967) 254 CA2d 926, 932, 62 CR 654. If plaintiff improperly mistitles the action as one for declaratory relief solely to obtain preference on the calendar, the court may prevent accomplishment of that purpose, not by dismissal of the action, but by an appropriate order or procedure. *Kessloff v Pearson* (1951) 37 C2d 609, 613, 233 P2d 899 (error to dismiss action). On sanctions generally, see CCP §§128.6-128.7.

Code of Civil Procedure §1062.3 does not prevent the court from exercising its discretion to refuse to grant declaratory relief. *State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 432, 304 P2d 13. See §§35.21-35.22 on court's discretion to deny declaratory relief.

In actions controlled by CCP §1062.3(b), in an appropriate case counsel should consider making a motion for a trial preference under Cal Rules of Ct 3.1335 (motion to advance). Counsel should consult local court rules to determine if there are any special requirements under the Trial Court Delay Reduction Act (Govt C §§68600-68620), or any other local rule. See chap 6. For further discussion of motion to advance, see chap 42. On moving to try issues raised in a declaratory relief action first under CCP §598, see §35.42.

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§35.44 2. Right to Jury Trial

The right to a jury trial in declaratory actions is controlled, as with all cases filed in California state courts, by Cal Const art I, §16. A litigant has a right to a jury trial as to all issues for which a right to a jury existed at common law in 1850. *Veale v Piercy* (1962) 206 CA2d 557, 560, 24 CR 91 (decided under former Cal Const art I, §7). A party may not be denied a jury trial because the action is for declaratory relief. *State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 304 P2d 13; *Veale v Piercy, supra*. See 7 Witkin, California Procedure, *Trial* §85 (5th ed 2008) (court will not permit declaratory relief label "to be used as a device to circumvent the right to a jury trial"). See also Comment, *Jury Trials in Declaratory Relief Actions: The Right Exists, But Under What Circumstances?* 6 UCLA L Rev 678, 687 (1959).

Thus, the right to a jury trial is controlled not by the form of the action, but by the nature of the issues to be adjudicated. When the factual issues raised by the declaratory relief action are legal in nature, there is generally a right to a jury trial as to those issues. See *Veale v Piercy, supra* (right to jury trial on legal issue of possession). See also 7 Witkin, Procedure, *Trial* §§85-86. When, however, the issues raised are equitable in nature, there is no right to a jury trial as to those issues. See *Carpenson v Najarian* (1967) 254 CA2d 856, 62 CR 687 (no jury trial in declaratory relief action seeking determination of priority of deed of trust over construction liens); *Veale v Piercy, supra* (declaratory relief action to quiet title in nature of equitable proceeding triable to court).

Although the order of proof rests in the discretion of the court (*Jaffe v Albertson Co.* (1966) 243 CA2d 592, 609, 53 CR 25), if the action contains both legal and equitable issues, the equitable issues are generally tried first (*Raedeke v Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 111 CR 693; *Veale v Piercy, supra*). See 7 Witkin, Procedure, *Trial* §149. It has been stated that the better practice is for the trial court to first determine the equitable issues before submitting the legal ones to the jury. See, *e.g., Bate v Marsteller* (1965) 232 CA2d 605, 43 CR 149.

Counsel should note that even when the right to a jury trial is not guaranteed by law as to some or all of the issues (*i.e.,* equitable issues are involved), a party may file a motion requesting an advisory jury. See *Estate of Cazaurang* (1946) 75 CA2d 217, 225, 170 P2d 694 (decided before enactment of former Cal Rules of Ct 377). Former Cal Rules of Ct 377 set forth the procedures and was repealed on January 1, 2003. However, the Advisory Committee comment states that, in an appropriate case, a party may request, and the court in its discretion may approve, the use of an advisory jury.

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§35.45 3. Burden of Proof

Plaintiff has the burden of establishing facts to justify the court's granting declaratory relief. *Boosman v United Bldg. Co.* (1952) 109 CA2d 486, 488, 241 P2d 58. However, the plaintiff in a declaratory relief action does not automatically carry the burden of proof with respect to the underlying issues. The burden of proof rests on the party "who 'without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence,' or who asserts the affirmative of any issue." *American Home Assur. Co. v Essy* (1960) 179 CA2d 19, 23, 3 CR 586, quoting from Borchard, Declaratory Judgments 404-409 (2d ed 1941). See *Roadside Rest, Inc. v Lankershim Estate* (1946) 76 CA2d 525, 173 P2d 554, in which the court, relying on former CCP §1981 (now Evid C §§500, 550), noted that the party holding the affirmative of the issue has to produce the evidence to prove it and therefore the burden of proof on any issue rests with the party who would be defeated if no evidence were given on either side.

Thus, for example, although an insurer may institute a declaratory relief action against an insured to determine coverage under a liability policy, the burden of proof rests with the insured defendant to prove coverage. *State Farm Mut. Auto. Ins. Co. v Spann* (1973) 31 CA3d 97, 100, 106 CR 923. By the same token, when an insurer brings a declaratory relief action to determine coverage, it has the burden of proving a lack of coverage based on an exclusion or other exculpatory clause contained within the policy. See *Executive Aviation, Inc. v National Ins. Underwriters* (1971) 16 CA3d 799, 806, 94 CR 347 (burden of proof on insurer to prove it was within exculpatory clause contained in liability policy in action filed by insured). *American Home Assur. Co. v Essy, supra* (insurer had burden of proof on issue of arson by the insured).

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§35.46 4. Statement of Decision

When a declaratory relief action is tried before the court without a jury, any party appearing at the trial has a right to a statement of decision on request. CCP §632. When a statement of decision fails to resolve a disputed factual or legal issue, the appellate court may not infer that the trial court decided that question in favor of the prevailing party. CCP §634. See *Anderson v Southern Pac. Co.* (1968) 264 CA2d 230, 70 CR 389 (under former CCP §§632 and 634, when trial court fails to provide statement of decision on request, appellate court will not presume court found in favor of prevailing party). On timing and procedure to request a statement of decision and other requirements, see CCP §632; Cal Rules of Ct 3.1590.

For further discussion of statement of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

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5. Declaratory Judgment

§35.47 a. Trial Court's Duty to Render Full and Complete Declaration

In an action for declaratory relief, the court should make a full and complete declaration, "disposing of all questions of rights, status or other legal relations encountered in construing the instrument before it" (*American Enter. v Van Winkle* (1952) 39 C2d 210, 219, 246 P2d 935, 939), including all legal and equitable issues (*Anderson v Southern Pac. Co.* (1968) 264 CA2d 230, 70 CR 389). It is the duty of a court hearing a declaratory relief action to make a complete determination and disposition of the controversy. *Amerson v Christman* (1968) 261 CA2d 811, 68 CR 378. In *Amerson,* the court added that the parties' rights should be determined on the facts found and not be limited by the issues joined or by counsels' claims. 261 CA2d at 824, 68 CR at 387. The requirements in declaratory relief actions with respect to a statement of decision are identical to the requirements in other types of actions. See *People v Superior Court* (1937) 24 CA2d 8, 74 P2d 326. See also *Anderson,* 264 CA2d at 234 (discussed in §35.46).

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§35.48 b. Judgment; Effect

The declaratory judgment is intended to constitute a judicial resolution of disputes between the parties. Although the court should dispose of the entire controversy between the parties, it has "discretion as to the extent of the relief to be afforded in a proceeding for declaratory relief [citation omitted], but where a case is made for such relief the court should not deny it." *Record Mach. & Tool Co. v Pageman Holding Corp.* (1954) 42 C2d 227, 234, 266 P2d 1. The declaration may be either affirmative or negative, declaring that a party is or is not under a duty. CCP §1060. See *Record Mach. & Tool Co. v Pageman Holding Corp., supra.*

As with any judgment, a declaratory judgment "should not rest upon probabilities, conjecture or vague inferences" (*Roadside Rest, Inc. v Lankershim Estate* (1946) 76 CA2d 525, 535, 173 P2d 554), but should be in conformity with the evidence and on the merits (*Phelps v Loop* (1942) 53 CA2d 541, 128 P2d 63). The declaratory judgment "must decree, not suggest, what the parties may or may not do." *Selby Realty Co. v City of San Buenaventura* (1973) 10 C3d 110, 117, 109 CR 799; *Monahan v Department of Water & Power* (1941) 48 CA2d 746, 751, 120 P2d 730.

While the primary purpose for declaratory relief is to guide the parties in their conduct to avoid a breach, a declaratory judgment may also include coercive relief. *Olson v Cory* (1983) 35 C3d 390, 400, 197 CR 843. Thus, *e.g.,* the court in its judgment may also award money damages (see *Lortz v Connell* (1969) 273 CA2d 286, 299, 78 CR 6; *Bertero v National Gen. Corp.* (1967) 254 CA2d 126, 147, 62 CR 714), order specific performance (*Beeler v Plastic Stamping, Inc.* (1956) 144 CA2d 306, 300 P2d 852), or order an accounting (*Steeve v Yaeger* (1956) 145 CA2d 455, 302 P2d 704). The court in an appropriate case may also issue an injunction ancillary to the relief sought to preserve the parties' rights. *Knox v Wolfe* (1946) 73 CA2d 494, 504, 167 P2d 3 (granting of injunctive relief necessary to a complete determination of the controversy held proper even though not prayed for). However, in *California Water & Tel. Co. v County of Los Angeles* (1967) 253 CA2d 16, 32, 61 CR 618, the court stated, "[a]n ancillary injunction should not issue as a concomitant to a declaratory judgment unless the pleading and proof demonstrate that the traditional requisites of injunctive relief have been met."

In appropriate cases, the court may retain jurisdiction to make such orders in the future that may be necessary (*Bertero v National Gen. Corp., supra*) because "[i]n giving declaratory relief a court has the powers of a court of equity." *City of Los Angeles v City of Glendale* (1943) 23 C2d 68, 81, 142 P2d 289.

The failure to seek coercive relief in a declaratory relief action does not preclude another action to enforce the rights obtained by the declaratory judgment. CCP §§1060, 1062; *Lortz, v Connell* (1969) 273 CA2d 286, 299, 78 CR 6. If a plaintiff who has not sought coercive relief obtains a favorable declaration in the declaratory relief action, the plaintiff in a later action against the defendant may rely on and allege in the pleadings the declaratory judgment to establish an issue resolved by that judgment. See *Lortz,* 273 CA2d at 301 (plaintiff entitled to rely on findings, conclusions, and judgment in earlier declaratory relief action to establish performance of contract obligations in later action for damages). But see *City of Los Angeles v City of San Fernando* (1975) 14 C3d 199, 230, 123 CR 1, disapproved on other grounds in *City of Barstow v Mojave Water Agency* (2000) 23 C4th 1224, 1247, 99 CR2d 294, in which the court explained that the res judicata or collateral estoppel effect of a legal ruling may differ from the effect of factual determination. The determination of a question of law should not be given res judicata effect in a subsequent action between the parties if injustice would result; moreover, when the public interest is involved, the collateral estoppel effect of earlier litigation will not prevent redetermination of a previously decided question of law. 14 C3d at 230. In any event, if it is determined in the declaratory relief action that the litigant has no rights, the litigant is precluded from relitigating his or her claim by seeking different relief. *Dills v Delira Corp.* (1956) 145 CA2d 124, 130, 302 P2d 397.

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§35.49 D. Appellate Review

Under CCP §1061, the court may refuse to exercise its power to grant declaratory relief "where its declaration or determination is not necessary or proper at the time under all the circumstances." See §35.21. A trial court's decision to grant or deny declaratory relief will not be disturbed on appeal unless an abuse of discretion can be shown. *Allstate Ins. Co. v Fisher* (1973) 31 CA3d 391, 395, 107 CR 251 (dismissal of declaratory relief action affirmed); *Fagerstedt v Continental Ins. Co.* (1968) 266 CA2d 370, 72 CR 126 (judgment of dismissal following sustaining of demurrers affirmed). See *Orloff v Metropolitan Trust Co.* (1941) 17 C2d 484, 489, 110 P2d 396 (judgment refusing to entertain declaratory relief complaint not reviewable on appeal except for abuse of discretion).

Although CCP §1061 vests a high degree of discretion in the trial court on whether to grant or deny declaratory relief (see *Farmers Ins. Exch. v Adams* (1985) 170 CA3d 712, 723, 216 CR 287, disapproved on other grounds in *Garvey v State Farm Fire & Cas. Co.* (1989) 48 C3d 395, 257 CR 292), that discretion is not unlimited. *Columbia Pictures Corp. v DeToth* (1945) 26 C2d 753, 762, 161 P2d 217. For example, when a complaint for declaratory relief is legally sufficient and states facts and circumstances that show that such relief is entirely appropriate, it has been held to be an abuse of discretion and reversible error for the trial court to refuse to assume jurisdiction by sustaining a general demurrer and dismissing the complaint. The appellate court will direct the trial court to entertain the action under those circumstances. *Columbia Pictures Corp. v DeToth, supra* ("[d]eclaratory relief must be granted when the facts justifying that course are sufficiently alleged").

When only legal issues are raised in the record on appeal, however, it has been stated that it would be an idle act to reverse a judgment of dismissal following an order sustaining a general demurrer without leave to amend for a trial on the merits. Rather, the appellate court will consider the merits of the legal controversy and its opinion will constitute the declaration of the parties' legal rights and duties in the matter. *Taschner v City Council* (1973) 31 CA3d 48, 57, 107 CR 214, disapproved on other grounds in *Associated Home Builders of the Greater Eastbay, Inc. v City of Livermore* (1976) 18 C3d 582, 135 CR 41 (ordinance declared invalid; judgment reversed with directions for trial court to overrule demurrer and take further proceedings consistent with view expressed in opinion). See *Western Homes, Inc. v Herbert Ketell, Inc.* (1965) 236 CA2d 142, 146, 45 CR 856, in which it was noted that a judgment of dismissal on an order sustaining a general demurrer is not to be reversed when plaintiff's allegations in the complaint show that plaintiff has no cause of action. "The declaration by the appellate court accomplishes declaratory relief." *Western Homes, Inc. v Herbert Ketell, Inc., supra*. See also *Cinmark Inv. Co. v Richard* (1966) 246 CA2d 498, 501, 54 CR 810 (judgment modified after trial court failed to make any declaration of rights on cross-complaint for declaratory relief; as modified, judgment affirmed).

On trial court's discretion to deny declaratory relief, see §§35.21-35.22.

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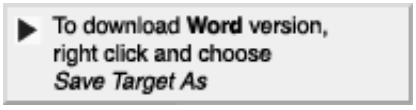
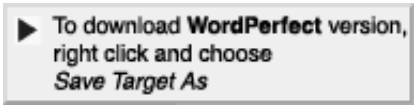
Source: Civil Litigation/California Civil Procedure Before Trial/35 Declaratory Relief/§35.50 VII. CHECKLIST: PROCEDURE FOR DECLARATORY RELIEF

§35.50 VII. CHECKLIST: PROCEDURE FOR DECLARATORY RELIEF





Moving Party

- Determine whether other remedies or forums are available that may bar declaratory relief (see §§35.16-35.22)
- Evaluate whether subject matter in dispute is appropriate for a declaratory relief action (see §§35.23-35.29)
- Confirm appropriate party to bring the action (see §35.32)
- Confirm the action is not time-barred (see §35.19)
- Consider whether action is being brought in appropriate court
- Jurisdiction (see §35.30)
- Venue (see §35.31)
- Name all appropriate parties as plaintiffs and defendants (see §35.32)
- Allege (see §35.33)
- Compliance with any condition precedent
- Facts showing either an actual present, or probable future, controversy between the parties
- If appropriate, consider
- Seeking coercive relief
- Joining other causes of action with declaratory relief cause of action
- The effect on trial calendar of seeking any relief in addition to declaration of rights and duties

Opposing Party

- Determine if there are any grounds for the court to exercise its discretion to deny relief
- Determine what responsive pleadings to file
- Demurrer (see §§35.35-35.37)
- Answer (see §35.38)
- Cross-complaint (see §35.39)
- Determine what motions, if any, to file, for example:
- Judgment on the pleadings (see §35.40)
- Summary judgment (see §35.41)
- Other motions (see §35.42)

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Source: Civil Litigation/California Civil Procedure Before Trial/35 Declaratory Relief/ VIII. FORMS/§35.51 A. Form: Complaint for Declaratory Relief on Contract

VIII. FORMS

§35.51 A. Form: Complaint for Declaratory Relief on Contract

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**COMPLAINT FOR**
vs	)	**DECLARATORY RELIEF ON**
	)	_ _[*WRITTEN/ORAL*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**CONTRACT**
	)	
	)	[*In limited civil case, add:*
	)	**Amount demanded**
	)	_ _[*exceeds/does not*
_____	)	*exceed*]_ _ **$10,000**]

Plaintiff, _ _[*name*]_ _, alleges:

First Cause of Action for Declaratory Relief on Contract

1. Plaintiff is now, and at all times mentioned in this complaint has been, _ _[*e.g., a corporation duly organized and existing under the laws of the State of California*]_ _.

2. Defendant, _ _[*name*]_ _, is now, and at all times mentioned in this complaint has been, _ _[*e.g., a resident of _ _ _ _ _ _ County, California*]_ _.

3. Plaintiff does not know the true names of defendants sued as Doe 1 through Doe _ _[*number of fictitiously named defendants*]_ _.

4. On or about _ _[*date*]_ _, plaintiff and defendant entered into a _ _[*written/oral*]_ _ contract that provided _ _[*state essential provisions of contract between parties*]_ _.

[*Add if written contract*]

A copy of this contract is attached as Exhibit _ _ and is incorporated by reference.

[*Continue*]

5. Thereafter, _ _[*state facts giving rise to actual controversy between parties*]_ _.

6. An actual controversy has arisen and now exists between plaintiff and defendant concerning their

respective rights and duties under the contract in that _ _[*state plaintiff's contention, e.g., concerning the construction, validity, interpretation, or effect of contract*]**_ _. Defendant disputes plaintiff's contention and contends that _ _**[*state defendant's contention*]**_ _.**

7. Plaintiff desires a judicial determination and declaration of plaintiff's and defendant's respective rights and duties under the contract and specifically whether under the contract _ _[*state desired declaration, e.g., plaintiff's interpretation of the contract is correct and defendant is obligated to perform the disputed acts under the contract*]**_ _.**

8. The declaration is necessary and appropriate at this time so that plaintiff can determine _ _[*his/her/its*]**_ _ _ _**[*rights/obligations and duties*]**_ _ under the contract. _ _**[*Continue with facts showing need for declaration, particularly any financial or other burdens caused by unsettled state of affairs resulting from different interpretations of contract and, when appropriate, that other remedies are inadequate*]**_ _.**

WHEREFORE, plaintiff demands judgment as follows:

1. That the Court declare that the _ _[*written/oral*]**_ _ contract obligates defendant to _ _**[*state defendant's obligation(s)*]**_ _.**

2. _ _[*For attorney fees if provided for in the contract or by statute*]**_ _.**

3. For costs of this action and all other just relief.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]**_ _**

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On alleging facts showing either an actual present, or a probable future, controversy, see §35.33. Note that the plaintiff may seek declaratory relief under either a written or an oral contract, but that other instruments under which relief is sought must be written. See §§35.23, 35.27. A complaint for declaratory relief may also claim damages or other forms of relief. See §§35.34, 35.48. Any additional relief claimed should be specified in the title of the complaint (*e.g.,* by adding "AND DAMAGES" or other designation), supported by factual allegations (preferably stated in a separate cause of action; see §35.34), and demanded in the prayer. If damages are sought in addition to declaratory relief, the amount of damages sought should be stated. On preparation of complaints generally, see chap 15.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§35.52 B. Form: Complaint for Declaratory Relief on Statute or Ordinance

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**COMPLAINT FOR DECLARATORY RELIEF ON** _ _[*STATUTE/ ORDINANCE*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	[*In limited civil case, add:* **Amount demanded** _ _[*exceeds/does not exceed*]_ _ **$10,000**]

Plaintiff, _ _[*name*]_ _**, alleges:**

First Cause of Action for Declaratory Relief

1. Plaintiff is now, and at all times mentioned in this complaint has been, _ _[*e.g., a corporation duly organized and existing under the laws of the State of California*]_ _**.**

2. Defendant, _ _[*name*]_ _**, is now, and at all times mentioned in this complaint has been, a governmental entity organized and existing under**

[*Option 1*]

the _ _[*Constitution/laws*]_ _ **of the State of California.**

[*Option 2*]

an ordinance of the _ _[*e.g., County of* _ _ _ _ _ _ _]_ _**.**

[*Continue*]

Defendant, _ _[*name*]_ _**, is** _ _[*title*]_ _ **and the person charged with** _ _[*describe responsibility for administering statute or ordinance*]_ _**.**

3. Plaintiff does not know the true names of defendants sued as Doe 1 through Doe _ _[*number of fictitiously named defendants*]_ _**.**

4. On or about _ _[*date*]_ _**, a** _ _[*statute/ordinance*]_ _ **described as** _ _[*specify*]_ _ **was enacted by the** _ _[*e.g., California State Legislature/City Council of* _ _ _ _ _ _ _ _]_ _**. A copy of this** _ _[*statute/ordinance*]_ _ **is**

attached as Exhibit _ _ and is incorporated by reference. This _ _[*statute/ordinance*]_ _ is in full force and effect.

5. _ _[*State facts showing that statute or ordinance is being applied or could be applied to plaintiff and that application of the statute or ordinance interferes with or impairs plaintiff's rights and privileges*]_ _.

[*Add if appropriate*]

6. _ _[*State facts showing that plaintiff has exhausted all administrative remedies*]_ _.

[*Continue*]

[7.] An actual controversy now exists between plaintiff and defendants concerning their respective rights and duties. Plaintiff contends that the _ _[*statute/ordinance*]_ _ is invalid and unenforceable on its face and as applied to plaintiff in that _ _[*state facts and contentions regarding statute's or ordinance's invalidity or unenforceability*]_ _. Defendants dispute plaintiff's contentions and contend that the _ _[*statute/ordinance*]_ _ is valid and enforceable and applies to plaintiff.

[8.] Plaintiff desires a judicial determination and declaration of plaintiff's and defendants' respective rights and duties concerning whether plaintiff's activities violate the _ _[*statute/ordinance*]_ _ and with respect to the validity and enforceability of the _ _[*statute/ordinance*]_ _ as applied to plaintiff. Such a declaration is necessary and appropriate at this time so that plaintiff may ascertain _ _[*his/her/its*]_ _ rights and duties without being subjected to liability for violation of the _ _[*statute/ordinance*]_ _. _ _[*State any facts showing harm that may result to plaintiff if declaratory relief is not obtained*]_ _.

WHEREFORE, plaintiff demands judgment as follows:

1. That the Court declare plaintiff's and defendants' respective rights and duties under the _ _[*statute/ordinance*]_ _ and declare that the _ _[*statute/ordinance*]_ _ is not valid and enforceable against plaintiff.

2. For costs of this action and all other just relief.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On when the constitutionality of a statute or ordinance must be attacked first in the agency, see §§35.18, 35.20. If appropriate or necessary, a cause of action for mandamus, injunctive, or other relief should be added, preferably in a separate cause of action (see §35.34) and demanded in the prayer. If such additional relief is claimed, it should be specified in the title of the complaint by adding, *e.g.,* "AND MANDAMUS." On preparation of complaints generally, see chap 15.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§35.53 C. Form: Judgment for Declaratory Relief

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**JUDGMENT FOR DECLARATORY RELIEF**
_ _[*Name(s)*]_ _, **Defendant(s)**	

This action came on regularly for trial on _ _[*date*]_ _**, in Department** _ _[*specify*]_ _ **of this Court, the Honorable** _ _ _ _ _ _**, Judge, presiding** _ _[*with/without*]_ _ **a jury.** _ _[*Name*]_ _ **appeared as attorney for plaintiff and** _ _[*name*]_ _ **appeared as attorney for defendant. Evidence having been presented** _ _[*,/and*]_ _ **the matter having been argued and submitted for decision,** _ _[*and the Court having issued its statement of decision/and a statement of decision not having been requested/and a statement of decision having been waived*]_ _**,**

IT IS ADJUDGED that:

[*Option 1: If action is based on contract*]

1. Under the _ _[*oral/written*]_ _ **contract dated** _ _[*specify*]_ _**, between** _ _[*name*]_ _ **and** _ _[*name*]_ _**,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, is obligated to** _ _[*specify*]_ _**.**

[*Option 2: If declaration is sought with respect to statute or ordinance*]

1. _ _[*Specify Code section or Ordinance No. _ _ _ _ of the _ _[e.g., County of _ _ _ _ _ _*]_ _]_ _

[*Choose appropriate statement*]

[*Either*]

does _ _[*not*]_ _ **apply to plaintiff,** _ _[*name*]_ _**, and therefore plaintiff,** _ _[*name*]_ _**, is** _ _[*not*]_ _ **required to** _ _[*specify*]_ _**.**

[*Or*]

violates _ _[*e.g., California Constitution Article* _ _[*specify*]_ _*, section* _ _[*specify*]_ _*,* _ _[*and, e.g., the due process clause of the Fourteenth Amendment to the United States Constitution*]_ _]_ _ **on its face and as applied to plaintiff,** _ _[*name*]_ _**, and, therefore, is unenforceable against plaintiff,** _ _[*name*]_ _**. Plaintiff,** _ _[*name*]_ _**, is therefore not required to** _ _[*e.g., obtain a permit under the statute or ordinance*]_ _**.**

[*Continue*]

[*Add if appropriate*]

2. Plaintiff, _ _[*name*]_ _**, shall have and recover judgment against defendant,** _ _[*name*]_ _**, in the amount of $**_ _ _ _ _ _**.**

[*Continue*]

[3.]_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _**, shall recover costs from** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _**, in the amount of $**_ _ _ _ _ _**.**

[*Continue if provided for by statute or contract*]

[4.]_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _**, shall recover attorney fees against** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _**, in the amount of $**_ _ _ _ _ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: If the prevailing party wishes to obtain injunctive relief in the judgment, the party may request the court to include a statement specifically describing the act or threatened acts to be enjoined. On notice of entry of judgment, time limitations, requirements concerning judgments generally, and other forms of judgments, see California Trial Practice: Civil Procedure During Trial, chap 23 (3d ed Cal CEB 1995).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Summary Judgment

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§36.1 I. SCOPE OF CHAPTER

This chapter covers motions for summary judgment and summary adjudication, including the availability of the motions and alternatives (see §§36.2-36.9), strategic considerations (§§36.10-36.13), evidentiary burdens and presumptions (see §§36.14-36.25), timing requirements (see §§36.26-36.51), preparing moving, opposition, and reply papers (see §§36.52-36.99), preparing admissible evidence (see §§36.100-36.144), objections to evidence (see §§36.145-36.159), the hearing (see §§36.160-36.170), the court's decision and order (see §§36.171-36.191), and challenging the court's order (see §§36.192-36.215). For forms, see §§36.216-36.228.

NOTE: Unless otherwise stated, the discussion of motions for summary judgment applies to motions for summary adjudication. *Grant-Burton v Covenant Care, Inc.* (2002) 99 CA4th 1361, 1370, 122 CR2d 204 (principles governing summary judgment also apply to summary adjudication).

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II. AVAILABILITY OF SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

§36.2 A. Law Governing Motions for Summary Judgment or Summary Adjudication

The procedures governing summary judgment and summary adjudication are entirely statutory, as specified in CCP §437c. Summary judgment is granted when "all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law." CCP §437c(c). Summary adjudication is governed by §437c(f), which provides that the court should grant the motion "only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."

PRACTICE TIP: For the best summary of the law and procedure in making or opposing summary judgment or adjudication under §437c, see *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 107 CR2d 841.

Specific rules of court pertaining to summary judgment and summary adjudication motions are found in Cal Rules of Ct 3.1350-3.1354. The rules state which documents must be filed and specify their format and length. Cal Rules of Ct 3.1350. The rules also discuss the handling of objections to proffered evidence. Cal Rules of Ct 3.1352-3.1354. There is a special rule for summary judgment or summary adjudication proceedings involving possession of real property (*e.g.*, unlawful detainer actions). See Cal Rules of Ct 3.1351.

CAUTION: Counsel should always check local court rules for any rules governing motions for summary judgment or summary adjudication.

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B. When Summary Judgment or Summary Adjudication Are Available

§36.3 1. When There Is No Triable Issue of Material Fact

A motion for summary judgment must be granted if all the papers submitted show that there is "no triable issue as to any material fact." CCP §437c(c); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. The decision is not discretionary; if no triable issue of material fact exists, the court must grant the motion. See *Habitat Trust for Wildlife, Inc. v City of Rancho Cucamonga* (2009) 175 CA4th 1306, 1342, 96 CR3d 813 (summary judgment not improper when review of evidence indicates no unresolved factual issues, only legal effect of undisputed facts).

Summary judgment "provide[s] courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841. Summary adjudication is available to completely dispose of any one or more causes of action, affirmative defenses, punitive damage claims, or issues of legal duty. CCP §437c(f). Summary judgment and summary adjudication are generally available in any action or proceeding. CCP §437c(a).

There is a triable issue of material fact if, and only if, the admissible evidence allows a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. *Aguilar v Atlantic Richfield Co.*, *supra.* To determine whether the papers submitted show that there is no triable issue as to any material fact, the court must consider (CCP §437c(c)):

- All evidence presented except that to which objections have been made and sustained; and
- All inferences reasonably drawn from the evidence.

If the inferences drawn from the evidence are contradicted by other inferences, or by evidence that presents a triable issue as to any material fact, the motion for summary judgment must be denied. CCP §437c(c). When the evidence presented reveals no factual conflict, the court will decide the issues of law. *Aguilar v Atlantic Richfield Co.*, *supra*; *Continental Ins. Co. v Superior Court* (1985) 165 CA3d 1069, 1071, 212 CR 140.

On preparing evidence for motion, see §§36.100-36.144. On objecting to evidence, see §§36.145-36.159. On evidentiary presumptions and burdens on motion for summary judgment or adjudication, see §§36.14-36.25.

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§36.4 2. Available in Any Form of Action

Summary judgment motions are generally available in any form of action by virtue of the language in CCP §437c(a) expressly stating its applicability in "any action or proceeding." *In re Mark K.* (1984) 159 CA3d 94, 102, 205 CR 393.

NOTE: Summary judgment is expressly available in unlawful detainer and forcible entry actions (CCP §1170.7), but the time frames in CCP §437c(a)-(b) are inapplicable. CCP §437c(q)-(r). In a forcible entry or unlawful detainer action (see CCP §§1159-1179a), notice of a motion for summary judgment must be given in compliance with CCP §§1013 and 1170.7. Cal Rules of Ct 3.1351. There is also a special rule of court for summary judgment or summary adjudication proceedings involving possession of real property, including unlawful detainer actions. See Cal Rules of Ct 3.1351.

On summary judgment in unlawful detainer proceedings, see California Landlord-Tenant Practice §§11.31-11.39 (2d ed Cal CEB 1997).

On cases in which summary judgment in unavailable, see §36.5.

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§36.5 C. When Summary Judgment and Summary Adjudication Are Not Available

Notwithstanding that CCP §437c(a) states that summary judgment applies in "any action or proceeding," it is unavailable in certain cases by virtue of either statute or case law. *Bagration v Superior Court* (2003) 110 CA4th 1677, 1688, 3 CR3d 292. See 6 Witkin, California Procedure, *Proceedings Without Trial* §206 (5th ed 2008). Neither summary judgment nor summary adjudication can be ordered in the following actions:

- Consumer class actions under the Consumers Legal Remedies Act (CC §§1750-1784). CC §1781(c)(3) (see California Summary Judgment §2.6 (Cal CEB 2010));
- Actions to terminate parental rights (see *In re Mark K.* (1984) 159 CA3d 94, 104, 205 CR 393) (see Summary Judgment §2.7);
- Election contests (*Anderson v County of Santa Barbara* (1976) 56 CA3d 780, 786, 128 CR 707) (see Summary Judgment §2.8);
- Medical malpractice actions in which an undertaking is required. CCP §1029.6(e) (see Summary Judgment §2.9); and
- Proceedings under the Sexually Violent Predators Act (Welf & I C §6600-6609.3); *Bagration v Superior Court* (2003) 110 CA4th 1677, 1688, 3 CR3d 292 (see Summary Judgment §2.10).

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§36.6 D. Summary Judgment vs Summary Adjudication

A summary adjudication motion is handled procedurally in the same manner as a summary judgment motion. CCP §437c(f)(2); *Jones v P.S. Dev. Co.* (2008) 166 CA4th 707, 711 n3, 82 CR3d 882; *Toigo v Town of Ross* (1998) 70 CA4th 309, 324, 82 CR2d 649. A party may move for one or the other, or move for both in the alternative.

The primary difference between the two motions is their effect on the action. Summary judgment resolves the entire action and results in the entry of an immediately appealable judgment (see California Summary Judgment §§2.14-2.15 (Cal CEB 2010)); a grant of summary adjudication on a claim or defense does not preclude trial on the remaining issues, but merely removes the need to prove or disprove at trial the claim or defense that was summarily adjudicated (see Summary Judgment §§2.16-2.24).

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§36.7 E. Comparison Of California and Federal Law on Motions for Summary Judgment

In California, 1992 and 1993 legislative amendments to CCP §437c changed summary judgment law dramatically in order to move it closer to its federal counterpart as clarified in *Celotex Corp. v Catrett* (1986) 477 US 317, 91 L Ed 2d 265, 106 S Ct 2548; *Anderson v Liberty Lobby, Inc.* (1986) 477 US 242, 91 L Ed 2d 202, 106 S Ct 2505; *Matsushita Elec. Indus. Co. v Zenith Radio Corp.* (1986) 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348. California law provides that, once the moving defendant meets its burden of showing that the cause of action cannot be established or there is a complete defense to that cause of action, the burden shifts to the plaintiff to show that there is a triable issue of material fact as to the cause of action or defense to it. CCP §437c(p)(2).

The California Supreme Court has stated that summary judgment law in this state now conforms largely to its federal counterpart. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 848, 107 CR2d 841.

California summary judgment law diverges from federal law by continuing to require a moving defendant to meet its burden by presenting specific facts showing that no triable issue of material fact exists. CCP §437c(p)(2); *Aguilar*, 25 C4th at 854 (moving defendant "must present evidence, and not simply point out through argument, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence"). Under the federal standard, a moving defendant may shift the burden of producing evidence to the nonmoving plaintiff merely by pointing out through argument the absence of evidence to support the plaintiff's claim. *Fairbank v Wunderman Cato Johnson* (9th Cir 2000) 212 F3d 528, 532. But see *Nissan Fire & Marine Ins. Co. v Fritz Cos.* (9th Cir 2000) 210 F3d 1099, 1105 (moving party without ultimate burden of persuasion at trial must "produce affirmative evidence negating an essential element of the nonmoving party's claim or defense").

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F. Alternate Methods for Narrowing Issues

§36.8 1. Alternatives to Motions for Summary Judgment or Summary Adjudication

As with other motions, attorneys should consider avoiding or reducing the expense and risk associated with a prospective summary judgment or summary adjudication motion and narrow the issue by other means. Possible alternate means to explore for narrowing issues include:

- Requests for admission (CCP §§2033.010-2033.420);
- Severance of the issues in the case into separate phases;
- Mini-trial or arbitration of key issues;
- Mediation, which can also include the mediator's review of draft summary judgment papers and an advisory opinion on the likely outcome; and
- Stipulations.

NOTE: A stipulation may not be used as substitute for the procedures mandated by CCP §437c. *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 121, 94 CR3d 109.

On advantages and risks of making a motion for summary judgment or summary adjudication, see §§36.11-36.12.

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§36.9 2. Chart: Comparison of Summary Judgment and Adjudication Motion to Alternative Dispositive Motions

The following chart compares motions for summary judgment and summary adjudication to other motion procedures:

Procedure	Description and Comparison
Summary Judgment (CCP §437c; Cal Rules of Ct 3.1350-3.1354)	Requests judgment on the ground that there is no material fact issue to be tried. Must be supported by admissible evidence. See §36.3; California Summary Judgment chap 2 (Cal CEB 2010).
Summary Adjudication (CCP §437c(f); Cal Rules of Ct 3.1350-3.1354)	Requests a binding adjudication of a cause of action, defense, issue of duty or punitive damages claim on the ground that as to such issue there is no material fact issue to be tried. Must be supported by admissible evidence. See §36.3; Summary Judgment chap 2.
Anti-SLAPP Motion (CCP §425.16)	A preemptive motion to dismiss the case on the ground that it is a bad faith attempt to chill exercise of rights to speech or petition government on an issue of public concern. Evidence is allowed. See Summary Judgment §1.22.
Demurrer (CCP §§430.10-432.10)	Seeks elimination of a pleading or cause of action in the pleading on the ground that the allegations of the pleading do not state a claim as a matter of law. May be based only on the allegations in the pleading and matters of which judicial notice may be taken; no evidence allowed. See chap 24; Summary Judgment §1.23.
Motion for Judgment on Pleadings (CCP §438)	Same as demurrer; only significant difference is timing: Demurrer is proper before the adversary's answer; motion for judgment on the pleadings is proper after answer. See chap 27; Summary Judgment §1.24.
Motion to Strike (CCP §435)	Requests that allegations in a pleading not in conformity with California law be stricken. May be based only on allegations in the pleading and matters of which judicial notice can be taken. No evidence is allowed. See chap 24; Summary Judgment §1.25.
Motion for Bifurcated Trial (CCP §597)	If granted, motion separates trial of certain defenses (*e.g.,* statute of limitations) from trial on merits; necessary when issues of fact exist as to those defenses. Motion for summary judgment should be made when no factual dispute exists as to defense. See California Trial Practice: Civil Procedure During Trial, chap 6 (3d ed Cal CEB 1995).
Objection to Introduction of All Evidence (see *Clemens v American Warranty Corp.* (1987) 193 CA3d 444, 451, 238 CR 339)	Similar to motion for Judgment on Pleadings; objecting party seeks to end trial and obtain favorable judgment on pleadings without evidence on ground that, even if proved, allegations would not state cause of action or defense. See Summary Judgment §1.26.
Motion In Limine (see *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1593,	Pretrial motion requesting an order precluding the admission of evidence. May be based on pleadings or limited evidentiary matters, such as discovery responses. See Summary Judgment §1.27.

71 CR3d 361)

Cottle Motion (see *Cottle v Superior Court* (1992) 3 CA4th 1367, 5 CR2d 882)	Motion requiring plaintiff to make prima facie showing of causation in personal injury cases. Directed to trial court's discretion, which may deny motion without having to consider it or specify reasons for denial. See Summary Judgment §1.28.
Motion for Nonsuit (CCP §581c)	After opening statement or presentation of plaintiff's evidence, motion concedes truth of facts presented but contends those facts are insufficient to establish prima facie case as a matter of law. See Summary Judgment §1.29; Civ Proc During Trial, chap 18.
Motion for Directed Verdict (CCP §630)	Usually made after all evidence is presented; court may direct verdict only when there is no substantial conflict in the evidence. See Summary Judgment §1.30.
Motion for JNOV (CCP §629)	Made after the jury has returned its verdict; court may render JNOV whenever a motion for directed verdict should have been granted had such motion been made. See Summary Judgment §1.30; Civ Proc During Trial, chap 25.
Motion for Judgment (CCP §631.8)	Made after party has completed presentation of evidence in a court (nonjury) trial; court weighs evidence as trier-of-fact and renders judgment. In motion for summary judgment, court does not weigh evidence or make factual determinations. See Summary Judgment §1.31; Civ Proc During Trial, chap 24.

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III. STRATEGIC CONSIDERATIONS

§36.10 A. Weigh Advantages and Disadvantages of Making a Motion for Summary Judgment or Summary Adjudication

Given the liberal tendency of most courts to grant summary judgment and termination motions, attorneys should begin a case by preparing an outline of his or her client's separate statement, either in favor of or in opposition to the anticipated summary judgment motion. Doing so helps the attorney rigorously analyze whether to file a summary judgment or summary adjudication motion, creates a roadmap for the discovery and legal research needed to make or oppose the motion, and aids in evaluation of the chances of failure and success of the motion, thus informing the approach to settlement.

The determination of whether to file a summary judgment or adjudication motion involves multiple strategic issues, including benefits and risks associated with such a motion.

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§36.11 1. Advantages of Making a Motion for Summary Judgment or Summary Adjudication

Advantages of making a motion for summary judgment or summary adjudication include:

- Saving the expense of a trial (see California Summary Judgment §1.6 (Cal CEB 2010));
- Aiding in early case resolution (see Summary Judgment §1.7);
- Providing an additional opportunity to prevail (see Summary Judgment §1.8);
- Narrowing the issues for trial (see Summary Judgment §1.9);
- Compelling disclosure of the opponent's evidence (see Summary Judgment §1.10);
- Facilitating trial preparation (see Summary Judgment §1.12); and
- Increasing the chances of settlement or voluntary dismissal of the case (see Summary Judgment §1.12).

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§36.12 2. Disadvantages of Making a Motion for Summary Judgment or Summary Adjudication

Disadvantages of making a motion for summary judgment or summary adjudication include:

- The motion may add significant expense to the litigation (see California Summary Judgment §1.13 (Cal CEB 2010));
- There is a high risk of defeat (see Summary Judgment §1.14);
- Losing the motion may weaken the moving party's settlement position (see Summary Judgment §1.15);
- The motion will educate the opposition about the moving party's evidence and strategy (see Summary Judgment §1.16);
- Supporting declarations generate evidence the opposing party may use for cross-examination at trial (see Summary Judgment §1.17);
- De novo review on appeal may be more favorable to opposing party than standard of review following a trial (see Summary Judgment §1.18);
- The result may be subject to reconsideration by the court on its own motion (see Summary Judgment §1.19).

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§36.13 B. Diagnostic Questions: Determining Whether to Make Motion

Answers to the following questions may assist the attorney in deciding whether to move for summary judgment or summary adjudication:

1. **(Defendant) With respect to each asserted cause of action, can any necessary element be shown to be missing or can an affirmative defense be established, or is a punitive damages claim without merit?** See §§36.2-36.3.
2. **(Plaintiff) With respect to each cause of action, has any affirmative defense been asserted, and can denials be overcome by showing that there are no triable issues of fact on each element of the cause of action?** See §§36.2-36.3.
3. **(Defendant) Can you meet the burden of persuasion/production to negate essential elements of the plaintiff's prima facie case?** See §§36.14-36.25.
4. **Have you weighed the likelihood of success against the risk of "tipping your hand" before trial?**
5. **Would other pretrial motions be more appropriate than a motion for summary judgment?** See §§36.8-36.9.
6. **Have you confirmed that summary judgment is available in your case?** See §§36.3-36.5.
7. **Can you file your motion within applicable time constraints?** See §§36.26-36.35.

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IV. EVIDENTIARY BURDENS AND PRESUMPTIONS

§36.14 A. Principal Authority: CCP 437c and *Aguilar*

The most cited case in California on the evidentiary burdens applicable to motions for summary judgment is *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841. Because that case was decided almost a decade ago, many court of appeal opinions published since then have clarified the evidentiary burden questions and provide examples of how courts have applied the supreme court's interpretations given to CCP §437c in *Aguilar*.

For detailed discussion of evidentiary burdens and presumptions, see California Summary Judgment chap 4 (Cal CEB 2010).

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B. Summary of Required Burdens

§36.15 1. Moving Party

The California summary judgment statute (CCP §437c) as interpreted by *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 845, 107 CR2d 841 permits the moving party to either:

- Prove its own case without having to negate the opposing party's case (CCP §437c(p)(1)(2); 25 C4th at 855; see California Summary Judgment §§4.24-4.29, 4.31 (Cal CEB 2010)); or
- Demonstrate that the opposing party lacks evidence sufficient to prevail at trial (CCP §437c(p)(1),(2); 25 C4th at 850; see Summary Judgment §§4.30-4.32).

NOTE: On the second point, California and federal law differ. See Summary Judgment §4.15.

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§36.16 2. Opposing Party

For the party opposing a summary judgment motion, California statutory law (CCP §437c) currently:

- Permits it to show that a triable issue of fact exists, after the moving party has met its initial burden of producing evidence (CCP §437c(p)(1),(2); see California Summary Judgment §§4.34-4.35, 4.37 (Cal CEB 2010));
- Prohibits reliance on mere allegations or denials in pleadings to show that a triable issue of material fact exists (CCP §437c(p)(1), (2); see Summary Judgment §4.43);
- Requires specific facts to show that a triable issue of material fact exists for a cause of action, an affirmative defense, a claim for damages, or an issue of duty (see CCP §437c(b)(3); see Summary Judgment §4.41);
- Does not require that the opposing party persuade the judge that its facts are conclusively established to defeat the motion; the opposing party need only raise a triable issue of material fact (see Summary Judgment §§4.5, 4.8-4.9, 4.13); and
- Permits it to prevail without presenting evidence, if the moving party has not satisfied its initial burden of production (CCP §437c(p)(2); see Summary Judgment §4.36).

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§36.17 C. Applicable Burdens in Summary Judgment Motions

In addressing motions for summary judgment, three burdens come into play. These are the burdens of: (1) production (Evid C §110); (2) persuasion (*Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841); and (3) proof (Evid C §115; see California Summary Judgment §4.11(Cal CEB 2010)).

Simply put, the moving party must produce sufficient evidence (burden of production; see Summary Judgment §§4.6-4.8) to persuade the judge (burden of persuasion; see Summary Judgment §4.9) that there is no triable issue as to any material fact on each element of the cause of action or defense that is the subject of the motion (see Summary Judgment §§4.7, 4.9).

WARNING: The burden of proof applicable to trial (defined in Evid C §115) has a limited role in summary judgment motions. Specifically, the trial standard for the burden of proof only influences the burden of producing evidence (see CCP §437c(p)) in summary judgment motions. See Summary Judgment §§4.6, 4.10-4.13.

On application of burdens or production and persuasion depending on which party has the burden of proof at trial, see Summary Judgment chap 4.

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§36.18 1. Burden of Production

The summary judgment procedure provides a system of shifting burdens of production (or producing evidence). The moving party bears an initial production burden, *i.e.,* to produce evidence sufficient to make a prima facie showing (see §36.19) of the nonexistence of any triable issue of material fact as to the elements of the claim or defense. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. See CCP §437c(o)-(p). This is a lesser burden than persuasion because the burden of production entails only a presentation of evidence. 25 C4th at 850.

If the moving party carries this burden, the burden shifts, and the opposing party must produce sufficient evidence to make a prima facie showing of a triable issue of material fact. 25 C4th at 850. See California Summary Judgment §4.8 (Cal CEB 2010). This is similar to the function of the burden of production at trial (see Jefferson's California Evidence Benchbook §§47.1-47.2, 47.15, 47.28-47.29 (4th ed CJA-CEB 2009)), except that in a summary judgment motion, the judge does not ultimately weigh the facts or act as a fact finder, as a trier of fact does at trial in applying the required burden of proof (25 C4th at 856). When a triable issue is raised by the party opposing a summary judgment motion, the judge must deny the motion. See Summary Judgment §4.14.

NOTE: Summary judgment may also be appropriate if all parties agree that there are no disputed facts and the sole question before the court is one of law. In that event, the importance of evidentiary burdens diminishes, and the trial court must hear and decide the disputed legal issues. See, *e.g*., *Blanco v Baxter Healthcare Corp.* (2008) 158 CA4th 1039, 70 CR3d 566 (federal law preemption defense decided on summary judgment motion); *Varni Bros. Corp. v Wine World, Inc.* (1995) 35 CA4th 880, 887, 41 CR2d 740.

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§36.19 a. Initial Burden; Prima Facie Showing

The moving party bears an initial burden of production to make a prima facie showing that there are no triable issues of material fact. See CCP §437c(p). The prima facie case on a summary judgment motion is formulated differently depending on which side the moving party is on and who has the burden of proof at trial. See California Summary Judgment §4.10 (Cal CEB 2010).

A prima facie showing in a summary judgment motion need not conclusively establish the position of the propounding party, but it must be sufficient to support its position. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. The supreme court in *Aguilar* compared this showing to that required to establish a rebuttable presumption under Evid C §602. See 25 C4th at 851.

EXAMPLE: Under a state law claim for employment discrimination, the plaintiff moving for summary judgment establishes a prima facie case of retaliation by showing that (1) the plaintiff engaged in protected activities, (2) the employer subsequently took adverse action against the plaintiff, and (3) there was a causal connection between the protected activity and the adverse action. *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 286, 100 CR3d 296. See CCP §437c(p)(1). This is essentially identical to the burden of production required of a plaintiff at trial. See Jefferson's California Evidence Benchbook §§47.1-47.2, 47.28-47.29 (4th ed CJA-CEB 2009). See also Summary Judgment §§4.25-4.28.

When the defendant is the moving party, however, a prima facie showing on a summary judgment motion need not establish an ultimate fact in the action. Rather, CCP §437c(p)(2) allows the defendant to meet its burden of showing that a cause of action is without merit by demonstrating through admissible evidence that the plaintiff cannot establish one or more elements of the subject cause of action. See Summary Judgment §4.30.

NOTE: When the burden shifts (see Summary Judgment §4.8), the opposing party also has to make a prima facie case that there is a triable issue of fact.

Technically, until the moving party meets its initial burden, the opposing party is not obligated to come forward with conflicting evidence or any evidence, although it may. CCP §437c(p); 25 C4th at 850. As a tactical matter, the opposing party will usually choose to do so. See Summary Judgment §§4.34-4.36.

On application of burdens or production and persuasion depending on which party has the burden of proof at trial, see Summary Judgment chap 4.

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§36.20 b. Shifting Burden; Triable Issue of Fact

If the moving party demonstrates that there are no triable issues of material fact, the burden of producing evidence shifts, and the opposing party must introduce sufficient evidence to make a prima facie showing of a triable issue of material fact. CCP §437c(p). A triable issue is created if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. One way of creating a triable issue is for the opposing party to present evidence that directly controverts the moving party's evidence, but the court does not weigh the evidence as it does in a trial. See California Summary Judgment §§4.13-4.14 (Cal CEB 2010). On permissible and impermissible ways to create a triable issue, see Summary Judgment §§4.37-4.46. On application of burdens or production and persuasion depending on which party has the burden of proof at trial, see Summary Judgment chap 4.

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§36.21 2. Burden of Persuasion

The moving party always bears the burden of persuading the court to grant the motion, *i.e.,* of demonstrating that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. This burden is properly characterized as one of persuasion, not proof, because the moving party's task is to persuade the trial court that there is no disputed material fact for a reasonable trier of fact to consider, not to offer proof as though the court were sitting as the trier of fact. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850 n11, 107 CR2d 841; *Kahn v East Side Union High School Dist.* (2003) 31 C4th 990, 1003, 4 CR3d 103. On the trial court's review of the evidence, see §§36.171-36.183.

NOTE: The burden of persuasion never shifts to the opposing party (see *Padilla v Rodas* (2008) 160 CA4th 742, 747, 73 CR3d 114; *Rosenblum v Safeco Ins. Co.* (2005) 126 CA4th 847, 857, 24 CR3d 427), because the opposing party is required only to demonstrate a triable issue. See California Summary Judgment §§4.37-4.40(Cal CEB 2010).

On application of burdens of production and persuasion depending on which party has the burden of proof at trial, see Summary Judgment chap 4.

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§36.22 3. Burden of Proof

The burden of proof applicable to trial (defined in Evid C §115) has a limited role in summary judgment motions. Specifically, the trial standard for the burden of proof influences only the burden of producing evidence (see CCP §437c(p)) in summary judgment motions. See California Summary Judgment §4.6 (Cal CEB 2010). How a party moving for or opposing summary judgment carries its burden of persuasion or production on a particular issue depends on which party would bear the burden of proof at trial. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841. See Summary Judgment §§4.11-4.13.

NOTE: The required quantum of evidence may also be affected by whether the evidence is direct or circumstantial (see Summary Judgment §§4.17-4.19).

On application of burdens of production and persuasion depending on which party has the burden of proof at trial, see Summary Judgment chap 4.

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§36.23 a. How Trial Burden of Proof Standard Affects Motion

When making a motion for summary judgment or summary adjudication, the moving party carries the initial production burden (see California Summary Judgment §4.6 (Cal CEB 2010)), also called "burden to produce evidence." The standard for that burden is the same as the burden of proof that would be applied at trial. See CCP §437c(p); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. The difference is that the court does not weigh conflicting evidence on a summary judgment motion as is done by the trier of fact at trial. See Summary Judgment §4.13.

Thus, if the burden of proof at trial on an issue to be decided in a summary judgment motion is preponderance of the evidence, the moving party would need to produce sufficient evidence by which a trier of fact could find for the moving party on that standard. See Summary Judgment §4.12. Similarly, if the burden of proof at trial were to be clear and convincing proof, the moving party would have to produce sufficient evidence by which a trier of fact could find for the moving party at that standard.

The burden of proof standards in civil cases vary greatly; they are not all governed by the preponderance standard. For an extensive list, see Jefferson's Evidence Benchbook (4th ed CJA-CEB 2009) §§47.21-47.27.

For further discussion of the application of burdens of production and persuasion depending on which party has the burden of proof at trial, see Summary Judgment chap 4.

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§36.24 b. Effect of Trial Standard of Proof on Prima Facie Case

If a plaintiff moves for summary judgment in a case governed by the preponderance of the evidence standard of proof, it must make a prima facie case that would require a reasonable trier of fact to find each underlying material fact more likely than not. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841. See, *e.g*., *In re Peterson* (2007) 156 CA4th 676, 687, 67 CR3d 584 (in probate action contesting distribution of life insurance proceeds, plaintiff administrator of estate satisfied preponderance standard by submitting authenticated copy of criminal conviction for first degree murder of which trial court took judicial notice).

If a defendant moves for summary judgment in the same type of case, it must either (*Kahn v East Side Union High School Dist.* (2003) 31 C4th 990, 1003, 4 CR3d 103):

- Make a prima facie case that would preclude a reasonable trier of fact from finding that it was more likely than not that a material fact of the claim were true, or
- Show that an element of the claim cannot be established, by presenting evidence that the plaintiff does not have and cannot reasonably obtain the necessary evidence to prove it.

EXAMPLE: In *Paduano v American Honda Motor Co.* (2009) 169 CA4th 1453, 1467, 88 CR3d 90, the defendant demonstrated in its motion for summary adjudication that plaintiff's breach of warranty claim on a vehicle purchase was not supported by the evidence in that the written warranty did not expressly include or exclude "mileage related defects" and the "EPA mileage estimate" did not by itself constitute a warranty. In response, the plaintiff failed to present any evidence suggesting that the low gas mileage was the result of a mechanical defect. The court concluded that the plaintiff did not establish a triable issue of material fact on the warranty with regard to gas mileage.

A defendant moving for summary judgment on an affirmative defense would make a prima facie case in the same manner as the moving party plaintiff described above. See, *e.g., Jessen v Mentor Corp.* (2008) 158 CA4th 1480, 1484, 71 CR3d 714. Similarly, a plaintiff moving for summary judgment on an affirmative defense would make a prima facie case in the same manner as the moving party defendant described above. See, *e.g., Continental Ins. Co. v Columbus Line, Inc.* (2003) 107 CA4th 1190, 133 CR2d 199.

For further discussion of the application of burdens or production and persuasion depending on which party has the burden of proof at trial, see California Summary Judgment chap 4 (Cal CEB 2010).

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§36.25 c. How Trial Court Reviews Evidence

Summary judgment is not affected by the burden of proof at trial in the sense of a party's obligation to establish the requisite degree of belief in the fact finder (see Evid C §115), for the judge has no power to weigh one inference against another or other evidence (CCP §437c(c); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 856, 107 CR2d 841; *Kids Universe v In2Labs* (2002) 95 CA4th 870, 879, 116 CR2d 158). See California Summary Judgment §§2.3, 4.46 (Cal CEB 2010). Rather, the court must determine what any evidence "could show or imply" to the reasonable trier of fact. In doing so, it does not decide any finding of its own but simply decides what finding such a trier of fact could make for itself. 95 CA4th at 879. When the moving and opposing papers in a summary judgment motion show one or more triable issues of material fact, the court must deny the motion. *Aguilar,* 25 C4th at 856. See CCP §437c(c), (g). See §36.3. See also Summary Judgment §4.37.

On the evidentiary issues specifically related to the meeting and shifting burdens, see Summary Judgment chap 4.

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V. TIMING REQUIREMENTS

A. Moving Papers

1. Earliest Date to Move for Summary Judgment or Summary Adjudication

§36.26 a. 60-Days After General Appearance

Any party may move for summary judgment at any time after **60 days** have elapsed from the general appearance of the party against whom the motion is directed, or at an earlier time after that party's general appearance, if the court so orders for good cause shown, with or without notice. CCP §437c(a).

The purpose of the **60-day** waiting period at the beginning of the case is to give the opposing party reasonable time to gather evidence and to obtain discovery before having to appear at a motion that could terminate the action.

PRACTICE TIP: As long as the hearing has been set for a date more than 60 days after the defendant has appeared, the notice of motion may be served and filed within the 60-day period. *Sadleir v Superior Court* (1986) 184 CA3d 1050, 229 CR 374.

For a detailed discussion of general appearance requirement, see California Summary Judgment chap 3 (Cal CEB 2010).

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Source: Civil Litigation/California Civil Procedure Before Trial/36 Summary Judgment/§36.27 b. Exception: Unlawful Detainer

§36.27 b. Exception: Unlawful Detainer

There is an exception to this rule for unlawful detainer and forcible entry or detainer cases, in which a motion for summary judgment may be made at any time after the answer is filed on **5 days'** notice. CCP §1170.7.

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§36.28 c. Judicial Attitude Regarding Early Motions

When a motion for summary judgment or summary adjudication is filed before 60 days after the opposing party's general appearance (see §36.26), the trial court will normally continue the hearing, when requested, to allow a reasonable time for discovery before deciding the motion.

However, if the pleadings are a sham and declarations can dispose of the case promptly, a motion for summary judgment should be made shortly after an answer is filed. See, *e.g., Charpentier v Von Geldern* (1987) 191 CA3d 101, 106, 236 CR 233. Resolving the case early saves the time and expense of prolonged litigation.

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§36.29 2. Latest Date to Make Motion Is 30 Days Before Trial Date

Motions for summary judgment cannot be heard later than **30 days** before the trial date, unless the court orders otherwise for good cause. CCP §437c(a); *Robinson v Woods* (2008) 168 CA4th 1258, 1268, 86 CR3d 241.

PRACTICE TIP: Counsel should check local rules and, if required, contact the clerk of the court to ascertain local procedure for setting hearing date. Many courts assign a law and motion hearing date, and some require counsel to contact the court to reserve a date before the motion is filed and served. See, *e.g.,* San Francisco Ct R 8.2(A)(2)(a). Some courts also limit the days of the week on which they will hear summary judgment motions, which might affect the scheduling of the hearing.

For a detailed discussion of the motion deadlines, see California Summary Judgment chap 3 (Cal CEB 2010).

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§36.30 3. Notice Required: 75 Days

The notice of the motion and supporting papers shall be served on all other parties to the action at least **75 days** before the time appointed for hearing. CCP 437c(a).

CAUTION: Without the parties' consent, the trial court has no authority to shorten the minimum notice period for the hearing of a summary judgment motion (75 days under CCP §437c(a)). *Robinson v Woods* (2008) 168 CA4th 1258, 1262, 86 CR3d 241; *McMahon v Superior Court* (2003) 106 CA4th 112, 115, 130 CR2d 407, 106 CA4th at 115.

For a detailed discussion of notice and service requirements, see Summary Judgment chap 3 and §§6.71-6.72 (Cal CEB 2010).

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§36.31 a. Manner of Service Extends Required Notice

This notice period is extended if service is made by mail. See CCP §437c(a) (time increased by 5 days if address is in California; by 10 days if address is outside California but in United States; and by 20 days if address is outside United States). The notice period is extended by 2 court days if service is by express mail or facsimile transmission. CCP §437c(a). See generally chap 18.

Service by mail. To accommodate the 75-day notice period under CCP §437c, plus additional time for service by mail, the motion cannot be noticed later than **110 days** before the trial date if mailed in California (days before the trial date (30 days), plus the statutory requirement for notice (75 days), plus the shortest additional time for service by mail (5 days)). See CCP §437c(a).

Personal service. If notice is personally served, the motion must be noticed no later than **105 days** before the trial date (days before the trial date (30 days), plus the statutory requirement for notice (75 days)). See CCP §437c(a).

For a detailed discussion of notice and service requirements, see Summary Judgment chap 3 (Cal CEB 2010).

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§36.32 b. Notice Must Be Accompanied by All Supporting Papers

It is insufficient to serve a notice of motion within the statutory parameters without serving the supporting papers simultaneously. "Notice of the motion and supporting papers shall be served" within the time periods set out in the statute. See CCP §437c(a).

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§36.33 c. Good Cause Required for Late Motion

Although the summary judgment statute does not specify what constitutes "good cause," some courts may permit a late motion for a reason such as newly discovered evidence if the attorney submits declarations showing why the evidence could not have been obtained earlier by the exercise of reasonable diligence. Even with trial imminent, given the proper showing, a court might be amenable to a late motion to eliminate the need for trial. However, summary judgment motions are time-consuming for the court, and there must be enough time for all papers to be considered.

NOTE: At least two appellate courts have held that if the trial date has been continued, a summary judgment motion can be set 30 days before the new trial date. *Green v Bristol Myers Co.* (1988) 206 CA3d 604, 609, 253 CR 745 (Second District); *Sentry Ins. Co. v Superior Court* (1989) 207 CA3d 526, 529, 255 CR 13 (Fourth District).

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4. Time for Filing Motion For Summary Judgment or Summary Adjudication in Court

§36.34 a. When to File

As with motions generally, a motion for summary judgment or summary adjudication must be filed at least **16 court days** before the hearing date. CCP §1005(b); Cal Rules of Ct 3.1300(a). Although CCP §437c(a) contains specific requirements for serving moving papers on other parties (see §§36.30-36.32), it does not specifically address the time for filing moving papers with the court.

A proof of service must be filed no later than **5 court days** before the hearing. Cal Rules of Ct 3.1300(c).

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§36.35 b. What to File

Unless local rules otherwise require, the moving party must file one set of original documents with the clerk of court in which the action is pending. CCP §1004; Cal Rules of Ct 3.1302(a).

Proof of service should be filed when the motion is filed. Statutes permitting service by mail are strictly construed, so counsel should be careful to review the proof of service before the motion is filed. See, *e.g., Valley Vista Land Co. v Nipomo Water & Sewer Co.* (1967) 255 CA2d 172, 63 CR 78.

On filing, the moving party must pay the applicable filing fee. Govt C §70617(d).

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B. Opposition Papers

§36.36 1. File and Serve Opposition Papers 14 Days Before Hearing

Any opposition to a motion for summary judgment must be served and filed at least **14 days** before the date of hearing unless for good cause the court orders otherwise. CCP §437c(b)(2). No extension of time is made for service by mail. CCP §437c(b)(2); see CCP §§1005, 1013(a). See §36.37.

Despite any other provision of CCP §1005, all papers opposing a motion shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with CCP §§1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of the next business day after the time the opposing papers are filed. CCP §1005(c) (applying to service of opposition papers regarding motions for summary judgment or adjudication).

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§36.37 2. No Extension if Service by Mail

California Code of Civil Procedure §1013, providing that any period for doing an act must be extended if service is by mail, does not apply to oppositions filed in response to motions for summary judgment, which are specifically governed by CCP §437c(b)(6).

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C. Reply Papers

§36.38 1. File and Serve Reply Papers 5 Days Before Hearing

Any papers in reply to an opposition to a motion for summary judgment or summary adjudication of issues must be served and filed at least **5 days** preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. CCP §437c(b)(4).

Despite any other provision of CCP §1005, all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with CCP §§1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of the next business day after the time the reply papers are filed. CCP §1005(c).

On time periods applicable to service of the moving papers, see CCP §437c(a); §§36.30-36.32.

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§36.39 2. No Extension if Service by Mail

California Code of Civil Procedure §1013(a), providing that any period for doing an act must be extended if service is by mail, does not apply to reply papers filed in support of motions for summary judgment, which are specifically governed by CCP §437c(b)(6).

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D. Filing Cross-Motion for Summary Judgment or Summary Adjudication

§36.40 1. When Appropriate to File Cross-Motions

A party served with a motion for summary judgment or adjudication may file a cross-motion for summary judgment or summary adjudication against the moving party. See, *e.g.*, *Cadence Design Sys. v Avant! Corp.* (2002) 29 C4th 215, 220, 127 CR2d 169; *United Servs. Auto. Ass'n v Pegos* (2003) 107 CA4th 392, 396, 131 CR2d 866. A cross-motion may be appropriate when, *e.g.*, the facts are undisputed and liability turns on the application of statutory or contract language. For factors to consider before deciding to make such a motion, see the diagnostic questions in §36.13.

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§36.41 2. Timing of Cross-Motions

It is efficient for both the court and counsel to argue any cross-motion at the same hearing as the original motion. The other party must be given 75 days' notice before the cross-motion is heard. CCP 437c(a). When service is by mail, the time must be extended in accordance with CCP §437c(a). If there are fewer than 75 days before the hearing on the original summary judgment motion, the opposing party should move to continue the original date to accommodate the notice period required for the cross-motion or apply ex parte for an order shortening time before the cross-motion is heard. On procedures for ex parte motions generally, see chap 13.

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§36.42 3. Checklist: Cross-Motions

To make cross-motion for summary judgment, summary adjudication, or both:

- Follow procedures outlined in §§36.52-36.99 for making motion.
- Move to continue hearing date if necessary to meet 75-day notice requirement or apply for order shortening time (CCP §437c(a)).
- File and serve papers for cross-motion (together with opposition papers to moving party's motion, if desired) at least 75 days before hearing date (CCP §437c(a)) and extend time for service of motion if service is by mail (see §§36.30-36.32).
- File and serve reply to moving party's response to cross-motion at least 5 days before hearing date (CCP §437c(b)(4)) (see §§36.38-36.39).

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§36.43 E. Requesting a Continuance

The court has inherent discretionary power to allow a party to amend the pleadings, to engage in further discovery, or to file supplemental declarations, and to grant continuances for those purposes. See CCP §437c(h); see *Bahl v Bank of America* (2001) 89 CA4th 389, 395, 107 CR2d 270. See also *Lerma v County of Orange* (2004) 120 CA4th 709, 717, 15 CR3d 609 (serious illness of attorney is good cause for granting continuance of summary judgment motion).

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1. Continuance to Amend Pleadings

§36.44 a. Timing of Motion to Amend Pleadings

When an amendment is needed to cure a defect in the pleadings, or to accommodate argument opposing a motion for summary judgment, the opposing party should serve, file, and set a formal motion for hearing to amend the pleadings before the date scheduled for the summary judgment motion. The motion to amend should not be heard on the same day as the summary judgment motion, because the amendment may make the motion for summary judgment moot. On procedures for noticed motions generally, see chap 12. On procedures for amending pleadings generally, see chap 16 (amended and supplemental complaints).

If there is not enough time before the summary judgment hearing to give proper notice on the motion to amend, the party seeking amendment may request a continuance of the hearing on the motion for summary judgment (see §36.45) or an order shortening time before the motion to amend is heard. On ex parte motions, including motions to shorten time, see chap 13.

When the defect in pleading is not discovered until the hearing on the summary judgment motion, an oral motion may be made during the hearing (see §§36.45-36.46).

On continuances by the opposing party to conduct further discovery, see §§36.48-36.51.

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§36.45 b. Oral Motion to Continue Hearing

If defects in the pleadings or papers first come to light at the hearing itself, counsel may move orally for a continuance. See *Stalnaker v Boeing Co.* (1986) 186 CA3d 1291, 1302, 231 CR 323 (court has discretion to delay ruling on summary judgment motion until amendment process is complete).

PRACTICTE TIP: It is wise to later file a declaration in support of the motion for continuance, to preserve the record in the event that a petition for a writ of mandate is filed after the motion is denied. See *American Continental Ins. Co. v C & Z Timber Co.* (1987) 195 CA3d 1271, 1280, 241 CR 466 (generalized statements in opposition papers of need to develop facts, in absence of declaration or affidavit, did not preserve issue of continuance needed for further discovery on appeal). On moving for continuance before the hearing, see §36.44.

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§36.46 c. Oral Motion to Amend Pleadings

Alternatively, counsel for the party seeking an amendment may make an oral motion to amend the pleadings at the hearing. If the amendment is not extensive, counsel may ask the court's permission to amend by alteration on the face of the pleading and request the court or clerk to initial all alterations. See Cal Rules of Ct 3.1324(d). Or, as in trial, counsel may move orally to amend the pleadings to conform to proof. If possible, counsel should either have the amended pleadings on hand to present to the court or prepare and file them soon after the hearing. For further discussion, see California Trial Practice: Civil Procedure During Trial §§18.103-18.123 (3d ed Cal CEB 1995).

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§36.47 d. Diligence Required

Diligence in seeking to amend is an important factor in obtaining leave of court. See, *e.g., Fisher v Larsen* (1982) 138 CA3d 627, 649, 188 CR 216 (trial court's denial of leave to amend justified because plaintiff had knowledge of defendants' motions for summary judgment for 5 months but delayed amending complaint). If no effort to amend is made, or if a motion is not diligently pursued, it is not an abuse of discretion for the court to deny permission to amend the pleadings.

On formal motion to amend pleadings before the hearing, see §36.44. On procedures for amending complaints, see generally chap 16.

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2. Continuance to Conduct Further Discovery

§36.48 a. Grounds for Continuance

The court may grant a continuance to permit the party opposing the motion for summary judgment to obtain affidavits or make discovery. CCP §437c(h). When the opposing party submits an affidavit showing that essential facts may exist but that it cannot present them in a timely manner, the court must either deny summary judgment or grant a continuance. *Dee v Vintage Petroleum, Inc.* (2003) 106 CA4th 30, 34, 129 CR2d 923.

The nonmoving party seeking a continuance when facts are not yet available must show (*Frazee v Seely* (2002) 95 CA4th 627, 633, 115 CR2d 780):

- The facts to be obtained are essential to opposing the motion;
- There is reason to believe such facts may exist; and
- The reasons additional time is needed to obtain these facts.

The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion for summary judgment is due. CCP §437c(h).

NOTE: Some local court rules may affect continuances under §437c(h). Even when not required by local rule, it is good practice to provide the court with an estimate of the time required and steps necessary to obtain the outstanding evidence in the opposing declaration in order to add credibility to the request.

Even if the motion for summary judgment is not premature, the court still may grant requests for additional discovery. See, *e.g., Hunter v Pacific Mechanical Corp.* (1995) 37 CA4th 1282, 44 CR2d 335 (court continued motion to permit additional discovery after discovery had closed; plaintiff still unable to meet burden of establishing genuine factual dispute) disapproved on other grounds in *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 854 n 23, 107 CR2d 841. See also *Nazar v Rodeffer* (1986) 184 CA3d 546, 556, 229 CR 209.

For discussion of continuances generally, see chap 42.

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§36.49 b. Declaration Supporting Continuance for Further Discovery

An opposing party who has not developed the facts needed to oppose the motion can move for a continuance on a showing by affidavit or declaration that controverting evidence may exist but for the reasons stated cannot yet be presented. CCP §437c(h). When the party requesting a continuance has made a showing that facts essential to justify opposition to the motion for summary judgment exist, the court must continue the summary judgment hearing, or deny the motion, or make any other just order. CCP §437c(h). See *Nazar v Rodeffer* (1986) 184 CA3d 546, 556, 229 CR 209; *Fisher v Larsen* (1982) 138 CA3d 627, 648, 188 CR 216.

Assertions in the opposition papers about the need for additional discovery are not a substitute for affidavits or declarations. A showing by affidavit is specifically required. CCP §437c(h); *American Continental Ins. Co. v C & Z Timber Co.* (1987) 195 CA3d 1271, 1280, 241 CR 466 (generalized statements in memorandum in opposition to summary judgment regarding need to develop facts did not, absent detailed affidavit, establish need for continuance).

The opposing affidavit or declaration need not contain evidentiary facts going to the merits of the case. It must, however, state facts demonstrating a likelihood that controverting evidence exists and detailing why that evidence cannot be obtained in time to respond to the motion. Courts are seldom receptive to vague and general affidavits or declarations that fail to track the statutory requirements. A continuance may be denied when the facts to be presented later were not relevant to the litigation and therefore were not "essential to justify opposition" under CCP §437c(h). *Coast-United Advertising, Inc. v City of Long Beach* (1975) 51 CA3d 766, 773, 124 CR 487.

On motions for continuance, generally, see chap 42.

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c. Diligence Required

§36.50 (1) Party Seeking Continuance Must Establish It Could Not Have Found Evidence Earlier

When a lack of diligence results in a party's having insufficient information to know whether facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit under CCP §437c(h), the trial judge may deny the request for continuance of the motion. *Desaigoudar v Meyercord* (2003) 108 CA4th 173, 190, 133 CR2d 408. See also *Cooksey v Alexakis* (2004) 123 CA4th 246, 19 CR3d 810 (in determining whether to grant party responding to summary judgment motion continuance for discovery under CCP §437c(h), trial court may consider whether that party has been diligent in completing discovery).

In deciding whether a continuance is appropriate, courts will consider whether it is reasonable for the opposing party not to have procured outstanding evidence earlier. The progress of the litigation is an important factor in that determination. A continuance may be denied if there has been ample time to obtain the desired information previously but the opposition has been dilatory.

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§36.51 (2) Court Has Limited Discretion to Grant Continuance in Absence of Diligence

When a party submits an affidavit demonstrating that facts essential to justify opposition may exist, but have not been presented to the court, because the party has not been diligent in searching for the facts through discovery, the court's discretion to deny a continuance is strictly limited. The policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency. *Bahl v Bank of America* (2001) 89 CA4th 389, 396, 107 CR2d 270. Even when a continuance is not mandatory because a party has failed to make the showing required by CCP §437(h), there may still be good cause to grant a continuance. See *Lerma v County of Orange* (2004) 120 CA4th 709, 15 CR3d 609 (serious illness of attorney is good cause for granting continuance of summary judgment motion).

PRACTICE TIP: Although CCP §437c(h) does not require the party seeking a continuance of a summary judgment motion to provide the court with an estimate of the time required and procedures necessary to obtain the outstanding evidence, including this information in a declaration in support of the motion is good practice because it adds credibility to the request. For discussion of affidavits and declarations in support of motion for summary judgment, see §§36.106-36.114.

If, after granting a continuance to allow specified additional discovery, the court finds that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication. This section does not affect or limit the ability of any party to compel discovery under the Civil Discovery Act (CCP §§2016.010-2036.050). CCP §437c(i).

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VI. REQUIRED DOCUMENTS

§36.52 A. Moving Papers

A motion for summary judgment or summary adjudication (or both) must contain and be supported by the following documents (CCP §437c; Cal Rules of Ct 3.1350(c)):

- Notice of motion (see §§36.53-36.56);
- Supporting memorandum (see §§36.57-36.61);
- Separate statement of undisputed material facts (see §§36.62-36.66);
- Request for judicial notice, if appropriate (see §36.67); and
- Evidentiary and supporting papers proving underlying facts of motion (see §§36.68-36.70).

Certain documents are not required to be filed in support of a motion for summary judgment or summary adjudication but can be useful and sometimes necessary to a successful motion. These documents include:

- Proposed order granting summary judgment or summary adjudication;
- Joinder in motion; and
- Ex parte request for relief from page limits (and proposed order).

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1. Notice of Motion

§36.53 a. Contents of Notice

A notice of motion for summary judgment or summary adjudication must be a document distinct from the separate statement of undisputed facts and supporting memorandum. Cal Rules of Ct 3.1350(c)(1)-(3). The notice of motion must identify the time, date, and place of the hearing (CCP §1010), as well as:

- The nature of the relief sought, *i.e.,* summary judgment, summary adjudication, or both (Cal Rules of Ct 3.1110(a));
- The specific grounds on which motion is made (CCP §1010; Cal Rules of Ct 3.1110(a));
- The identity of each party against whom the motion is directed;
- All documents on which the moving party is relying (CCP §1010); and
- The nature of any attached document**,** except an exhibit.

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§36.54 (1) When Seeking Summary Adjudication

If the motion is for summary adjudication, the notice must also specify the "specific cause of action, affirmative defense, claims for damages, or issues of duty" sought to be summarily adjudicated. Cal Rules of Ct 3.1350(b). Although not required, the moving party should include a citation to the numbered undisputed facts that support each cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication is sought, creating an outline of the motion for the court.

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§36.55 (2) When Requesting Judicial Notice

The moving party should state in the notice of motion that it is requesting judicial notice, *e.g.,* "Notice is also given that judicial notice is requested of the matters set forth in the accompanying Request for Judicial Notice." Cal Rules of Ct 3.1110(a).

On request for judicial notice, see §36.67.

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§36.56 b. Format of Notice

The moving party should attach the notice of motion to the supporting memorandum (see §§36.57-36.61). Cal Rules of Ct 3.1113(j). The notice of motion should follow the rules governing the format of court papers generally. See Cal Rules of Ct 3.1110(b); chap 11.

In both the title and the body of the notice, the moving party should specifically name the party against whom the motion is directed, rather than designating "All Parties And Their Attorneys Of Record." Cal Rules of Ct 3.1112(d). This is particularly important in complicated cases with numerous parties. The caption should include, beneath the number of the case, the following information:

- Title of the document;
- Hearing judge (if ascertainable);
- Date the action was filed;
- Trial date (if set); and
- Date, time, and location of the hearing.

EXAMPLE: In a summary judgment motion against a defendant, the title of the notice of motion might read: "NOTICE OF MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT ABC CO., INC."

On preparing a notice of motion generally, see §§12.8-12.29.

For sample notice of motion for summary judgment or summary adjudication, see §36.216.

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§36.57 2. Supporting Memorandum

A summary judgment motion must be supported by a memorandum. Cal Rules of Ct 3.1350(c)(3). The supporting memorandum provides the court with a summary of facts, statutes, case law, and legal argument in support of the motion. The memorandum should demonstrate what the facts actually prove and how legal authorities relate to those facts. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841.

WARNING: The court may construe a failure to file a supporting memorandum as an admission that the motion is not meritorious, and deny it. Cal Rules of Ct 3.1113(a).

PRACTICE TIP: Reference to cases restating general principles of summary judgment law is seldom necessary; rather the memorandum should clearly connect the issues and the authorities supporting the moving party's position on those issues. Cal Rules of Ct 3.1113(b). Most, if not all, memorandums cite to *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841 and CCP §437c.

For a sample form of memorandum, see §36.217.

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§36.58 a. Contents of Supporting Memorandum

The supporting memorandum should include (Cal Rules of Ct 3.1113(b)):

- Statement of facts;
- "Concise" statement of the law that applies to all elements of:
- Causes of action or defenses (or claims for damages or issues of duty) that the moving party must establish; or
- Separate causes of action or defenses, issues of punitive damages, or issues of duty that the moving party claims are undisputed;
- Evidence and arguments; and
- Discussion of the statutes, cases, and treatises cited in support of the motion. That is counsel should relate evidence to the legal authorities provided.

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§36.59 b. Optional Summary of Issues and Evidence

Although not required by statute, it may be to the moving party's advantage to include a brief (1- to 2-page) summary of the issues and evidence in the supporting memorandum so that the court will not have to glean the information from the entire file. The judge who rules on a summary judgment motion rarely has background knowledge of the facts and issues in the case. A summary, which immediately orients the court to the salient facts and where the disputes lie, can make the motion more persuasive. This is especially important in complicated cases with multiple parties and cross-actions.

Another effective and often-used method of presenting fact issues is by a detailed statement of facts, with references to the record, which can be made at the beginning of the supporting memorandum.

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§36.60 c. Other Requirements

The memorandum must include a table of contents, table of authorities, and an opening summary of argument. Cal Rules of Ct 3.1113(e). The memorandum does not need to be organized by causes of action. *Hope Int'l Univ. v Superior Court* (2004) 119 CA4th 719, 731, 14 CR3d 643. On the opening summary of issues and evidence, see §36.59.

For a sample form of memorandum, see §36.217.

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§36.61 d. Memorandum Limited to 20 Pages

In a summary judgment or adjudication motion, no opening memorandum may exceed 20 pages. Cal Rules of Ct 3.1113(d). This page limit does not include exhibits, declarations, attachments, a table of contents, a table of authorities, or the proof of service. Cal Rules of Ct 3.1113(d). On pagination of the memorandum, see Cal Rules of Ct 3.1113(h). The motion must be printed on recycled paper. Cal Rules of Ct 2.101.

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3. Separate Statement of Undisputed Facts

§36.62 a. Purpose of Separate Statement

Papers filed in support of a motion for summary judgment or summary adjudication must include "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed." CCP §437c(b)(1); *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 117, 94 CR3d 109 (summary judgment procedure requires moving party "to support its motion with evidence in the relatively elaborate form of separate statements"); *Fleet v CBS, Inc.* (1996) 50 CA4th 1911, 1916 n3, 58 CR2d 645. On opposing party's response, see §36.72.

The purpose of a separate statement of undisputed facts is to:

- Provide the court with a document that plainly and concisely specifies all material facts claimed to be undisputed (CCP §437c(b)(1));
- Provide the court with clear reference to evidence supporting each material fact (Cal Rules of Ct 3.1350); and
- Afford due process to opposing parties (*State ex rel Harris v PricewaterhouseCoopers LLP* (2005) 125 CA4th 1219, 1262 n28, 23 CR3d 529, rev'd on other grounds (2006) 39 C4th 1220, 48 CR3d 144; *United Community Church v Garcin* (1991) 231 CA3d 327, 335, 282 CR 368).

The statutory mandate for a separate statement requires a party to specify within that document any facts he or she deems to be disputed facts material to the issue presented. *Mills v Forestex Co.* (2003) 108 CA4th 625, 640, 134 CR2d 273. The statement serves two functions: (1) to give the opponent notice of the facts and (2) to permit the trial court to focus on the facts germane to the issues. See also *Magana Cathcart McCarthy* 174 CA4th at 117, citing *United Community Church, supra* ("Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to […] determine quickly and efficiently whether material facts are disputed").

NOTE: The separate statement of facts is not a "pleading." CCP §422.10. Because judicial admissions may be made only in a pleading, by stipulation, or in response to a request for admission, facts accepted as true for the purpose of summary judgment and included in the separate statement of facts cannot be characterized as judicial admissions. *Myers v Trendwest Resorts, Inc.* (2009) 178 CA4th 735, 746, 100 CR3d 658 (affirming denial of plaintiff's motion for judgment notwithstanding verdict after jury found defendant had not sexually harassed plaintiff, even though defendant had previously admitted in its separate statement of facts that plaintiff had been harassed).

On requirement of separate statement, see California Summary Judgment §§6.21-6.22 (Cal CEB 2010).

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§36.63 b. Effect of Failure to File Separate Statement

All facts necessary to grant the motion should be contained in the separate statement. The moving party's failure to comply with the separate statement requirements is a sufficient ground for denying the motion. CCP §437c(b)(1); *Teselle v McLoughlin* (2009) 173 CA4th 156, 168, 92 CR3d 696.

JUDICIAL PERSPECTIVE: The summary judgment motion should be based on the statement of undisputed facts. Unless all the material facts supporting the motion are provided in the statement, many judges will deny the motion, even if the facts are included in a declaration or in some other evidence filed in support of the motion. See *e.g.*, *Mills v Forestex Co.* (2003) 108 CA4th 625, 640, 134 CR2d 273, (if it is not stated in the statement of facts, it does not exist).

PRACTICE TIP: A trial court may not grant a party's motion to join in another party's summary judgment motion if it does not contain its own separate statement. *Frazee v Seely* (2002) 95 CA4th 627, 636, 115 CR2d 780.

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§36.64 c. Separate Statement Content Requirements

The separate statement must separately identify (Cal Rules of Ct 3.1350(d)):

- Each cause of action, claim for damages, issue of duty, or affirmative defense;
- Each supporting material fact claimed to be undisputed with respect to each cause of action, claim for damages, issue of duty, or affirmative defense; and
- Supporting evidence that establishes those undisputed facts, with citations to the evidence for each fact, including references to exhibits, titles, and page and line numbers.

The moving party cannot rely on the allegations or denials of its pleadings to show the existence of a triable issue of material fact; the moving party must identify all material undisputed facts that support each necessary element of a cause of action, defense, claim for damages, or issue of duty. See CCP §437c(c).

All undisputed facts listed in the separate statement must be material, *i.e.,* those that tend to prove or disprove an element of the cause of action or defense. A factual issue is nonmaterial when it has no significance in determining the outcome of the case.

Explanatory facts, *e.g.,* facts about the background of the case, may be immaterial. To make the court aware of explanatory facts, albeit immaterial, counsel should include them in the supporting memorandum (with citations to supporting evidence), not in the separate statement.

For each material, necessary, and accurate fact, the moving party must identify supporting evidence. See, *e.g., Union Bank v Superior Court* (1995) 31 CA4th 573, 37 CR2d 653 (moving defendant could rely on plaintiffs' Judicial Council form interrogatory answers as evidentiary basis for its separate statement). As with all evidence, this evidence must have a sufficient foundation and be admissible. On supporting evidence, see §§36.100-36.144.

NOTE: A summary adjudication motion made in the alternative may refer to and depend on the same evidence submitted in support of the summary judgment motion. If summary adjudication is sought, however, the separate statement must link each undisputed material fact to the specific cause of action, affirmative defense, claim for damages, or issue of duty, which must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement. Cal Rules of Ct 3.1350(b).

On contents of separate statement, see California Summary Judgment §§6.24-6.31 (Cal CEB 2010).

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d. Separate Statement Format Requirements

§36.65 (1) Two-Column Requirement

The required contents of the separate statement must be presented in a two-column format:

- The first column lists the undisputed facts in numerical sequence, followed by the supporting evidence that establishes the undisputed facts, with references to exhibits, titles, and page and line numbers (Cal Rules of Ct 3.1350(d));
- The second column should be left blank by the moving party (to await opposing party's evidence) (Cal Rules of Ct 3.1350(h)).

For a sample form of separate statement, see §36.219.

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§36.66 (2) Electronic Version Requirement

Within 3 days of a request, the moving party must provide to any other party or the court an electronic version of its separate statement. The electronic version may be provided in any form on which the parties agree. If the parties cannot agree on the form, the moving party must provide the electronic version of the separate statement that it used to prepare the document filed with the court. The moving party is not required, however, to create an electronic version or any new version of any document to transmit to the requesting party. Cal Rules of Ct 3.1350(i).

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§36.67 4. Request for Judicial Notice

A request for judicial notice listing the specific matters for which notice is requested must be made in a separate document. Cal Rules of Ct 3.1113(*l*), 3.1350(c)(5) (moving party), 3.1350(e)(4) (opposing party). For sample request, see §§12.143.

The request should identify facts and issues that are supported by the matters to be judicially noticed, *e.g.,* that complaint on file in another case shows that plaintiff discovered his or her alleged injury long ago, and the statute of limitations has run on the present claim. These facts and issues should also be identified in the separate statement of undisputed material facts. On moving party's separate statement, see §§36.62-36.66; on opposing party's separate statement, see §§36.75-36.80.

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§36.68 5. Evidence in Support of Motion

A summary judgment motion must be supported by evidence establishing the moving party's right to the relief sought. CCP §437c(b)(1). If the moving party contends that an issue of fact lacks support in the record, "it must set forth all the material evidence on the point and not merely the evidence favorable to it." *Rio Linda Unified Sch. Dist. v Superior Court* (1997) 52 CA4th 732, 740, 60 CR2d 710.

Counsel should incorporate and properly attach the supporting evidence to the moving papers. All documents should be clearly labeled, and tabbed if necessary or useful, so that the court can easily locate relevant materials while reviewing the papers.

On types and admissibility of evidence, see §§36.100-36.144. On discovery evidence, see §§36.122-36.129. On format of supporting evidence, see §§36.68-36.70. On objecting to evidence presented in opposition to the motion, see §§36.81-36.86.

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§36.69 a. Format of Evidence in Support of Motion

If the evidence in support of the motion exceeds 25 pages, it must (Cal Rules of Ct 3.1350(g)):

- Be bound in a separate volume, and
- Include a table of contents.

The pages of each exhibit should be bound together at the top to permit easy page turning. Cal Rules of Ct 3.1110(e). In addition, each exhibit must be separated by a hard 8½ by 11 sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. There also must be an index to exhibits. Cal Rules of Ct 3.1110(f).

NOTE: Pages from a single deposition and associated exhibits must be designated as a single exhibit. Cal Rules of Ct 3.1110(f).

Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter. Cal Rules of Ct 3.1110(g).

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§36.70 b. Prepare Deposition as Exhibit

The are several technical requirements for use of a deposition as an exhibit, among them:

- Stating the deponent's name and the date of the deposition on the first page of the deposition (Cal Rules of Ct 3.1116(a));
- Including only relevant pages of transcript (other than the title page) and clearly showing the original deposition page number at the bottom of each page (Cal Rules of Ct 3.1116(b)); and
- Marking all relevant portions of the deposition testimony to call attention to it, *e.g.,* by highlighting with a marker or underlining (Cal Rules of Ct 3.1116(c)).

PRACTICE TIP: It is preferable to underline rather than highlight the relevant deposition testimony, because it reproduces more clearly and will be easier to read on appeal.

Unless local rules provide otherwise, lodge the original deposition transcript with the court clerk, who will return the material after the court rules on the motion. Cal Rules of Ct 3.1302. Counsel must include a self-addressed stamped envelope with the lodged material. Cal Rules of Ct 3.1302(b).

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§36.71 6. Checklist for Preparing Moving Papers

- Consider advantages and disadvantages of motion (see §§36.10-36.12)
- Calculate time for serving motion (see §§36.26-36.35)
- Gather and authenticate supporting evidence:
- Declarations and affidavits (see §§36.106-36.121)
- Evidence obtained through discovery responses:
- Deposition testimony (see §§36.123-36.126)
- Interrogatories and Requests for Admissions (see §36.127)
- Documents produced in response to demands for inspections (see §36.128)
- Results of mental and physical examinations (see §36.129)
- Judicial admissions and stipulations (see §§30.130-36.134)
- Matters to be judicially noticed (see §36.135)
- Prepare moving papers:
- Notice of motion (see §§36.53-36.56)
- Supporting memorandum (see §36.57-36.61)
- Separate statement specifying (see §§36.62-36.66):
- All material facts that moving party contends are undisputed
- References to supporting evidence as to each such material fact
- Request for judicial notice (see §36.67)
- Evidence in support of motion (see §§36.68-36.70)
- Contact court to set hearing date: At least 30 days before trial date (see §36.29)
- File and serve moving papers: Serve at least 75 calendar days before hearing date (CCP §437c(a)) and extend time if service is by mail, express mail, or facsimile transmission (see §§36.30-36.33); file at least 16 days before hearing (CCP §1005(b); Cal Rules of Ct 3.1300(a)) (see §§36.34-36.35)

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B. Opposition Papers

§36.72 1. Documents in Opposition to the Motion

The opposition to a motion for summary judgment, summary adjudication, or both must consist of the following documents, separately stapled and titled as shown (CCP §437c(b)(3); Cal Rules of Ct 3.1350(e)):

- The opposing party's memorandum (see §§36.73-36.74);
- The opposing party's separate statement of undisputed material facts (see §§36.75-36.80);
- The opposing party's evidence (see §§36.87-36.89); and
- The opposing party's request for judicial notice (see §36.67).

The following documents are optional, but often useful, in opposing a summary judgment or summary adjudication motion:

- Opposing party's objections to the moving party's evidence (see §§36.81-36.86);
- Ex parte application to continue the hearing (see §§36.29-36.51); and
- Proposed order denying the motion (see §36.90).

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2. Opposing Memorandum

§36.73 a. Contents of Opposing Memorandum

The opposition to a summary judgment motion must be supported by a memorandum. Cal Rules of Ct 3.1350(e)(1). The opposing party's memorandum should:

- Specify the material fact(s) that are clearly in dispute, with references to evidence showing the controversy;
- Meet each argument raised in moving party's memorandum;

PRACTICE TIP: Whenever possible, the opposing memorandum should mirror the moving party's memorandum so that the judge will not overlook specific opposing points and will more easily grasp why the motion should be denied.

- Include citations holding that the moving party has the burden of showing there is no triable issue of fact (see §§36.14-36.25); and
- Distinguish or otherwise negate cases supporting the moving party's position.

PRACTICE TIP: The opposing party's memorandum will be more credible if it does not ignore cases that support the moving party's position. Instead, distinguish such cases and provide the court with a clear reason why they do not apply.

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§36.74 b. Format for Opposing Memorandum

The format requirements for the opposing memorandum are the same as for the supporting memorandum: It must not exceed 20 pages, apart from exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service. Cal Rules of Ct 3.1113(d). On format for memorandum, see §§36.58-36.61.

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§36.75 3. Opposing Party's Separate Statement

The party opposing a summary judgment motion must submit a separate statement of disputed and undisputed facts corresponding to the moving party's separate statement. *Lewis v County of Sacramento* (2001) 93 CA4th 107, 113 CR2d 90 (in opposition to motion, plaintiff must submit separate statement with specific facts that show triable issue of material fact exists).

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§36.76 a. Failure of Opposing Party to Submit Separate Statement

The opposing party's failure to file an adequate responsive statement is a sufficient ground, in the court's discretion, to grant the summary judgment motion. CCP §437c(b)(3); *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 94 CR3d 288 (no error to grant summary judgment when defendants made prima facie showing of entitlement to judgment and plaintiffs failed to file separate statement); *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 576, 88 CR3d 363 (deficiencies in separate statement were substantive and not curable procedural defects).

An immediate grant of summary judgment is usually too harsh a consequence for failure to file an adequate opposing separate statement. "[T]he proper response in most instances, if the trial court is not prepared to address the merits of the motion in light of the deficient separate statement, is to give the opposing party an opportunity to file a proper separate statement.… " *Parkview Villas Ass'n v State Farm Fire & Cas. Co.* (2005) 133 CA4th 1197, 1211, 35 CR3d 411. See also *Teselle v McLoughlin* (2009) 173 CA4th 156, 160, 92 CR3d 696 (abuse of discretion to impose terminating sanction for violation of procedural rule; although opposing party filed separate statement one day late, moving party timely replied and court had time to consider papers before hearing). In rare cases, the court may decide to consider the merits of the opposition, despite the lack of a separate statement. See *Gilbertson v Osman* (1986) 185 CA3d 308, 315, 229 CR 627 (court considered merits despite lack of separate statement because case involved "single, simple issue" with little evidentiary support), disapproved on other grounds in *Woods v Young* (1991) 53 C3d 315, 328 n4, 279 CR 613.

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Source: Civil Litigation/California Civil Procedure Before Trial/36 Summary Judgment/§36.77 b. Contents of Separate Statement

§36.77 b. Contents of Separate Statement

The opposition separate statement must (CCP §437c(b)(3)):

- Respond to each of the material facts claimed to be undisputed;
- Plainly and concisely list any other material fact the opposing party contends are disputed; and
- Reference each material disputed fact to supporting evidence.

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§36.78 c. Format of Separate Statement

The separate statement filed in opposition must follow the format set out in the sample in Cal Rules of Ct 3.1350(h). For sample separate statement in opposition to motion for summary judgment or summary adjudication, see §36.222.

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§36.79 (1) Two-Column Format

The opposing party's separate statement must use a two-column format (Cal Rules of Ct 3.1350(f):

- The first column repeats each material fact claimed by the moving party to be undisputed, followed by the evidence advanced by the moving party to establish that fact, and
- The second column, directly opposite the recitation of each of the moving party's undisputed facts, states whether the fact is "disputed" or "undisputed."

As to those facts that are disputed, the opposing party must (Cal Rules of Ct 3.1250(f)):

- State the nature of the dispute, and
- Describe the evidence supporting the position that the fact is controverted, with citation to exhibit, title, page, and line numbers in the evidence submitted.

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§36.80 (2) Request Electronic Copy of Moving Party's Separate Statement

The opposing party should request an electronic copy of the moving party's separate statement immediately to avoid having to retype the information into the first column. See Cal Rules of Ct 3.1350(i) (on request, moving party must within **3 days** provide electronic version of its separate statement if one exists). On the moving party's responsibility to provide an electronic version of the separate statement on request, see §36.66.

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§36.81 4. Objections to Moving Party's Evidence

Evidentiary objections are an important part of any opposition. To determine whether the moving papers show that there is no triable issue as to any material fact, the court must necessarily first decide what admissible evidence it has before it. *Hollywood Screentest, Inc. v NBC Universal, Inc.* (2007) 151 CA4th 631, 642, 60 CR3d 279. See CCP §437c(c) (court must consider all evidence in papers, "except that to which objections have been made and sustained by the court").

The procedure for making objections and ensuring the existence of a proper record is provided in Cal Rules of Ct 3.1352 and 3.1354. See *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 782, 97 CR2d 140. Objections may be submitted in writing before the hearing (see §§36.82-36.85) or made orally at hearing (see §36.86).

PRACTICE TIP: Written objections allow the court sufficient time to review the evidence offered and objections made. This is especially important in large cases with complicated facts or complex claims. Because the court's decision is based on evidence (or lack thereof), the best practice is to submit written objections so the court can consider the objections before rendering a tentative decision.

On evidentiary objections, see §§36.145-36.159.

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a. Written Objections to Evidence

§36.82 (1) Timing for Written Objections

Written objections must be served and filed at the same time the objecting party serves and files its opposition or reply papers. On a showing of good cause, the court may allow the party to file its objections at a different time. Cal Rules of Ct 3.1354(a).

On when a party must file its opposition or reply papers, see §§36.36, 36.38.

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§36.83 (2) Format for Written Objections

The objecting party must serve and file written objections separately from the other papers in support of or in opposition to the motion. Although the objecting party may reference objections in the right column of the separate statement, the party may not restate or reargue the objections in the separate statement. Cal Rules of Ct 3.1354(b).

In formatting the written objections, an objecting party must number each objection consecutively and (Cal Rules of Ct 3.1354(b)(1)-(4)):

- Identify the name of the document in which the specific objectionable material is located;
- State the exhibit, title, page, and line number of the objectionable material;
- Quote or set forth the objectionable statement or material; and
- State the grounds for each objection to that statement or material.

The Rules of Court specify two alternate formats for written objections; counsel must follow one for its written objections. Cal Rules of Ct 3.1354(b).

EXAMPLE 1: The first permissible format specified by Cal Rules of Ct 3.1354(b) appears as follows:

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7-8.)

Grounds for Objection 1: Hearsay (Evid. Code, §1200); lack of personal knowledge (Evid. Code, §702(a)).

EXAMPLE 2: The second permissible format specified by Cal Rules of Ct 3.1354(b) appears as follows:

Objections to Jackson Declaration

Material Objected to:	**Grounds for Objection:**
Jackson declaration, page 3, lines 7-8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, §1200); lack of personal knowledge (Evid. Code, §702(a)).

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§36.84 b. Waiver if No Ruling Obtained

Evidentiary objections not made at the hearing are waived (CCP §437c(b)(5)), as are objections to declarations (and affidavits) or a declarant's personal knowledge or competence to testify (CCP §437c(d)). See §§36.146. If a trial court fails to rule on evidentiary objections, then the objections are ordinarily deemed waived on appeal. *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 254, 100 CR3d 296 (defendant's objections to plaintiff's evidence deemed waived because court did not expressly rule on individual objections). See §§36.147-36.148, 36.164, 36.168, 36.200-36.204.

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§36.85 c. Proposed Order

When a party submits written objections, it must also submit a proposed order. The proposed order must include a place for the court to indicate its ruling on each objection (sustained or overruled) and a place for the judge's signature. The Rules of Court specify two alternate formats for a proposed order on the written objections; counsel must submit a proposed order following one of the two formats. Cal Rules of Ct 3.1354(c).

EXAMPLE 1: The first permissible format specified by Cal Rules of Ct 3.1354(c) appears as follows:

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7-8.)

Grounds for Objection 1: Hearsay (Evid. Code, §1200); lack of personal knowledge (Evid. Code, §702(a)).

Court's Ruling on Objection 1:	**Sustained: _____** **Overruled: _____**

EXAMPLE 2: The second permissible format specified by Cal Rules of Ct 3.1354(c) appears as follows:

Objections to Jackson Declaration

Material Objected to:	**Grounds for Objection:**	**Ruling on the Objection**
1. Jackson declaration, page 3, lines 7-8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, §1200); lack of personal knowledge (Evid. Code, §702(a)).	**Sustained: _____** **Overruled:_____**
Date: _____		**_____** **Judge**

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§36.86 d. Oral Objections

As an alternative to filing written objections, a party may raise its objections orally at the summary judgment hearing. See CCP §437c(b)(5). The objecting party must arrange for a court reporter to attend the hearing to record the objections for the record. Cal Rules of Ct 3.1352.

PRACTICE TIP: Presenting written objections before the hearing is almost always preferable to making oral objections. Because the court usually will reach a tentative ruling before the hearing, written objections are the best method to ensure that the objections will be given full consideration. Although the statute does not distinguish between written and oral objections, oral objections may be given less weight because the court may not have sufficient time or means to study the basis for the objection. If oral objections must be made, however, prepare them before the hearing and read them into the record.

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§36.87 5. Evidence in Opposition to Motion

To defeat a summary judgment motion, the opposing party must produce evidence showing at least one triable issue of material fact. See CCP §437c(b)(3). See also *Shepherd v Jones* (1982) 136 CA3d 1049, 1062, 186 CR 708 (opposing papers cannot merely assert that jury trial is opponent's right without any evidence on issues raised in motion). To defeat a summary adjudication motion, the opposing party must show that there is a triable issue of material fact as to the challenged causes of action, punitive damages claims, or defenses. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. If the opposing party fails to counter the moving party's affidavits or declarations, the moving party's evidence will be accepted as true. *Melorich Builders, Inc. v Superior Court* (1984) 160 CA3d 931, 935, 207 CR 47.

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§36.88 a. Format for Opposition Evidence

The format for evidence in opposition to a summary judgment motion is subject to the same rules as for supporting evidence, *e.g.,* if evidence in opposition exceeds 25 pages, it must be in a separately bound volume and must include a table of contents. Cal Rules of Ct 3.1350(g). On evidence format rules, see §§36.68-36.70.

Although evidence can be presented to the court through other methods (*e.g.,* judicial notice, discovery), the testimony in affidavits and declarations submitted by the opposing party is usually the primary means of establishing that material facts are in dispute. For discussion of evidentiary rules for affidavits and declarations, see §§36.106-36.121.

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§36.89 b. Opposition by Claiming Privilege Against Self-Incrimination

A party who opposes a summary judgment motion by claiming the privilege of self-incrimination must submit evidence from which it could be inferred that the party faces a "dilemma" caused by proper assertion of the privilege. The opposing party must show by affidavit that facts essential to his or her opposition might exist but cannot be presented because of the possibility of self-incrimination; the party should make a factual showing that he or she faces potential parallel criminal prosecution, or that, if such prosecution could be assumed, facts necessary to oppose the motion exist but cannot be presented because of the assertion of the privilege. *Fisher v Gibson* (2001) 90 CA4th 275, 286, 109 CR2d 145.

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§36.90 6. Proposed Order

Counsel should include a proposed order specifying the issues still in dispute with appropriate references to the evidence. If a motion is denied, the court must specify in its order the material triable issue or issues still in controversy and specifically refer to the evidence establishing a triable issue of fact concerning each of those issues. CCP §437c(g). On court hearing and ruling, see §§36.171-36.191.

For a form of proposed order, see §36.223.

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§36.91 7. Checklist: Preparing Opposition

When moving papers received

- Decide whether to oppose motion, make cross-motion (see §§36.40-36.42), or both

To oppose motion

- Gather and authenticate supporting evidence:
- Declarations and affidavits (see §§36.106-36.121)
- Evidence obtained through discovery responses:
- Deposition testimony (see §§36.123-36.126)
- Interrogatories and Requests for Admissions (see §36.127)
- Documents produced in response to demands for inspections (see §36.128)
- Results of mental and physical examinations (see §36.129)
- Judicial admissions and stipulations (see §§30.130-36.134)
- Matters to be judicially noticed (see §36.135)
- Request continuance of hearing date, if grounds exist (CCP §437c(h)):
- Facts essential to justify opposition may exist, but cannot be presented until further evidence is obtained
- Notice period of 75 days is required before hearing on cross-motion (CCP §437c(a))
- Prepare opposition papers:
- Memorandum in opposition to motion (see §§36.73-36.74)
- Separate statement (see §§36.75-36.80):
- Response to each material fact the moving party contends is undisputed, indicating agreement or disagreement
- Any other material facts the opposing party contends are disputed and
- References to supporting evidence for each material fact the opposing party contends is disputed
- Proposed order (see §36.90)
- Prepare objections to moving party's declarations and evidence (if not made, they are waived) (see §§36.81-36.86):
- Serve written objections or
- Plan to make objections orally at hearing, in which event attendance of a court reporter must be arranged
- File and serve opposition papers:
- At least 14 days before noticed or continued date of hearing (CCP §437c(b)(2)) (see §36.36)

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C. Reply Papers

1. Reply Memorandum

§36.92 a. Purpose of Reply Memorandum

The reply should be limited to rebuttal arguments to the opposing party's papers. These arguments may include procedural, evidentiary, or substantive issues. See California Summary Judgment §§8.6-8.13 (Cal CEB 2010). Generally, the reply should not include new evidence. See §36.97.

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§36.93 b. Format of Reply Memorandum

No reply memorandum in support of the motion shall exceed 10 pages. Cal Rules of Ct 3.1113(d). Memorandums in support of the motion are generally governed by Cal Rules of Ct 3.1113.

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§36.94 2. No Supplemental Separate Statement

There is no provision in CCP §437c for a supplemental separate statement in the reply. *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 252, 100 CR3d 296; *San Diego Watercrafts, Inc. v Wells Fargo Bank, N.A.* (2002) 102 CA4th 308, 313, 125 CR2d 499. Generally, the moving party may not rely on new evidence submitted with its reply; see §36.97. The court has discretion to consider new evidence submitted in the reply papers as long as the opposing party has notice and an opportunity to respond to prevent violation of the opposing party's due process rights. *San Diego Watercrafts, Inc.*, 102 CA4th at 316.

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§36.95 3. Objections to Opposing Party's Evidence

The format of objections to evidence submitted in a reply are the same as those in the opposing papers. On the required format for objections, see §36.83. On objections to evidence generally, see §§36.145-36.159. On opposing party's objections to evidence, see §§36.46-36.86.

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§36.96 4. Reponses to Opposing Party's Objections to Evidence

If the opposing party has objected to evidence, the moving party should prepare a memorandum supporting its position. On objections to evidence, see §§36.145-36.159. On methods of objecting, see §§36.81-36.86.

If objections are lengthy, consider whether to file a document entitled Objections and Motion To Strike Evidence Introduced in Opposition to Motion, including:

- The page and line number of the document to which the objection is made; and
- The specific grounds for the objection. Cal Rules of Ct 3.1354.

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§36.97 5. No Affirmative Evidence Submitted with Reply Papers

The reply generally should not include any new evidence. Code of Civil Procedure §§437c does not explicitly provide for submitting additional evidence or a supplemental separate statement with the reply papers. *San Diego Watercrafts, Inc. v Wells Fargo Bank, N.A.* (2002) 102 CA4th 308, 313, 125 CR2d 499. Nevertheless, the court has discretion to consider evidence not mentioned in a party's separate statement and to permit amendments to the party's submissions, provided the opponent is afforded its due process right to an adequate opportunity to address the evidence or amendments. *San Diego Watercrafts, Inc. v Wells Fargo Bank, N.A., supra*. Thus, the trial court may properly consider new evidence submitted with a reply brief as long as the opposing party has notice and an opportunity to respond. *Plenger v Alza Corp.* (1992) 11 CA4th 349, 362 n8, 13 CR2d 811.

If it is necessary to submit evidence in support of the motion with the reply brief, expect the court to deny or to continue the hearing of the motion. See *Weiss v Chevron, U.S.A., Inc.* (1988) 204 CA3d 1094, 1099, 251 CR 727.

The moving party should be cautious in filing reply affidavits and declarations. If filed, these documents should not create disputes about immaterial facts cited by the opposition that might demonstrate to the court that there is indeed need for trial. Reply evidence should be presented when it is apparent that it is uncontroversial and would be difficult to refute, tending to prove that there is no dispute on a triable issue of material fact or when it is directed to procedural defects in the opposition papers (*e.g.,* sufficiency of separate statement).

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§36.98 6. Proposed Order

It is advisable to file a proposed order with the reply papers. This can get the order signed faster, because otherwise the proposed order has to be served on the opposing party and that party has 5 days to object as to form. See Cal Rules of Ct 3.1312(a).

For sample proposed orders, see §§36.220-36.221.

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§36.99 7. Checklist for Preparing Reply Papers

After opposition papers received:

- Prepare reply to opposition papers (see §§36.92-36.97)
- Prepare objections to opposing party's evidence (see §§36.81-36.86; see also §§36.145-36.159):
- Serve written objections or
- Plan to make objections orally at hearing
- Serve reply:
- Not less than 5 calendar days before noticed or continued hearing date (CCP §437c(b)(4)) (see §36.38) or
- As the court orders otherwise

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VII. PREPARING EVIDENCE TO SUPPORT OR OPPOSE MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

§36.100 A. Evidence Is Required

Before moving for summary judgment, the moving party should review all discovery and other evidence to determine what is needed to support the motion. The moving party should then gather all evidence needed to support motion just as it would for trial. Similarly, to defeat a summary judgment motion, the opposing party should gather all evidence showing at least one triable issue of material fact. See CCP §437c(b)(3).

NOTE: The moving party's evidentiary submissions are strictly construed, while evidence submitted in opposition to a summary judgment motion are given a liberal construction. *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 768, 107 CR2d 617; *Truong v Glasser* (2009) 181 CA4th 102, 109, 103 CR3d 811. Despite this liberality, the same evidentiary standards apply to both to the moving and opposing parties. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841. See §7.30.

Some federal cases permit a defendant, who is the moving party, to point out through argument that the plaintiff has no evidence to support its case. See §36.7. California law, however, requires a defendant moving for summary judgment to present evidence (*e.g.,* plaintiff's discovery responses)—not simply to assert—that the plaintiff does not possess, and cannot reasonably obtain, the evidence needed to meet its trial burden. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 855, 107 CR2d 841. See also *Rio Linda Unified Sch. Dist. v Superior Court* (1997) 52 CA4th 732, 739, 60 CR2d 710 (demonstrating a negative is akin to the burden of appellant in proving that there is no substantial evidence to support a judgment).

PRACTICE TIP: The best way to *show* with *admissible evidence* that the opposing party does not have evidence to support its case is with broad requests for admission going to the other party's claims or defenses ("admit defendant was not negligent with respect to the subject incident"), followed up with an interrogatory asking for all facts, witnesses, and evidence in support of any answer other than an unqualified admission. Such broad discovery almost necessarily embodies "contention" questions calling for legal conclusions; it is thus not a good idea to base your motion for summary judgment on such broad questions asked at a deposition, because such "basis of contention" questions are not allowed. However, a deposition may establish crucial factual matters, such as that the plaintiff saw no foreign substance on the ground in a slip and fall case.

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§36.101 1. Evidence Must Be Admissible

Admissible evidence is required to support and oppose a motion for summary judgment. CCP §437c(b). Using inadmissible evidence can be fatal to the motion. See *Martin v Johnson* (1979) 88 CA3d 595, 151 CR 816 (trial court granted defendant's summary judgment motion after striking all plaintiff's exhibits and inadmissible portions of plaintiff's declaration in opposition to motion).

PRACTICE TIP: To meet the standards of admissibility, the evidence's proponent must either obtain originals of necessary documents or secure foundational proof for the admission of secondary evidence. See Evid C §1521 (secondary evidence admissible as proof of content in most cases). On the secondary evidence rule, see §36.138.

See Jefferson's California Evidence Benchbook, chap 1 (4th ed CJA-CEB 2009).

On preparing admissible evidence, see §§36.100-36.144. See also Summary Judgment chap 5 (Cal CEB 2010).

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§36.102 a. No Ultimate Facts

To be admissible, evidence must state evidentiary facts, as opposed to conclusory or "ultimate" facts. *Brown v Ransweiler* (2009) 171 CA4th 516, 529, 89 CR3d 801; *Tuchscher Dev. Enters., Inc. v San Diego Unified Port Dist.* (2003) 106 CA4th 1219, 1240, 132 CR2d 57.

PRACTICE TIP: Although there is sometimes a fine distinction between admissible facts and inadmissible conclusions, counsel can avoid problems by stating underlying facts with specificity whenever possible.

In general, pleadings contain "ultimate facts," whereas "evidentiary facts" are found in answers to interrogatories, responses to requests for admission, depositions, other discovery, and affidavits and declarations made on personal knowledge. See CCP §437c(b)(1). However, admissions made in another party's pleadings (either by affirmative allegation or by failure to deny an allegation) are admissible evidence that can be used to support the motion. The admission "is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues." *Walker v Dorn* (1966) 240 CA2d 118, 49 CR 362. See *Pinewood Invs. v City of Oxnard* (1982) 133 CA3d 1030, 1035, 184 CR 417. On judicial admissions in pleadings, see §§36.130-36.133.

For examples illustrating to improper use of legal conclusions or ultimate facts, see 6 Witkin, California Procedure, *Proceedings Without Trial* §227 (5th ed 2008).

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b. Sources of Evidence

§36.103 (1) Permissible Source of Evidence

The moving and opposing parties may use the following methods to present evidence in support of or in opposition to a summary judgment motion:

- Affidavits or declarations (see §§36.106-36.121);
- Evidence derived from discovery procedures, *e.g.,* depositions, answers to interrogatories, requests for admissions, documents produced in response to a demand for inspection, or reports of physical or mental examinations (see §§36.122-36.129);
- Admissions (by other party) or stipulations in the pleadings or other papers (see §§36.130-36.134); and
- Matters subject to judicial notice (see §36.135).

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§36.104 (2) Impermissible Sources of Evidence

A party may not rely on the following methods to prove any fact needed to support or oppose a summary judgment motion:

- Party's own interrogatory responses (CCP §2030.410; *Great American Ins. Cos. v Gordon Trucking, Inc.* (2008) 165 CA4th 445, 450, 81 CR3d 65);
- Party's own pleadings (CCP §437c(p); *Slobojan v Western Travelers Life Ins. Co.* (1969) 70 C2d 432, 437, 74 CR 895);
- Inconsistent theories or facts pleaded by an opposing party (see *Conn v National Can Corp.* (1981) 124 CA3d 630, 639, 177 CR 445;
- Admissions made by a party other than the party opposing or moving for summary judgment (see Evid C §1220);
- Oral testimony at the hearing (*Spencer v Hibernia Bank* (1960) 186 CA2d 702, 717, 9 CR 867);
- Unauthenticated documents (see Evid C §1401);
- Opposing party's clearly mistaken discovery response (*Mason v Marriage & Family Ctr.* (1991) 228 CA3d 537, 545, 279 CR 51); and
- Discovery responses from parties other than the party against whom the motion is directed. CCP §§2030(n) (interrogatories), 2033(n) (admissions).

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§36.105 2. Evidence Must Be Directed to Issues Raised by Pleadings

Motions for summary judgment are limited to issues raised by the pleadings. *Laabs v City of Victorville* (2008) 163 CA4th 1242, 1253, 78 CR3d 372; *Ferrari v Grand Canyon Dories* (1995) 32 CA4th 248, 252, 38 CR2d 65. Thus, "to create a triable issue of material fact, the opposition's evidence must be directed to issues raised by the pleadings." *Distefano v Forester* (2001) 85 CA4th 1249, 1264, 102 CR2d 813.

PRACTICE TIP: If the opposing party's evidence would show some factual assertion, legal theory, defense, or claim not yet pleaded, the moving party should seek leave to amend the pleadings before the hearing on the summary judgment motion. *Laabs v City of Victorville* (2008) 163 CA4th 1242, 1253, 78 CR3d 372, citing *Distefano v Forester*, *supra*. Similarly, if the opposition is based on a defense or claim not previously pleaded, the opposing party must generally amend the pleadings. *Oakland Raiders v National Football League* (2005) 131 CA4th 621, 648, 32 CR3d 266; *Keniston v American Nat'l Ins. Co.* (1973) 31 CA3d 803, 812, 107 CR 583. On continuance to amend pleadings, see §§36.44-36.47. On amending pleadings generally, see chap 16.

NOTE: The moving party may move for summary judgment even if there are defects on the face of the moving party's pleadings that make it vulnerable to a demurrer or a motion for judgment on the pleadings, if the supporting affidavits or declarations are factually within the general scope of the causes of actions or defenses set out in the pleadings. See *Varco-Pruden, Inc. v Hampshire Constr. Co.* (1975) 50 CA3d 654, 656, 123 CR 606 (pleading situation in case was unusual in that "parties entirely ignored the theories expressed in the pleadings and the summary judgment was considered and granted on a theory not pleaded"); *Ramos v City of Santa Clara* (1973) 35 CA3d 93, 96, 110 CR 485 (court permitted defendant to move for summary judgment despite that defenses were not raised first in its answer).

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§36.106 B. Declarations and Affidavits

Most summary judgment motions are largely based on witness testimony in affidavits or declarations made under penalty of perjury. Likewise, the primary means by which the opposing party establishes that material facts are in dispute is by testimony in affidavits and declarations. The declarations of the moving party are strictly construed, whereas those of the opposing party are liberally construed. *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 711, 128 CR2d 529.

For sample declarations in support of and in opposition to a motion for summary judgment, see §§36.218.

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§36.107 1. Differences Between Declarations and Affidavits

Declarations are made and signed under penalty of perjury (CCP §2015.5), whereas affidavits are written declarations made under oath and attested to, ordinarily by a notary public (CCP §2003).

PRACTICE TIP: Declarations are used much more often than affidavits to support summary judgment motions in California because they need not be made under oath before an authorized officer.

Whichever form is used, it is important that it conform strictly to content and execution requirements. See §§36.111-36.121.

On declarations and affidavits, generally, see chap 12.

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§36.108 2. When to Use Declaration or Affidavit

Declarations and affidavits, *i.e.,* written statements made under penalty of perjury or under oath (CCP §§2015.5, 2003), are used to present facts to the judge from:

- A witness (including a party) to an event;
- An expert witness;
- A custodian of records; and
- Any witness who can prove or disprove a fact needed to support the motion.

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3. When Not to Use Declaration or Affidavit

§36.109 a. When State of Mind Is at Issue

The moving party should avoid presenting a declaration or affidavit on an individual's state of mind (or lack thereof) when that fact is sought to be established only by the individual's affirmation of it. See CCP §437c(e). A court is not required to accept an undisputed declaration by an individual as to his or her state of mind; rather, such matter is committed to the court's discretion. *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 417, 94 CR3d 288; *Violette v Shoup* (1993) 16 CA4th 611, 620, 20 CR2d 358. See California Summary Judgment §11.16 (Cal CEB 2010).

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§36.110 b. When Declarant Is Sole Witness

The moving party should avoid presenting a declaration or affidavit of a declarant who is the sole witness to a material fact, because the court may deny summary judgment when this is the only proof of an uncontroverted material fact. See CCP §437c(e). It is in the court's discretion whether to accept an undisputed declaration by an individual who is the sole witness to a material fact. *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 417, 94 CR3d 288. See California Summary Judgment §11.15 (Cal CEB 2010).

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§36.111 4. Substantive Requirements for Declarations and Affidavits

Because the pleadings define the scope of the issues on a summary judgment motion (see §36.105), counsel must direct declaration and affidavits to the issues raised by the pleadings. *Keniston v American Nat'l Ins. Co.* (1973) 31 CA3d 803, 812, 107 CR 583.

A declaration or affidavit must assert the truth of the matters it sets out. CCP §2015.5; *Baron v Mare* (1975) 47 CA3d 304, 307, 120 CR 675. In addition, it must:

- Be presented in good faith (see CCP §437c(j); §36.112);
- Be based on personal knowledge of the declarant (CCP §437c(d)) (see §36.113);
- Show affirmatively the declarant's competence to testify as to matters stated (CCP §437c(d)) (see §36.114); and
- Set out admissible evidence (CCP §437c(d)) (see §§36.101-36.104).

PRACTICE TIP: Do not include argument in declarations or affidavits; simply present the facts that will establish a fact or authenticate a document without characterizing them or arguing their importance.

On general requirements for declarations and affidavits, see 6 Witkin, California Procedure, *Proceedings Without Trial* §224 (5th ed 2008).

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§36.112 a. Must Be Presented in Good Faith

All declarations must be presented in good faith, or they will be subject to sanctions on notice and an opportunity to be heard. CCP §437c(j) (court must impose sanctions in amount of reasonable expenses incurred by other party if affidavits are presented in bad faith or solely for purposes of delay).

On sanctions for bad faith affidavits, see §36.169.

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§36.113 b. Must Be Based on Personal Knowledge

The affidavit or declaration must be made by any person on personal knowledge. CCP §437c(d). Thus, unless the declarant is an expert (see §§36.116-36.120), they generally may not offer opinion evidence. On lay opinion evidence, see §36.115.

PRACTICE TIP: Although when drafting declarations many attorneys routinely include a statement such as "I have personal knowledge of the facts stated herein," the court is unlikely to consider such a conclusory statement as sufficient to show personal knowledge. See *Snider v Snider* (1962) 200 CA2d 741, 754, 19 CR 709 (when facts stated in affidavit do not demonstrate personal knowledge, assertion of personal knowledge and competency to testify "should be ignored"). The declaration must include specific information showing that the declarant has personal knowledge of the facts supporting the motion. See CCP §437c(d); *Bowden v Robinson* (1977) 67 CA3d 705, 719, 136 CR 871).

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§36.114 c. Must Establish Competence to Testify

A declaration in support of a motion for summary judgment must affirmatively show that the declarant is competent to testify as a witness about the matters stated. CCP §437c(d). See, *e.g., Rincon v Burbank Unified Sch. Dist.* (1986) 178 CA3d 949, 955, 224 CR 88. A competent declarant is a person qualified to be a witness who:

- Has personal knowledge of the subject of the declaration (Evid C §702); or
- Is qualified by training or experience to express an expert opinion on the subject of the declaration (Evid C §§720, 801).

Note that every person is qualified to be a witness unless a statute provides otherwise. Evid C §700. See, *e.g.,* Evid C §§701, 703.5.

PRACTICE TIP: Counsel should ensure that a declaration includes *facts* showing that the declarant is competent to testify about the matters stated. That is, unless the declarant is an expert, the declaration must include specific information demonstrating that the declarant has personal knowledge of the facts supporting the motion.

See Jefferson's California Evidence Benchbook chap 27 (4th ed CJA-CEB 2009).

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5. Opinion Evidence

§36.115 a. Lay Opinion Evidence

A nonexpert witness, *i.e.,* a lay witness, may properly state an opinion if the declaration includes foundational facts showing that the opinion is both rationally based on the witness's perception and helpful in understanding other facts in the document. Evid C §800.

To provide evidentiary support, a lay opinion must clearly state:

- Sufficient reasons and explanations for the opinion;
- The factors considered; and
- The reasoning employed.

For examples of subjects considered appropriate for opinion testimony by lay witnesses, see California Expert Witness Guide §2.7 (2d ed Cal CEB 1991). On opinion testimony from lay witnesses generally, see Jefferson's California Evidence Benchbook §§30.1-30.15 (4th ed CJA-CEB 2009).

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§36.116 b. Expert Opinion Evidence

Expert witnesses may give opinions that are (Evid C §801):

- Related to a subject sufficiently beyond common experience that an expert opinion would assist the trier of fact; and
- Based on matter (including special knowledge, skill, experience, training, and education) that may be relied on by an expert in forming an opinion on the subject.

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§36.117 (1) Include Statement of Expert Qualifications

An expert declaration offered in support of or opposition to a summary judgment motion must make the same showing on qualifications and expertise that would be required if the expert were testifying in person at trial. See *Towns v Davidson* (2007) 147 CA4th 461, 472, 54 CR3d 568. The declaration should state with particularity the facts that make the expert competent to render the opinion contained in the declaration. The expert should first state what type of expert he or she is and give enough information about his or her background to qualify as an expert in that field. Courts are generally fairly lenient in allowing experts to testify somewhat far afield in this context. See, *e.g., Mann v Cracchiolo* (1985) 38 C3d 18, 38, 210 CR 762 (medical expert may be qualified to testify on standard of care for medical field outside his or her own specialty).

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§36.118 (2) Include Factual Basis for Opinion

The expert should set out the facts of the case on which his or her opinion is based, state his or her opinions, and enumerate any additional bases for those opinions. See, *e.g., Johnson v Superior Court* (2006) 143 CA4th 297, 307, 49 CR3d 52 (defendant failed to establish doctor's care was within standard of care because his expert did not provide basis for determining safe amount of radiation); *Kelley v Trunk* (1998) 66 CA4th 519, 523, 78 CR2d 122 (expert declaration that failed to make any foundational showing that expert's opinion rested on matters of type on which experts reasonably rely was inadmissible). But see *Hanson v Grode* (1999) 76 CA4th 601, 608 n6, 90 CR2d 396 (criticizing *Kelly v Trunk* for suggesting that "an expert's declaration must set forth in excruciating detail the factual basis for the opinions stated therein").

PRACTICE TIP: The court in *Powell v Kleinman* (2007) 151 CA4th 112, 125, 59 CR3d 618, reconciled *Hanson* and *Kelley* by reasoning that an expert declaration made in *support* of a defendant's summary judgment motion must be detailed and with foundation to carry the burden of production in showing the nonexistence of any genuine issue of fact, but an expert declaration made in *opposition* to a motion need not be detailed, because it is entitled to all favorable inferences. 151 CA4th at 125. Counsel should consider this distinction between moving and opposing declarations in preparing expert declarations.

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§36.119 (3) Must Not Be Based on Speculation or Conjecture

The court may dismiss an expert declaration if the expert's stated opinion is speculative or lacks sufficient certainty. *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 718, 128 CR2d 529. See *McGonnell v Kaiser Gypsum Co.* (2002) 98 CA4th 1098, 1106, 120 CR2d 23 ("court is not bound by expert opinion that is speculative or conjectural"); *Kelley v Trunk* (1998) 66 CA4th 519, 524, 78 CR2d 122 (expert opinion is "worth no more than the reasons upon which it rests"; expert opinion unsupported by reasons or explanations does not establish absence of material fact for purposes of summary judgment).

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§36.120 (4) Must Not Be Merely Conclusory

As with all evidence in support of or in opposition to a summary judgment motion, expert opinion must not be merely a conclusory assertion. See, *e.g., Parker v Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 184, 89 CR 737 (expert stated only "conclusory assertions" that employment offered is "not different from or inferior to" that under different employment contract).

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§36.121 6. Common Defects in Affidavits and Declarations

A summary judgment motion can be lost because of defects in the affidavits and declarations. The most common problems that prevent consideration of the merits are:

- Failure to comply with requirements of CCP §2015.5 for declarations under penalty of perjury, including such defects as:
- Omission of signatures;
- Omission of date or place of execution; or
- Failure to assert the truth of the matter stated;
- Failure to comply with the requirement of CCP §2003 that an affidavit recite the fact that it was made under oath or that the witness was sworn;
- Failure to have the affidavit or declaration (CCP §437c(d)):
- Be made by someone with personal knowledge,
- Set out admissible evidence, and
- Show that the affiant is competent to testify to the matter.

On declarations generally, see chap 12.

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§36.122 C. Evidence Obtained Through Discovery

Evidence obtained from an opponent to be used in support of or opposition to a summary judgment motion is usually in responses to discovery requests. Such evidence may also be found in admissions made in pleadings or stipulations. See §§36.130-36.134. The parties may use all methods of discovery to support or oppose a summary judgment motion, as long as the discovered matter is not hearsay or otherwise objectionable under the rules of evidence. On hearsay, see §§36.139-36.143.

Discovery methods that are easily adaptable to obtaining evidence from the opposing party to support the motion or the opposition to the motion include: depositions (see §§36.123-36.126), answers to interrogatories and requests for admissions (see §36.127), documents produced in response to demands for inspection (see §36.128), and reports of physical or mental examinations (see CCP §§2032.010-2032.650) (see §36.129).

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§36.123 1. Deposition Testimony

Depositions can be used to support a motion for summary judgment subject to the same rules of admissibility as a witness's affidavit or declaration. CCP §437c(b)(1). *Saporta v Barbagelatta* (1963) 220 CA2d 463, 469, 33 CR 661.

PRACTICE TIP: Because the scope of examination at depositions is broader than the admissible evidence standard, it is essential for counsel to review all deposition testimony used to support the motion with the rules of evidence in mind. See CCP §2017.010 (matter is discoverable if it either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence). Otherwise, the opposing party may be able to object successfully that the testimony is inadmissible. Despite the ability to file reply papers, counsel may not have the time to show by alternative means the truth of supporting facts, thus seriously weakening the moving party's position before the court rules on the motion.

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§36.124 a. Accompany Transcript with Authenticating Declaration

To satisfy the personal knowledge and secondary evidence requirements (see §§36.136, 36.138), an attorney who was present at the deposition should provide an authenticating declaration stating, under penalty of perjury, that:

- He or she was present at the deposition; and
- The transcript accurately reflects the questions asked and the answers given.

PRACTICE TIP: In the authenticating declaration, identify questions and responses by page and line, and set them out verbatim if they are short and pivotal to the motion. Attach copies of the relevant pages, with the cited material highlighted, to the declarations as exhibits. See Cal Rules of Ct 3.1116.

On authenticating evidence, see §§36.136-36.138.

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§36.125 b. Obtain Signed Deposition Transcript

After the deposition, the deponent is notified when the transcript is available and requested to sign it. Even if the deponent refuses to sign or fails to respond, the deposition has the same force and effect as a signed deposition. CCP §2025.520(f). For example, in *Gray v Reeves* (1977) 76 CA3d 567, 142 CR 716, defendants moved to file plaintiff's unsigned deposition in support of their summary judgment motion. The appellate court affirmed the granting of summary judgment in defendants' favor and upheld the trial court's right to find facts from the deposition transcript even though the plaintiff had filed a counter declaration that the testimony in the "uncorrected" transcript was incorrect. It is, however, preferable to have the deponent's signature on the transcript or the writing accompanying the recording, because a deponent who has signed the transcript cannot explain away inconsistencies as easily and any later motion to suppress a signed deposition may not as readily succeed.

PRACTICE TIP: If the deposition has not been signed, use a declaration of an attorney or the court reporter in attendance to identify the transcript as a correct rendition of the testimony given, unless a standard stipulation was in effect that an unsigned deposition can be used with the same force and effect as a signed one.

On preparing depositions transcript as exhibits, see §36.70. On authenticating evidence, see §§36.136-36.138.

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§36.126 c. Use of Party's Own Deposition Testimony

Because a party generally may not use its own deposition at trial or at a hearing under CCP §2025.620, there is a question about whether a party may use its own deposition to support a summary judgment motion. However, CCP §437c(b)(1) authorizes the use of depositions to support summary judgment motions without qualification and without reference to §2025.620.

PRACTICE TIP: To avoid a problem on this issue, file the client's declaration stating what transpired at the deposition. If it is necessary to submit the client's deposition in support of the motion, argue that, because the deposition itself allowed the opponent the opportunity for cross-examination, the deposition should be admissible under CCP §437c(b)(1).

In any event, a party's deposition testimony may not be contradicted by its own self-serving declarations. See *Archdale v American Int'l Specialty Lines Ins. Co.* (2007) 154 CA4th 449, 473, 64 CR3d 632, citing *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 22, 112 CR 786.

On preparing a deposition as an exhibit, see §36.70. On authenticating evidence, see §§36.136-36.138.

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§36.127 2. Interrogatories and Requests for Admission

A party's answers to interrogatories, and admissions in response to requests for admission, may be used against that party. See *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 21, 112 CR 786 (parties are bound by admissions made during discovery and, "on motion for summary judgment, no further evidence of the matters so deemed admitted is required"); *Hejmadi v AMFAC, Inc.* (1988) 202 CA3d 525, 553, 249 CR 5. A mistaken admission, however, cannot be the basis for summary judgment. See *Mason v Marriage & Family Ctr.* (1991) 228 CA3d 537, 545, 279 CR 51.

PRACTICE TIP: Counsel should include the relevant answers and admissions relied on in the moving papers, because they may not otherwise be filed with the court. See CCP §2030.280(a), CCP §2033.270(a). Attach copies and incorporate them by reference into the moving papers as appropriate.

On preparing documents as evidence, see §§36.136-36.144.

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§36.128 3. Documents Produced in Response to Demands for Inspection

Documents produced in response to demands for inspection may be used to support or oppose a summary judgment motion. See CCP §437c(b)(1). The fact that documents are produced in response to a demand, however, will not overcome any admissibility problems. To use these documents as evidence, they must be:

- Identified and authenticated (see §36.137),
- Admissible under the secondary evidence rule (see §36.138), and
- Nonhearsay or admissible under a hearsay exception (see §§36.139-36.143).

Documentary evidence must be accompanied by a supporting declaration that authenticates the document(s) relied on. See §36.137.

On authentication, and compliance with the rules of evidence, see §§36.136-36.143. On preparation of documents as exhibits to motion for summary judgment, see §§36.68-36.70.

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§36.129 4. Results of Physical and Mental Examinations

The results of an order for examination by a physician under CCP §§2032.010-2032.650 also may be used to support or to oppose the motion. Normally, the procedures for presenting these results is through a declaration by the examining physician.

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§36.130 D. Judicial Admissions and Stipulations

Admissions of fact can be shown from an adverse party's pleadings, written concessions by counsel, or stipulations of fact. *Brown v Surety Co. of Pac.* (1981) 122 CA3d 614, 618, 176 CR 143 (statements found to be admissible as "adoptive admissions" under Evid C §1221, because adverse party acknowledged truth of statements). Such a showing is not merely evidence of fact, but it can be treated as a conclusive concession sufficient to remove the issue as a triable issue. *Smith v Walter E. Heller & Co.* (1978) 82 CA3d 259, 268, 147 CR 1 (admission in complaint); *Brown v City of Fremont* (1977) 75 CA3d 141, 146, 142 CR 46 (admission of fact in complaint). See also *Residents of Beverly Glen, Inc. v City of Los Angeles* (1973) 34 CA3d 117, 127, 109 CR 724 (admissions in pleadings).

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§36.131 1. Admissions in Pleadings

The admission of fact in a pleading is a "judicial admission" that either party may rely on as part of the case. *Valerio v Andrew Youngquist Constr.* (2002) 103 CA4th 1264, 1271, 127 CR2d 436. See *Walker v Dorn* (1966) 240 CA2d 118, 49 CR 362 (judicial admissions by affirmative allegation will support motion for summary judgment or summary adjudication).

On summary judgment, a judicial admission is proper and overcomes evidence even when the opposing party seeks to contradict the prior admission. *Kurinij v Hanna & Morton* (1997) 55 CA4th 853, 871, 64 CR2d 324.

PRACTICE TIP: Counsel for the moving party should check for judicial admissions in the pleadings and documents filed by the opposing party that may be used to show that facts are not in dispute. Do not refer to judicial admissions in a declaration; rather, include them in a request for judicial notice and the supporting memorandum. *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 370 n15, 110 CR 353.

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§36.132 a. Judicial Admissions Cannot Be Controverted

Unequivocal admissions in pleadings, *i.e.,* "judicial admissions," cannot be controverted by the pleader. *Myers v Trendwest Resorts, Inc*. (2009) 178 CA4th 735, 746, 100 CR3d 658. An admission in a pleading is not merely evidence of fact; it can be treated as a conclusive concession sufficient to remove the issue as a triable issue. *Smith v Walter E. Heller & Co.* (1978) 82 CA3d 259, 268, 147 CR 1 (admission in complaint); *Brown v City of Fremont* (1977) 75 CA3d 141, 146, 142 CR 46 (admission of fact in complaint).

PRACTICE TIP: Unlike admissions made during discovery, a judicial admission in a pleading usually may be eliminated by amending the pleadings.

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§36.133 b. Judicial Admissions May Be Implied

In addition to express admissions, implied pleading admissions can be used to support or oppose a summary judgment motion, including:

- Implied admissions resulting from a failure to deny (*Reich v Yow* (1967) 249 CA2d 12, 14, 57 CR 117); and
- Implied admissions resulting from a defective denial (see *Oliver v Swiss Club Tell* (1963) 222 CA2d 528, 537, 35 CR 324 (denial on information and belief, or for want of information or belief, of alleged fact that may be ascertained from public record constitutes admission of allegation in complaint)).

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§36.134 2. Stipulations of Fact

Stipulations are used when the parties have agreed in writing or orally in court that material facts are not in dispute. *Parker v Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181, 89 CR 737 See CCP §283(1) (authority of attorney to bind client). If the moving party possesses the original, signed stipulation, he or she should file it as a document in support of the summary judgment motion. If, however, the moving party has only a copy of the stipulation, he or she may attach the copy, *e.g.,* a letter signed by both parties concerning uncontested facts, to an affidavit or declaration identifying and authenticating the stipulation, and subpoena or request the original stipulation, if necessary.

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§36.135 E. Judicial Notice

A summary judgment motion may be based on matters of which the court must, or may, take judicial notice. CCP §437c(b)(1). See Evid C §§451-452 (setting out matters that must or may be judicially noticed). In fact, summary judgment may be granted based solely on matters that have been judicially noticed if the matters noticed are sufficient to dispose of the issues. *Comora v Comprehensive Care Corp.* (1983) 140 CA3d 369, 189 CR 538. See *Magnolia Square Homeowners Ass'n v Safeco Ins. Co.* (1990) 221 CA3d 1049, 1056, 271 CR 1 (trial court took judicial notice of allegation in complaint filed by plaintiff in separate action, which showed knowledge that precluded recovery in present action).

On judicial notice generally, see Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009). On procedures for requesting judicial notice, see chap 12.

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§36.136 F. Laying the Foundation for Evidence

All evidence used in connection with a summary judgment motion must have a proper foundation. Evidence must be:

- Authenticated (see §36.137);
- Compliant with the secondary evidence rule (see §36.138);
- Nonhearsay or within an exception to the hearsay rule (see §§36.139-36.143); and
- Incorporated and properly attached to the moving or opposing papers (see §36.144).

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§36.137 1. Authentication of Documents

Before a document or its contents may be introduced and considered by the trier of fact, the proponent must show sufficient facts to sustain a finding that the document is the writing the proponent claims that it is. Evid C §§1400-1402. See *Jazayeri v Mao* (2009) 174 CA4th 301, 320, 94 CR3d 198 (testimony that USDA poultry condemnation certificates submitted as exhibits and offered for truth of matters stated were received from USDA Freedom of Information Act office in response to her request was sufficient to authenticate them).

On summary judgment, the proponent typically authenticates a document by preparing a declaration that establishes the foundational matters, *i.e.,* the witness's personal knowledge as to the identity of the proffered evidence and that it is what the proponent says it is. See *U.S. v Dibble* (9th Cir 1970) 429 F2d 598, 602 ("a writing is not authenticated simply by attaching it to an affidavit"; foundation is laid by testimony of witness with personal knowledge of facts who attests to identity, execution, and delivery of document).

The Evidence Code sets forth several methods for authenticating documents, including:

- Testimony of anyone who saw the writing made or executed (Evid C §1413);
- Evidence that the opposing party has admitted its authenticity or acted on it as if it were genuine (Evid C §1414);
- Testimony confirming the authenticity of the signature or handwriting by a witness personally familiar with the handwriting, by a handwriting expert, or by the trier of fact (Evid C §§1415-1418);
- Evidence that the writing was received in response to a communication sent to the claimed author (Evid C §1420); or
- Evidence that it states matters unlikely to be known by anyone other than the purported author (Evid C §1421).

Authentication may also be accomplished by appropriate use of discovery devices, *e.g.,* requests for admission, interrogatories, depositions. Special rules apply to the introduction of official records. See Evid C §§1530-1532.

PRACTICE TIP: An alternative means of authenticating a signature is to request that the court compare the similarity of a signature on a contract to the signature on a verification to the answer or complaint in the court file. Evid C §1417 (trier of fact may compare handwriting that was treated as genuine by party against whom evidence offered).

For further discussion of authentication of documents, see California Summary Judgment chap 5 (Cal CEB 2010).

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§36.138 2. The Secondary Evidence Rule

Under the "secondary evidence rule," the content of a writing may be proved by otherwise admissible secondary evidence unless (Evid C §1521(a)):

- A genuine dispute exists regarding material terms of the writing and justice requires exclusion, or
- Admission would be unfair.

In the context of a summary judgment motion, secondary evidence issues arise whenever a party seeks to rely on deposition testimony, responses to interrogatories and request for admissions, or copies of documents.

When the original document is not available and an objection to secondary evidence on one of the two grounds provided in §1521 is anticipated, an explanatory statement should be added to the appropriate declarations to show that the secondary evidence is admissible under that code section. For example, if presenting a copy of a check at trial, the declaration should state: "On January 4, 2010, the defendant met me at work. He stated that he had the check, which is the document in question, and did not dispute that it was a check from me to him in the amount of $5000."

PRACTICE TIP: To avoid problems with the secondary evidence rule, serve requests for admissions as to the genuiness of documentary evidence before filing or opposing a summary judgment motion. This will avoid any objections to your use of copies and will be the only authentication needed.

On printed representations of computer information or computer programs, see Evid C §1552. On printed representations of images stored on a video or digital medium, see Evid C §1553. For detailed discussion of the secondary evidence, see California Summary Judgment chap 5 (Cal CEB 2010).

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§36.139 3. Hearsay Rule

Unless it falls under a hearsay exception (see §§36.140-36.143), evidence is inadmissible hearsay (Evid C §1200) if it:

- Consists of an out-of-court statement made by someone other than the testifying witness; and
- Is offered for the truth of the matter stated.

If the mere existence of a document, and not the truth of its contents, is essential to the fact to be shown in a summary judgment motion, no hearsay problem arises. See Evid C §1200. However, when a document is used in a summary judgment motion to prove the truth of the matters stated in it, the hearsay problem must be overcome.

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§36.140 a. Exceptions to Hearsay Rule

When a document is used in a summary judgment motion to prove the truth of the matters stated in it, the hearsay problem must be overcome, usually by the use of one of the exceptions to the hearsay rule. See Evid C §§1201-1380.

On exceptions to the hearsay rule, see Jefferson's California Evidence Benchbook, chap 2 (4th ed CJA-CEB 2009).

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§36.141 b. Exceptions Commonly Arising in Summary Judgment Context

Two of the most commonly used hearsay exceptions in the summary judgment context are those for business records (see §36.142) and official records (see §36.143).

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§36.142 (1) Business Records Exception

For a document to fall within the business records exception to the hearsay rule, it must be shown that (Evid C §1271):

- The writing was made in the regular course of business at or near the time of the act, condition, or event;
- The custodian or other qualified witness attests to the record's identity and the mode of its preparation; and
- The sources of information and method and time of preparation were such as to indicate the record's trustworthiness.

For purposes of this exception, "business" is defined broadly to include every kind of business, profession, occupation, or calling; government activities; and various operations of for-profit and nonprofit institutions. Evid C §1270. See, *e.g., Garibay v Hemmat* (2008) 161 CA4th 735, 741, 74 CR3d 715 (although hospital and medical records are hearsay, they can be admitted under business records exception to hearsay rule).

The purpose of these writings is to prepare a record of an act or event pertaining to the business, not to provide evidence; the fact that they may become relevant evidence does not change the purpose for which they were prepared. *People v Taulton* (2005) 129 CA4th 1218, 29 CR3d 203 (prison records are business records). See California Trial Objections §19.26 (Cal CEB Annual).

PRACTICE TIP: To make the requisite showing under the business records exception, use the declaration of the custodian or other qualified witness.

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§36.143 (2) Official Records Exception

For a document to fall within the official records exception to the hearsay rule, it must be shown that it is a writing made (Evid C §1280):

- As a record of an act, condition, or event,
- By and within the scope of duty of a public employee,
- At or near the time of the act, condition, or event recorded, and
- With use of information sources and a method and time of preparation that indicate its trustworthiness.

People v Martinez (2000) 22 C4th 106, 119, 91 CR2d 687 (uncertified computer printouts as evidence that defendant was habitual offender admissible under official records exception). See *People v Delgado* (2008) 43 C4th 1059, 77 CR3d 259 (abstract of judgment was sufficient to prove prior felony conviction); *Hildebrand v DMV* (2007) 152 CA4th 1562, 1570, 62 CR3d 234 (police officer's sworn statement and unsworn arrest report were admissible in DMV administrative hearing as public employee records, even to extent each reported fire captain's observations that defendant was driving).

PRACTICE TIP: Unlike the business-records exception (see §36.142), the exception for official records under Evid C §1280 does not require that the custodian or other qualified witness testify about the identity and mode of preparation of the writing itself. See Comment to Evid C §1280.

On the official records exception generally, see California Trial Objections §19.27 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 5 (4th ed CJA-CEB 2009).

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§36.144 4. Incorporation of Documents by Reference in Declaration

Portions of a pleading or document filed in the case, or any other paper in the court file, may be incorporated by reference into a declaration. *Raczynski v Judge* (1986) 186 CA3d 504, 509 n3, 230 CR 741.

Because facts in a declaration must conform to requirements for oral testimony, the declarant must have personal knowledge of any facts that are in documents before they may be adopted into the declaration. *Rincon v Burbank Unified Sch. Dist.* (1986) 178 CA3d 949, 955, 224 CR 88.

If pleadings or documents are incorporated by reference, copies of the incorporated material should be attached directly to the declaration, and the specific pertinent portions should be referenced in the declaration, memorandum, and separate statements of undisputed facts. Failure to attach exhibits to a declaration referred to in that declaration may preclude entry of summary judgment. See *Dugar v Happy Tiger Records, Inc.* (1974) 41 CA3d 811, 815, 116 CR 412.

PRACTICE TIP: Counsel should routinely review the moving papers before filing to ensure that all documents are properly attached. If a declaration was mistakenly filed without exhibits that were incorporated by reference, a new declaration by the same declarant should be filed.

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§36.145 VIII. OBJECTING TO EVIDENCE

When deciding a motion for summary judgment, a court determines whether a triable issue of material fact exists from the evidence set out in the parties' papers, "except that to which objections have been made and sustained by the court." CCP §437c(c). "Evidentiary objections are an integral part of the summary judgment process." *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 782, 97 CR2d 140. The summary judgment statute presupposes that objections will be made to evidence submitted in support of or in opposition to the motion. If objections are not made at the hearing, they are waived. CCP §437c(b)(5).

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§36.146 A. Raise Objections or Waive Them

Objections on every available ground must be made or waived, just as at trial. Very few judges will initiate objections, just as at trial. Evidentiary objections that are not made at the hearing are waived (CCP §437c(b)(5)), as are objections to declarations (and affidavits) or a declarant's personal knowledge or competence to testify (CCP §437c(d)).

WARNING: Failure to object will be taken as agreement that the evidence is relevant and admissible, meaning that counsel admits, on behalf of his or her client(s), that the opposing party has made a truthful and evidentiary showing as to the fact(s) in question.

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§36.147 1. Obtain Trial Court's Ruling on Objections

A trial court has a duty to consider all evidentiary objections and to rule on their merits. *Vineyard Springs Estates, LLC v Superior Court (Wyatt)* (2004) 120 CA4th 633, 642, 15 CR3d 587; *Sambrano v City of San Diego* (2001) 94 CA4th 225, 234, 114 CR2d 151. See CCP §437c(c), (q). If a trial court fails to rule on evidentiary objections, then the objections are ordinarily deemed waived on appeal, and the appellate court will consider all evidence submitted, including that to which objections have been made. See *Sharon P. v Arman Ltd.* (1999) 21 C4th 1181, 1186 n1, 91 CR2d 35, disapproved on another ground in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854 n19, 107 CR2d 841. See also *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137; *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 783, 97 CR2d 140. See §§36.163-36.167.

Counsel should obtain rulings on at least the key objections central to the client's case. If a trial court does not rule on evidentiary objections before ruling on the motion, then counsel should emphasize to the court its duty to rule on the objections. If the court grants the motion without having ruled on the objections, then counsel should send a letter to the court, reminding the judge that all evidence will come in on appeal and potentially undermine the court's ruling on the motion. If the court still fails to rule on the objections, then counsel should consider taking a writ to compel the judge to rule.

NOTE: The Third Appellate District has ruled that a writ of mandate may be issued to compel a trial court to rule on evidentiary objections and to reconsider its ruling on the motion after making the evidentiary rulings. See *Vineyard Springs Estates, LLC v Superior Court (Wyatt)* (2004) 120 CA4th 633, 642, 15 CR3d 587.

PRACTICE TIP: The court may rule orally on objections from the bench during the hearing. As long as the rulings are on the record, they can be reviewed on appeal. Ask the court to rule on each objection so that the record is clear that counsel is not waiving an objection should the court fail to rule on it.

On format for proposed order and court's ruling on evidentiary objections, see §§36.224, 36.226.

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§36.148 2. Obtain Express Ruling on Each Objection

One case, *Biljac Assocs. v First Interstate Bank* (1990) 218 CA3d 1410, 1419, 267 CR 819, has held that a trial court may refuse to rule expressly on each and every objection, and instead could simply state that it would disregard inadmissible or incompetent evidence in ruling on the motion. *Biljac* was disapproved by the same court that decided it (see *Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 566, 57 CR3d 204 (First District, Division Two)), and other appellate districts have also rejected it (see *Sambrano v City of San Diego* (2001) 94 CA4th 225, 234, 114 CR2d 151 (Fourth District, Division One); *Swat-Fame, Inc. v Goldstein* (2002) 101 CA4th 613, 623, 124 CR2d 556, overruled on other grounds in *Zamos v Stroud* (2004) 32 C4th 958, 973, 12 CR3d 54 (Second District, Division Seven)).

WARNING: Review is currently pending in *Reid v Google, Inc.* (review granted Jan. 30, 2008, S158965; superseded opinion at 155 CA4th 1342, 66 CR3d 744), which followed *Biljac* in holding that the trial court was not required to rule expressly on each and every objection when considering the admissibility of statistical evidence of age discrimination. 155 CA4th at 1356.

On format for proposed order and court's ruling on evidentiary objections, see §36.85.

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§36.149 3. Methods of Objecting

The procedure for making objections and ensuring the existence of a proper record is provided in Cal Rules of Ct 3.1352 and 3.1354. See *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 782, 97 CR2d 140. Objections may be submitted in writing before the hearing (see §§36.82-36.85) or made orally at hearing (see §36.86).

PRACTICE TIP: Written objections allow the court sufficient time to review the evidence offered and objections made. This is especially important in large cases with complicated facts or complex claims. Because the court's decision is based on evidence (or lack thereof), the best practice is to submit written objections so the court can consider the objections before rendering a tentative decision.

On format of written objections, see §§36.83.

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§36.150 B. Common Objections to Evidence

Counsel should be alert to the fact that different sources of evidence may give rise to differing objections. For example, a declaration may be objectionable based on form (*e.g.,* failure to declare that the declaration is submitted under California law) and substance (*e.g.,* declaration relied on inadmissible double hearsay).

PRACTICE TIP: Counsel should review all the evidence submitted in opposition to the client's case and evaluate whether a valid ground exists for excluding it, then decide whether and how to object to it. When several objections can be made to the same evidence, evaluate them and organize the response so that the objections that are most specific and important to the complete exclusion of the objectionable material are stated first and supported by appropriate authority and argument, followed by additional grounds for objection, including those that may not completely exclude the evidence but may limit its use in the proceeding.

For further discussion of objections to evidence, see California Summary Judgment chap 9 (Cal CEB 2010).

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§36.151 1. Attacking Form and Sufficiency of Evidence

The opposing party should object if the form or sufficiency of evidence supporting the motion is inadequate. CCP §437c(c). Some objections to consider include relevance, incompetence, hearsay, and insufficient foundation. See California Summary Judgment §9.17 (Cal CEB 2010).

On objections based on form and sufficiency of the evidence, see California Trial Objections (Cal CEB Annual). On the law and issues associated with form and sufficiency of the evidence, see Jefferson's California Evidence Benchbook, chaps 24-25 (4th ed CJA-CEB 2009).

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§36.152 2. Attacking Expert Qualifications

To meet their burdens of production and persuasion (see §§36.14-36.25), parties regularly submit expert declarations in summary judgment proceedings. One way to attack an expert witness declaration is to object to the person's qualifications as an expert. To challenge the qualifications of an expert, a party must lodge an objection to the declaration and then the trial court must determine the witness's competency as a matter of fact.

PRACTICE TIP: In most cases, an expert can be easily qualified. Counsel's time may be better spent attacking the expert's opinion rather than the expert's qualifications. See California Summary Judgment §9.19 (Cal CEB 2010).

On qualifications to testify as an expert, see Jefferson's California Evidence Benchbook §§30.16-30.25 (4th ed CJA-CEB 2009). On objections to expert and other witness opinions, see California Trial Objections §§20.6-20.22 (Cal CEB Annual). On use of expert witnesses in summary judgment proceedings, see California Expert Witness Guide, chap 16 (2d ed Cal CEB 1991).

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§36.153 3. Attacking Expert Opinion

An expert's opinion may be attacked on several grounds. Under Evid C §801(a), an expert opinion is admissible if the subject matter is sufficiently beyond common experience that the expert's opinion would assist the trier of fact. Depending on the subject matter involved, it may be possible to argue that the trier of fact is able to draw its own conclusions from the facts, and thus expert testimony is not necessary. See *Kotla v Regents of Univ. of Cal.* (2004) 115 CA4th 283, 291, 8 CR3d 898.

Objecting to an expert's opinion on the ground that the opinion is on an ultimate issue in the case is not a valid objection. Evid C §805. The opinion may, however, be objectionable on other grounds, such as an expert opinion on a question of law. *Towns v Davidson* (2007) 147 CA4th 461, 472, 54 CR3d 568 (expert offered only legal conclusions).

On opinion testimony by expert witnesses, see Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009). On objecting to improper opinion testimony, see California Trial Objections, chap 20 (Cal CEB Annual).

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§36.154 4. Attacking Lay Opinion

A lay witness is permitted to offer opinion testimony when the opinion is rationally based on the witness's perception, helpful to a clear understanding of the witness' testimony, or otherwise permitted by law. Evid C §§702, 800. Lay opinion is permitted on certain subjects, such as speed, distance, and value of the witness's own property. A lay witness's opinion may be excluded if it is not based on the witness's perception of the facts. Evid C §702.

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§36.155 5. Attacking Speculative Evidence

If a witness does not have personal knowledge of the facts or is not qualified to give an opinion, then the witness's testimony is considered speculative. See Evid C 702, 800(a). A court is not bound by an expert opinion that is speculative, conjectural, or based on an incorrect legal theory. *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 775, 107 CR2d 617.

On objections based on speculation, see California Trial Objections, chap 16 (Cal CEB Annual).

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§36.156 6. Attacking Business and Official Records

The business and official records exceptions to the hearsay rule permit a party to introduce into evidence written records of business or official proceedings as long as the records were made in the regular course of business, at or near the time of the act, condition, or event, and the sources of information, as well as the method and time of preparation, indicate trustworthiness. Evid C §§1272 (business records), 1280 (official records). Although the records themselves may qualify under an exception to the hearsay rule, the contents of the records may be subject to other objections, such as irrelevancy, privilege, lack of personal knowledge, and secondary evidence.

On hearsay objections generally, see California Trial Objections chap 19 (Cal CEB Annual). On business records and official records, see Jefferson's California Evidence Benchbook chaps 4-5 (4th ed CJA-CEB 2009).

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§36.157 7. Attacking Secondary Evidence

The secondary evidence rule allows proof of the content of a writing by otherwise admissible secondary evidence. Evid C §1521(a), (d). The rule applies to evidence offered to prove the content of a writing, not to prove some other fact. Secondary evidence may be excluded in two situations: (1) when a genuine dispute exists as to the content of the writing and justice requires exclusion; or (2) when admission of secondary evidence would be unfair. Evid C §1521(a)(1)-(2). On use of secondary evidence generally, see *Dart Indus., Inc. v Commercial Union Ins. Co.* (2002) 28 C4th 1059, 1068, 124 CR2d 142.

By the terms of the §1521, secondary evidence must comply with other rules of evidence, including authentication and the hearsay rule. Even if the secondary evidence cannot be excluded under Evid C §1521, counsel should review the evidence carefully to ascertain whether it can be excluded under any other evidentiary rule.

On secondary evidence generally, see Jefferson's California Evidence Benchbook chap 32 (4th ed CJA-CEB 2009). On objecting to secondary evidence see California Trial Objections chap 24 (Cal CEB Annual).

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§36.158 8. Attacking Moving Party's Credibility

The opposing party cannot simply attack the moving party's credibility. The moving party's motion for summary judgment "may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment." CCP §437c(e). If the opposing papers merely assert the opponent's right to a jury trial and do not contain any evidence on the issues raised in the motion for summary judgment, that opposition is insufficient to defeat the motion. See *Shepherd v Jones* (1982) 136 CA3d 1049, 1062, 186 CR 708 (opposition to moving party's declarations alleging reliance on advice of counsel did not challenge facts asserted or allege additional facts; rather, opposition simply asserted that issue could not be decided in summary judgment proceeding).

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§36.159 9. Evidence of State of Mind

In some instances, the opposing party cannot reasonably be expected to produce controverting evidence. For example, if the issue is the moving party's state of mind, controverting evidence is difficult or impossible to gather. Under such circumstances, the court has the discretion to deny summary judgment so that the trier of fact can judge the moving party's credibility. CCP §437c(e); See *Viner v Sweet* (2004) 117 CA4th 1218, 1230, 12 CR3d 533 (CCP §437c(e)) (authorizes trial court discretion to deny summary judgment motion when moving party's burden is to prove witness's state of mind and only evidence submitted is testimony from that witness).

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IX. THE HEARING AND ORAL ARGUMENT

§36.160 A. Hearing Requirement

A "hearing" means an oral hearing at which counsel has "the opportunity to persuade the court and respond to its inquiries." *Mediterranean Constr. Co. v State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 260, 77 CR2d 781. A hearing on summary judgment involves the contemporaneous presence (in person or electronically) of the parties and a judge. 66 CA4th at 260.

NOTE: Courts have broad discretion to determine that a party waived the right to oral argument by failing to invoke the procedure in a timely and proper manner. *Brannon v Superior Court, supra*. Similarly, in the Ninth Circuit, district courts may promulgate local rules requiring a party to request oral argument on a summary judgment motion or have it considered waived (except if the refusal to hear oral argument would unfairly prejudice a party). *Mahon v Credit Bureau, Inc.* (9th Cir 1999) 171 F3d 1197.

If the trial court refuses to allow for oral argument on summary judgment, the aggrieved party may seek review of that decision by petition for a peremptory writ. *Mediterranean Constr. Co.,* 66 CA4th 267 n12.

On challenging a trial court's decision by writ review, see California Civil Writ Practice chap 11 (4th ed Cal CEB 2008); Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide February 2009).

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§36.161 B. Tentative Ruling

Most courts offer a tentative ruling procedure that allows the court, before the hearing, to inform the parties of a tentative decision based on its review of the submitted papers. Cal Rules of Ct 3.1308. See, *e.g.,* Riverside Ct R 2.0016; San Francisco Ct R 8.3.

A court that follows a tentative ruling procedure must state that in its local rules and must specify (Cal Rules of Ct 3.1308(c)):

- The telephone number or website for obtaining the tentative rulings; and
- The time by which the rulings will be available.

When the tentative ruling is against a party, that party may contest the tentative ruling by requesting a hearing. The local or departmental rules may specify procedures by which counsel must contest the ruling, *e.g.,* through the court's website or by leaving a voicemail message with the department in which the hearing will take place after notice to all parties.

Generally, a party should contest the tentative ruling if:

- Oral argument may change the court's decision;
- The record needs to be clarified; or
- The grounds for the court's decision are unclear from its tentative ruling.

Failure to contest a tentative ruling will cause it to become the court's order. See, *e.g.,* San Francisco Ct R 8.3(E) (if no party appears, "the tentative ruling will be adopted").

On tentative rulings and preparation for hearing, see California Summary Judgment §§10.5-10.23 (Cal CEB 2010).

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§36.162 C. Oral Argument

Oral argument is required for summary judgment motions. *Brannon v Superior Court* (2004) 114 CA4th 1203, 8 CR3d 491 (trial court may not properly determine summary judgment motion without permitting opportunity for oral argument); *Gwartz v Superior Court* (1999) 71 CA4th 480, 83 CR2d 865 (trial court's order denying summary judgment motion without hearing was vacated and remanded); see *Mediterranean Constr. Co. v State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 262, 77 CR2d 781 (noting repeated references in CCP §437c to "hearing").

At the hearing, counsel should listen carefully to and address the court's concerns, comments, or questions and discuss any matter not already covered in the legal memorandums.

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§36.163 1. Evidentiary Objections at Hearing

Counsel may make evidentiary objections orally at the hearing. See CCP §437c(b)(5), (d)). If counsel intends to do so, however, he or she must arrange to have a court reporter present at the hearing. Cal Rules of Ct 3.1352(2). See §36.86.

Evidentiary objections not made at the hearing are deemed waived. CCP §437c(b)(5). Similarly, objections to declarations based on failure to comply with CCP §437c(d) must be made at the hearing or will be deemed waived. CCP §437c(d).

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2. Preserving Issues for Appeal

§36.164 a. Ask for Express Ruling on Evidentiary Objections

Counsel should ask the court for an express ruling on evidentiary objections. If a party makes evidentiary objections (see §§36.82-36.85) but the trial court does not expressly rule on them, the objections are ordinarily deemed waived and are not preserved on appeal. When a ruling on an objection is important to the case, counsel should ask for, and actively pursue, an express and/or written ruling at the hearing. On court's failure to rule on evidentiary objections, see §36.167.

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§36.165 (1) Procedure for Making Oral Objections to Evidence

As an alternative to filing written objections (see §§36.82-36.85), the opposing party may raise evidentiary objections at the summary judgment hearing. See CCP §437c(b)(5). Presenting written objections before the hearing is almost always preferable to making oral objections. If oral objections must be made, however, the attorney should prepare them before the hearing and read them into the record.

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§36.166 (2) Court Reporter Required if Making Oral Objections

The objecting party must arrange for a court reporter to attend the hearing to record the objections for the record. Cal Rules of Ct 3.1352.

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§36.167 (3) Court's Failure to Rule on Objections

When a trial judge fails to rule on summary judgment or adjudication motion evidentiary objections, the objections are deemed waived on appeal. See, *e.g., Sharon P. v Arman Ltd.* (1999) 21 C4th 1181, 1186 n1, 91 CR2d 35, disapproved on other grounds in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841; *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137.

One clear exception to this rule is when it would have been a fruitless or idle act to continually interpose repeated requests for rulings; when this occurs, written evidentiary objections may be deemed preserved for appellate review. *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 785, 97 CR2d 140 (defense counsel twice orally raised issue in court of securing ruling on previously filed written evidentiary objections; third oral request for rulings would have been fruitless). On options in appellate court if trial court does not rule on evidentiary objections, see §§36.202-36.204.

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§36.168 b. Ask Court to Specify Findings for Order

When denying a motion for summary judgment based on the existence of a triable issue as to one or more material facts, the court must, by written or oral order, specify the material fact(s) raised by the motion. CCP §437c(g). The court must specifically refer to the evidence proffered in support of and in opposition to the motion that indicates that a triable controversy exists.

When granting a motion for summary judgment on the ground that there is no triable issue of material fact, the court must, by written or oral order, specify the reasons for its determination. CCP §437c(g). The order must specifically refer to the evidence proffered in support of and in opposition to the motion indicating that no triable issue exists. The court must record its determination by court reporter or written order. On decision and order after hearing, see §§36.184-36.189.

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§36.169 D. Requesting Sanctions

If it appears that any party's affidavits or declarations were made in bad faith or solely for the purpose of delay, it may be appropriate to request an order for sanctions. Under CCP §437c(j), if the court determines that affidavits were presented in bad faith or solely for purposes of delay, it must order the party presenting the affidavits to pay the other party its "reasonable expenses" caused by the affidavits. Reasonable expenses do not include attorney fees. *Collins v Department of Transp.* (2003) 114 CA4th 859, 864, 8 CR3d 132 (decided under former CCP §437c(i), now CCP §437c(j)). But see *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1176, 230 CR 289 (sanctions, including attorney fees, awarded against party who submitted affidavits opposing summary judgment in bad faith based on CCP §128.5).

Before such sanctions can be imposed, the party requesting them, or the court on its own motion, must give notice and an opportunity to be heard. CCP §437c(j).

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§36.170 E. Diagnostic Questions: Preparing for Hearing

Certain actions may be taken immediately before or during the hearing. Counsel should review the moving and opposing papers and be sure points such as the following have been accounted for:

1. **Has the admissibility of evidence in the supporting and opposing declarations been carefully analyzed?**
2. **If evidence is inadmissible, can its defects be cured? If so, consider moving orally for continuance of hearing to allow this.**
3. **Are there evidentiary objections to opposing declarations that were not made to the court in writing? If so, be sure to raise them orally at the hearing, and arrange for a court reporter to be present to record them.**
4. **Have the pleadings been carefully reviewed?**
5. **Are there any defects that can be cured by amendment? If so, move orally for a continuance to allow an amendment.**
6. **Has the supporting evidence been carefully examined?**
7. **Are there gaps in proof that supplemental declarations can cure? If so, consider moving orally for a continuance of the hearing to allow for further discovery and presentation of supplemental declarations.**

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X. COURT DECISION

§36.171 A. Statutory Test

A motion for summary judgment must be granted if all the moving and opposing papers submitted "show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CCP §437c(c); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. Thus, if the evidence would permit a trier of fact to find for a nonmoving plaintiff under the standard of proof applicable at trial, then summary judgment must be denied, even if the trial court believes that the nonmovant would probably lose at trial. The court's role is not to predict the outcome at trial nor to weigh the evidence as if sitting as the trier of fact. The court's role is simply to decide whether the admissible evidence would *permit* the trier of fact to find in favor of the nonmoving party.

A similar test would appear to apply to each ruling sought by a motion for summary adjudication to eliminate any cause of action, claim for punitive damages, or affirmative defense that has no merit; to establish a cause of action to which there is no defense; or to establish that one or more defendants does or does not owe a duty to specified plaintiffs. See CCP §437c(f).

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§36.172 1. Court Applies Three-Step Analysis

The trial court (and the appellate court reviewing a trial court ruling) applies a three-step analysis to:

- Identify issues framed by the pleadings (because, *e.g.,* a defendant's summary judgment motion must respond to these allegations by establishing a complete defense or the absence of any factual basis for any of the plaintiff's theories);
- Decide whether facts shown in the summary judgment papers warrant judgment for the moving party and negate the opposing party's claims; and
- Decide whether the opposing party has established that any triable material fact exists.

WRI Opportunity Loans II, LLC v Cooper (2007) 154 CA4th 525, 531, 65 CR3d 205, citing *Bostrom v County of San Bernadino* (1995) 35 CA4th 1654, 1662, 42 CR3d 669.

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§36.173 2. When Facts Essential to Motion Exist But Cannot Be Presented

If the affidavits submitted in opposition to a summary judgment or summary adjudication motion show that facts essential to justify the opposition may exist but cannot then be presented to the court, the court must deny the motion or order a continuance to permit the party time to obtain affidavits or take discovery. CCP §437c(h). On continuances for further discovery, see §§36.48-36.51.

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§36.174 3. Supplemental Declarations and Late Papers

Before ruling on a summary judgment or summary adjudication motion, a court has the discretion to consider papers filed late and to afford relief for a party's "mistake, inadvertence, surprise, or excusable neglect." CCP §473(b). But see *Ambrose v Michelin N. Am., Inc.* (2005) 134 CA4th 1350, 1354, 37 CR3d 1 (late request for continuance due to other deadlines and concurrent obligations is not excusable neglect under §473).

CAUTION: A court is well within its discretion to refuse to consider any late filed and served papers. Do not rely on §473(b) relief in lieu of filing and serving papers on time.

If the court believes that an untimely paper prejudices the other party, it may continue a hearing on the motion and make any other appropriate orders, including an order that the responsible party pay expenses arising from the postponement. CCP §§594a, 1024; *Kapitanski v Von's Grocery Co.* (1983) 146 CA3d 29, 32, 193 CR 839.

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§36.175 B. Consideration of Proffered Evidence

When ruling on a summary judgment or summary adjudication motion, a court must consider all of the evidence in the papers, except that to which objections have been made and sustained by the court. CCP §437c(c). Evidentiary objections may be made either in writing or orally at the hearing on the motion (see §§36.82-36.86), and objections not made are deemed waived. See CCP §437c(b)(5), (d). In reviewing evidentiary objections, the trial court must be guided and controlled by legal principles. *Fasuyi v Permatex, Inc.* (2008) 167 CA4th 681, 695, 84 CR3d 351. On appeal, the trial court is granted deference on its evidentiary rulings; the standard for review is abuse of discretion. A conclusory ruling on evidentiary objections without consideration of the individual objections lodged is an abuse of discretion. *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 255, 100 CR3d 296.

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§36.176 1. Court Must Construe Evidence in Favor of Party Opposing Motion

To safeguard the opposing party's right to trial on the merits, all doubts on the propriety of granting a summary judgment or summary adjudication motion must be resolved against the moving party. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841. See *Stoltenberg v Newman* (2009) 179 CA4th 287, 290 n2, 101 CR3d 606, citing *Aguilar v Atlantic Richfield Co., supra* (all evidence and all inferences reasonably drawn therefrom must be viewed in light most favorable to opposing party). When the court examines the sufficiency of the evidence, the declarations or affidavits of the moving party are strictly construed and those of the opposition are liberally construed. *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 21, 112 CR 786; *Grant-Burton v Covenant Care, Inc.* (2002) 99 CA4th 1361, 1369, 122 CR2d 204, citing *Jackson v County of Los Angeles* (1997) 60 CA4th 171, 178, 70 CR2d 96.

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§36.177 a. Exception: When Opposing Party Repudiates Earlier Admission

The rule requiring liberal construction of the opposition's evidence does not apply if the opposing party attempts to create a conflict in the evidence by repudiating earlier admissions. *Shapero v Fliegel* (1987) 191 CA3d 842, 849, 236 CR 696. When the moving party uses an admission to establish a material fact, the court may disregard conflicting allegations in the opposing declarations. *State Farm Mut. Auto. Ins. Co. v Eastman* (1984) 158 CA3d 562, 573, 204 CR 827 (credibility of admissions is valued so highly that controverting affidavits may be disregarded as irrelevant, inadmissible, or evasive).

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§36.178 b. When Opposing Party Adequately Explains Conflict

Apparent contradictions between an affidavit filed in support of summary adjudication and earlier testimony, however, does not preclude consideration of the affidavit if the contradiction is satisfactorily explained in the affidavit and the explanation is corroborated by the evidence. See *Niederer v Ferreira* (1987) 189 CA3d 1485, 1503, 234 CR 779 (affiant's unfamiliarity with concept of assignment caused her, at her deposition, to erroneously deny that assignment had been made).

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§36.179 2. Inferences Drawn From Evidence Presented

In ruling on a summary judgment motion, the court's consideration of evidence is not limited to the face of the documents proffered by the parties. Evidence in support of summary judgment also includes inferences deducible from the papers submitted. CCP §437c(c). All evidence must be viewed in a light most favorable to the nonmovant, and all reasonable inferences must be drawn in favor of the nonmovant. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 856, 107 CR2d 841.

Inferences must be reasonably deducible. They may not be derived solely from speculation or conjecture. *O'Neil v Dake* (1985) 169 CA3d 1038, 215 CR 732. Inferences precluding summary judgment sometimes arise from the moving party's own declarations. See, *e.g., Maxwell v Colburn* (1980) 105 CA3d 180, 185, 163 CR 912 (rational inference of negligence from moving party's declaration that he was unable to stop in time to avoid hitting plaintiff).

When inferences are contradicted by other inferences, a triable issue of fact may be revealed precluding summary judgment. See *Burke v Superior Court* (1982) 128 CA3d 661, 180 CR 537. The court has no power in summary proceedings to weigh one inference against another or against other evidence. CCP §437c(c); *Saylin v California Ins. Guar. Ass'n* (1986) 179 CA3d 256, 224 CR 493.

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§36.180 3. Uncontroverted Evidence

If the opposing party does not present controverting evidence, the court must accept the facts stated in the moving party's declarations as true for purposes of ruling on the summary judgment motion, as long as the declarant could competently testify about those facts based on personal knowledge. *Leo F. Piazza Paving Co. v Foundation Constructors, Inc.* (1981) 128 CA3d 583, 177 CR 268. Additionally, the court may not deny the motion on the grounds that the declarant has not been cross-examined. CCP §437c(e).

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§36.181 a. Exception: When Only Proof of Fact Is Declaration of Sole Witness

When the moving party's evidence is uncontroverted, the court has discretion to refuse to grant summary judgment when the only proof of a material fact supporting the motion is the declaration of the only witness to that fact. CCP §437c(e); *Overland Plumbing, Inc. v Transamerica Ins. Co.* (1981) 119 CA3d 476, 483, 174 CR 1.

EXAMPLE: Sole witness to material fact. In a malpractice action against a dentist for the death of a patient under anesthesia, the dentist, in his declaration in support of summary judgment, says that he administered the proper amount of anesthesia and that the patient had been fully advised of the risks of anesthesia and consented to being anesthetized.

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§36.182 b. Exception: When Fact Is Individual's State of Mind Established by Affirmation Only

When the moving party's evidence is uncontroverted, the court has discretion to refuse to grant summary judgment the material fact is an individual's state of mind and the only evidence offered concerning it is that individual's affirmation. CCP §437c(e).

EXAMPLE: Individual's state of mind established by affirmation only. In a lawsuit alleging fraud, the plaintiff alleges that the defendant entered into a contract with no intention to perform and the only evidence of intent offered by the defendant is his affidavit stating that he meant to perform on the contract when he entered into it.

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§36.183 4. Court Discretion to Consider Evidence Not Presented in Moving Party's Separate Statement

The trial court has discretion to consider evidence not referenced in the separate statement in ruling on a summary judgment or summary adjudication motion, but in exercising this discretion, the court should consider due process implications. *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 315, 125 CR2d 499. See *Fenn v Sherriff* (2003) 109 CA4th 1466, 1480, 1 CR3d 185 (applying factors set out in *San Diego Watercrafts, Inc.* and declining to exercise discretion to look beyond separate statement in reviewing summary judgment).

The court may consider:

- Evidence filed with the separate statement but not specifically referenced (*Kulesa v Castleberry* (1996) 47 CA4th 103, 112, 54 CR2d 669; but see *Fleet v CBS, Inc.* (1996) 50 CA4th 1911, 1916 n3, 58 CR2d 645; *North Coast Bus. Park v Nielsen Const Co.* (1993) 17 CA4th 22, 31, 21 CR2d 104); or
- Evidence filed for the first time with the reply brief as long as the opposing party has notice and an opportunity to respond to the new material (*Wall Street Network, Ltd. v New York Times Co* (2008) 164 CA4th 1171, 1183, 80 CR3d 6; *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 315, 125 CR2d 499).

On circumstances under which court may consider evidence not in the separate statement, see California Summary Judgment §§11.16-11.18 (Cal CEB 2010).

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XI. COURT ORDER

A. Preparation and Approval of Court Order

§36.184 1. Prevailing Party Usually Prepares Order

The court will usually direct the prevailing party to submit a formal order for court approval. Although a court may shift the burden of *preparing* the formal order onto the prevailing counsel (see *Tera Pharmaceuticals, Inc. v Superior Court* (1985) 170 CA3d 530, 532, 215 CR 923), the court may not abdicate its responsibility to specify the findings necessary to support its order. *Carnes v Superior Court* (2005) 126 CA4th 688, 692, 23 CR3d 915 (disapproving court's grant of motion without specifying the findings and reason for its decision).

It is an abuse of discretion for the trial court to direct the losing party to prepare the formal order, because it is the prevailing party who has an interest in preparing an adequate order to protect the favorable trial court ruling. *Beatrice Co. v Superior Court* (1986) 182 CA3d 525, 527, 227 CR 316. If the prevailing party fails to prepare or submit a formal order, however, any other party may do so. Cal Rules of Ct 3.1312(c).

For forms of order, see §§36.224-36.226.

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§36.185 2. Timing

If a proposed order was not prepared and submitted before the hearing, and the opposing party has not waived notice or the court ordered otherwise, the prevailing party must prepare and serve the order on the opposing party within **5 days** after the ruling. The opposing party has **5 days** to object to the order as to form. Cal Rules of Ct 3.1312(a).

NOTE: These timing rules do not apply when the motion was unopposed and the prevailing party submitted a proposed order with its moving papers, unless otherwise ordered by the court. Cal Rules of Ct 3.1312(d).

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B. Contents of Court Order

§36.186 1. When Summary Judgment Motion Is Granted

When summary judgment is granted, the court must specify the reasons for its determination by "written or oral order." CCP §437c(g). See *Barton v Elexsys Int'l, Inc.* (1998) 62 CA4th 1182, 1194, 73 CR2d 212 (finding that trial court's oral statement at hearing is sufficient).

PRACTICE TIP: If the order is made orally at the hearing, it must be recorded by a court reporter. CCP §437c(g).

The order must also specifically refer to the evidence in support of and, if applicable, in opposition to the motion showing no triable issue exists. CCP §437c(g). See *Vineyard Springs Estates v Superior Court* (2004) 120 CA4th 633, 642, 15 CR3d 587 (trial court cannot faithfully carry out mandate of §437c(g) without considering all objections to proffered evidence and ruling on their merits);

The court's failure to provide a sufficient statement of reasons is not automatic grounds for reversal, because it is the ruling's validity that is reviewable, not the grounds for it. *Ace Am. Ins. Co. v Walker* (2004) 121 CA4th 1017, 1027, 18 CR3d 1. See *W. F. Hayward Co. v Transamerica Ins. Co.* (1993) 16 CA4th 1101, 1110, 20 CR2d 468 (statement of reasons must allow for meaningful appellate review). In some cases, however, the lack of a statement of reasons may be a ground for reversal, particularly if the issues litigated through summary judgment were complex, the facts supported both the moving and opposing parties, and the court decided credibility issues. *Santa Barbara Pistachio Ranch v Chowchilla Water Dist.* (2001) 88 CA4th 439, 448, 105 CR2d 856.

NOTE: When summary judgment is granted, no findings are made, because no trial on the facts has taken place. *Business Title Corp. v Division of Labor Law Enforcement* (1976) 17 C3d 878, 882 n3, 132 CR 454; *Perry v Farley Bros. Moving & Storage* (1970) 6 CA3d 884, 86 CR 397.

If the court orders summary judgment on the ground that the opposing party failed to submit the required separate statement of disputed and undisputed facts under CCP §437c(b)(3), the court should state the basis of its order in the record, normally in the minute order. The appellate court will not presume that summary judgment was decided on the basis of procedural defects, rather than on the merits. *Gilbertson v Osman* (1986) 185 CA3d 308, 315, 229 CR 627, disapproved on other grounds in *Woods v Young* (1991) 53 C3d 315, 279 CR 613.

The order should include a direction that judgment be entered for the prevailing party specifying any affirmative relief.

PRACTICE TIP: Prepare and submit a proposed judgment to the court with the proposed order. Be sure to comply with any local court rules.

On requirements for an order when the court grants summary judgment motion, see California Summary Judgment §§11.21-11.25 (Cal CEB 2010). For form of order, see §36.224.

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§36.187 2. When Summary Judgment Motion Is Denied

When a court denies summary judgment on the ground that there is a triable issue as to one or more material facts, it must, by written or oral order (CCP §437c(g)):

- Specify the material fact(s), and
- Specifically refer to the evidence proffered in support of and in opposition to the determination that a triable controversy exists.

The specificity requirement compels the trial court to focus its attention on the legal and factual issues before concluding that disputed factual issues exist, thus precluding summary judgment. *Greater Irvine Credit Union v Superior Court* (1986) 186 CA3d 1189, 1191, 231 CR 296 (court's order fell "far short" of required specificity). A general statement that the liability of the moving party is at issue does not assist the appellate court in reviewing the denial order. *Beatrice Cos. v Superior Court* (1986) 182 CA3d 525, 527, 227 CR 316.

The specificity requirement does not apply, however, if summary judgment is denied on the ground that the moving party failed to meet the burden of proof or for procedural reasons (*e.g.,* failure to comply with applicable local rules).

NOTE: Issues not specified in the order are not foreclosed at trial. That is, disputed issues specified in the order denying summary judgment are not necessarily the only issues in the case left to be decided at trial. The court is not required by the statute to list all disputed factual issues in the order, only "one or more" such issues. CCP §437c(g).

A reviewing court must vacate orders denying summary judgment that fail to comply with CCP §437c(g). See *Young v Superior Court* (1986) 179 CA3d 28, 33, 224 CR 405 (court vacated order denying summary judgment because order failed to refer specifically to evidence proffered in support of and in opposition to motion indicating that triable controversy existed).

For form of order, see §36.226. On requirements for an order when the court denies summary judgment motion, see California Summary Judgment §§11.26-11.29 (Cal CEB 2010).

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§36.188 3. When Summary Adjudication Motion Is Granted

In an order granting summary adjudication, a court must specify its reasons and refer to the evidence, just as it would in an order granting or denying summary judgment. CCP §437c(g). See §36.173.

On requirements for an order when the court grants summary adjudication motion, see California Summary Judgment §§11.30-11.32 (Cal CEB 2010).

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§36.189 4. When Summary Adjudication Motion Is Denied

When a court denies summary adjudication, the court should specify the material facts as to which there is a triable issue, including references to supporting and opposing evidence. See CCP §437c(g) ("[t]he court shall also state its reasons for any other determination").

On orders granting summary judgment and summary adjudication, see also §§36.173, 36.175. For sample orders, see §§36.224-36.226. On requirements for an order when the court denies summary adjudication motion, see California Summary Judgment §§11.34-11.35 (Cal CEB 2010).

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5. Obtaining Attorney Fees and Sanctions

§36.190 a. Contractual Attorney Fees

If a contract provides for attorney fees to enforce the contract, the prevailing party is entitled to attorney fees whether or not he or she is the party specified in the contract. See *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614 (CC §1717 requires that any contractual provision for attorney fees to "prevailing party" must be applied mutually, even if contract specifies that only one party may recover fees); *FDIC v Dintino* (2008) 167 CA4th 333, 358, 84 CR3d 38 (defendant was prevailing party because he prevailed on only contract-based cause of action). On contractual attorney fee awards, see California Attorney Fee Awards, chap 4 (3d ed Cal CEB 2010).

Special rules apply to the definition of "prevailing party" on a summary judgment motion and its appeal. One court held, despite CC §1717, that attorney fees (*Presley v Whelan* (1983) 146 CA3d 959, 196 CR 1):

- Cannot be awarded to a party who wins appellate reversal of a summary judgment while the litigation is continuing;
- Can be awarded to a plaintiff who succeeds in reversing summary judgment on appeal and then proceeds to win final judgment (as long as there is a contract under CC §1717 entitling the plaintiff to attorney fees on appeal); and
- Can be awarded to a defendant who ultimately prevails, as provided by the contract, but a plaintiff who succeeded earlier in reversing summary judgment is not entitled to any right of offset.

NOTE: The *Presley* court reasoned that to allow an offset would discourage the efficient resolution of litigation by use of motions for summary judgment and would require the court to review all interim procedural rulings in the case. 146 CA3d at 963. An offset would be allowed, however, for the expense of frivolous motions made by the prevailing party before conclusion of the suit under CCP §128.7.

On the prevailing party concept, see California Attorney Fee Awards, chap 2 (3d ed Cal CEB 2010). For further discussion of procedure for obtaining attorney fees, see California Summary Judgment §§11.37-11.39 (Cal CEB 2010); California Trial Practice: Civil Procedure During Trial, chap 26 (3d ed Cal CEB 1995); California Civil Appellate Practice chap 20 (3d ed Cal CEB 1996).

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§36.191 b. Sanctions for Bad Faith Affidavits

Under CCP §437c(j), if the court determines that affidavits were presented in bad faith or solely for purposes of delay, it must order the party presenting the affidavits to pay the other party its "reasonable expenses" caused by the filing of the affidavits. See *Collins v Department of Transp.* (2003) 114 CA4th 859, 864, 8 CR3d 132 (reasonable expenses allowed as sanctions under the summary judgment statute do not include attorney fees). But see *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1176, 230 CR 289 (sanctions, including attorney fees, awarded against party who submitted affidavits opposing summary judgment in bad faith based on CCP §128.5).

NOTE: Because CCP §437c(j) is based on Fed R Civ P 56(g), applicable federal cases are persuasive authority for California courts; however, federal courts have been reluctant to find bad faith. See, *e.g., Sonobond Corp. v Uthe Technol., Inc.* (ND Cal 1970) 314 F Supp 878.

Before sanctions can be imposed, the party requesting them, or the court on its own motion, must give notice and an opportunity to be heard. CCP §437c(j).

PRACTICE TIP: It is rare for courts to award sanctions under §437c(j), because bad faith or intentional delay is difficult to prove. The determination of whether declarations are presented in bad faith frequently cannot be made until after the summary judgment motion has been denied and a trial is conducted in which the evidence reveals the bad faith of the party presenting them. Given the difficulty of winning sanctions motions and the already overcrowded motion calendars, counsel may choose not to pursue sanctions except in extreme cases.

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§36.192 XII. CHALLENGING THE COURT'S ORDER

After losing the trial court's ruling on a motion for summary judgment or adjudication, a party must decide whether to challenge the decision. The losing party may challenge the decision by means of various trial court procedures, or by appellate review via writ or appeal.

For detailed discussion of each of the losing party's options to challenge the court's ruling, see California Summary Judgment chap 12 (Cal CEB 2010).

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A. When Motion for Summary Judgment Is Granted

§36.193 1. Trial Court Options

When a summary judgment motion is granted, the opposing party may challenge the grant directly in the trial court by the following motions:

- Motion for reconsideration (see California Summary Judgment §§12.3-12.6 (Cal CEB 2010));
- Motion for a new trial (see Summary Judgment §§12.8-12.10);
- Motion for relief under CCP §473 (see Summary Judgment §§12.11-12.14); or
- Motion or separate action to set aside the judgment due to extrinsic fraud or mistake (see Summary Judgment §§12.15-12.17).

In addition to the parties' motions for reconsideration under §1008(a), courts have inherent authority, on their own motion, to reevaluate their own interim rulings at any time before entry of judgment, and can reconsider a previously denied motion for summary judgment or adjudication sua sponte despite the absence of new facts or law. *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249. But see *Schachter v Citigroup, Inc.* (2005) 126 CA4th 726, 23 CR3d 920 (court's inherent power to correct its own rulings does not excuse party from complying with requirements of CCP §437c(f)(2)).

See chart summarizing post-ruling options and timing in §§36.211-36.212.

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2. Appellate Court Review

§36.194 a. Judgment on Motion for Summary Judgment Is Appealable

An order granting a motion for summary judgment is a nonappealable interim order (see CCP §904.1(a)(1); 9 Witkin, California Procedure, *Appeal* §95 (5th ed 2008)), but an appeal does lie from the judgment entered on that order. CCP §437c(m); *Fraser-Yamor Agency, Inc. v County of Del Norte* (1977) 68 CA3d 201, 207, 137 CR 118.

By statutory definition (see CCP §577), a judgment is the "final determination of the rights of the parties." *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149. Thus, a summary judgment in favor of a plaintiff/cross-defendant on the cross-complaint is not final until the claims raised by the complaint against the defendant/cross-complainant are resolved.

NOTE: Despite the plain rule that an order granting summary judgment is not appealable (see §12.18), there are instances in which courts have construed such an order as a "final judgment," or treated an appeal from a nonappealable order as an appeal from a subsequent judgment, so that an appeal can go forward. See *Nystrom v First Nat'l Bank* (1978) 81 CA3d 759, 762, 146 CR 711 (court of appeal treated order granting summary judgment as appealable final judgment).

In other instances, courts have chosen to treat a notice of appeal from an order granting summary judgment as a writ petition. See, *e.g., Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 1072, 54 CR2d 385.

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§36.195 b. Time to File Notice of Appeal

An attorney who wants to appeal from the grant of a summary judgment must file a notice of appeal on or before the earliest of (Cal Rules of Ct 8.104(a)(1)-(3)):

- **60 days** after the superior court clerk serves the party filing the notice of appeal a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date that either was served;
- **60 days** after the party filing the notice of appeal serves or is served by a party with a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
- **180 days** after entry of judgment.

PRACTICE TIP: Service of a notice of appeal may be made by any permitted method, including electronic service. See Cal Rules of Ct 8.104(a)(4).

For purposes of Cal Rules of Ct 8.104, the date of entry of an appealable order is the date it is entered in the permanent minutes unless the minute order directs that a written order be prepared, in which case the entry date is the date the signed order is filed. Cal Rules of Ct 8.104(d)(2). For appealable orders not entered into the permanent minutes, the entry date is the date the signed order is filed. Cal Rules of Ct 8.104(d)(3).

NOTE: A written order prepared under Cal Rules of Ct 3.1312 or similar local rule is not considered an order prepared by direction of a minute order. Cal Rules of Ct 8.104(d)(2).

WARNING: The time period for filing a notice of appeal is jurisdictional. The appellate court must dismiss an appeal that is filed after the expiration of the notice period.

On the time for filing the notice of appeal, see California Civil Appellate Practice §§7.25-7.43 (3d ed Cal CEB 1996).

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§36.196 c. Scope of Review

The general rules relating to the scope of appellate review usually apply to summary judgment. For example, an argument or theory will generally not be considered if it is raised for the first time on appeal, unless it is a question of law to be applied to undisputed facts. See, *e.g., DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 676, 69 CR3d 888; *American Continental Ins. Co. v C & Z Timber Co.* (1987) 195 CA3d 1271, 1281, 241 CR 466.

In addition, theories not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal (see, *e.g., National Indem. Co. v Manley* (1975) 53 CA3d 126, 133, 125 CR 513), and issues raised and then abandoned in the trial court cannot be considered on appeal. See *Chesney v Gresham* (1976) 64 CA3d 120, 131, 134 CR 238 (some allegations in plaintiff's complaint might be construed as effort to plead actual fraud, but there was no suggestion of actual fraud in other papers submitted in opposition to defendant's summary judgment motion; thus, court of appeal found that plaintiff waived issue).

NOTE: There is an important exception to ordinary appellate rules in that an appellate court may not reverse summary judgment with directions to the trial court to enter judgment for the other party unless a cross-motion for summary judgment was made from which that party has taken an appeal. See *Dvorin v Appellate Dep't of Superior Court* (1975) 15 C3d 648, 650, 125 CR 771. To permit such a judgment would deny the original moving party the right to allege or produce additional facts justifying a trial of factual issues. 15 C3d at 651.

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§36.197 d. Standard of Review

On appeal from an order granting summary judgment, the appellate court determines de novo whether a triable issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law. See CCP §437c(c); *Merrill v Navegar, Inc.* (2001) 26 C4th 465, 476, 110 CR2d 370; *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 254, 100 CR3d 296. The appellate court reviews the trial court's ruling, not its rationale. *Silva v Lucky Stores, Inc.* (1998) 65 CA4th 256, 261, 76 CR2d 382.

NOTE: It does not follow from the fact that summary judgments are reviewed de novo that the parties may stipulate that a summary judgment would have been granted, when none has been made, and when case law, statutes, and court rules provide otherwise, and seek review of the so stipulated "judgment." *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 122, 94 CR3d 109.

The court of appeal considers all evidence the parties have offered in connection with the motion "except that to which objections have been made and sustained." *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 334, 100 CR2d 352, citing *Artiglio v Corning Inc.* (1998) 18 C4th 604, 612, 76 CR2d 479.

NOTE: In *Mamou v Trendwest Resorts, Inc.* (2008) 165 CA4th 686, 711, 81 CR3d 406, the court of appeal noted that *Guz* has been erroneously interpreted as requiring the appellate court to give conclusive effect to the trial court's treatment of the evidence. If a court admits patently inadmissible evidence over a proper objection, the appellate court must disregard the evidence.

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§36.198 e. Review of Evidence

Although as a general rule an appellate court reviews a trial court's decision to grant summary judgment de novo (see §36.196), the court of appeal reviews the trial court's rulings on evidentiary objections for abuse of discretion. *Walker v Countrywide Home Loans, Inc.* (2002) 98 CA4th 1158, 1168, 121 CR2d 79. But see *City of S. Pasadena v Department of Transp.* (1994) 29 CA4th 1280, 1288, 35 CR2d 113 (incorrect to use abuse of discretion standard outside of review of discretionary decision to deny summary judgment under CCP §437c(e)).

In reviewing the evidence presented in bringing and opposing the summary judgment motion, the appellate court (*Herberg v California Inst. of the Arts* (2002) 101 CA4th 142, 148, 124 CR2d 1):

- Strictly construes the moving party's evidence;
- Liberally construes the opposing party's evidence; and
- Accepts as undisputed only the portions of the moving party's evidence that are uncontradicted.

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§36.199 (1) Limited to Separate Statement

On review of a motion for summary judgment, the relevant facts are limited to those in the parties' statements of undisputed facts that are supported by affidavits and declarations, to the extent those facts have evidentiary support. See CCP §437c(b); *West v Sundown Little League, Inc.* (2002) 96 CA4th 351, 362, 116 CR2d 849. Facts not contained in the separate statements do not exist. *Lewis v County of Sacramento* (2001) 93 CA4th 107, 112, 113 CR2d 90.

On the moving party's separate statement, see §§36.62-36.66; on the opposing party's separate statement, see §§36.75-36.80.

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(2) Waiver of Evidentiary Objections

§36.200 (a) Failure to Appeal Trial Court's Ruling Sustaining Objections

When reviewing a motion for summary judgment, an appellate court may not consider evidence to which objections have been made and properly sustained. *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 334, 100 CR2d 352. If an opposing party does not challenge a trial court's ruling that sustains a moving party's objections to evidence offered in opposition to the summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived." *Lopez v Baca* (2002) 98 CA4th 1008, 1014, 120 CR2d 281.

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§36.201 (b) Failure to Object to Admission in Trial Court

If a party does not make an objection in the trial court, the evidence is admitted in evidence and becomes part of the record on appeal. *Alexander v Codemasters Group Ltd.* (2002) 104 CA4th 129, 140, 127 CR2d 145, citing *Haskell v Carli* (1987) 195 CA3d 124, 129, 240 CR 439. Failure to object, even to otherwise inadmissible evidence, waives the defect. CCP §437c(b)(5) (evidentiary objections not made at summary judgment hearing are deemed waived); Evid C §353(a) (to preserve right to challenge erroneously received evidence, litigant must make timely objection).

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§36.202 (c) Failure to Obtain Express Ruling by Trial Court

If a party files evidentiary objections, but the trial court does not expressly rule on them, the objections are waived and are not preserved on appeal. *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137 (objected-to evidence is considered admitted and becomes part of record on appeal). See CCP §437c(b)(5), (c). If, however, it would have been a fruitless or idle act to continually interpose repeated requests for rulings, written evidentiary objections may be deemed preserved for appellate review. *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 784, 97 CR2d 140.

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§36.203 (d) Objections May Be Preserved Even if Not Expressly Ruled On

In *Biljac Assocs. v First Interstate Bank* (1990) 218 CA3d 1410, 267 CR 819, the First District Court of Appeal held that, under CCP §437c, a trial court is not required to make formal rulings on evidentiary objections, and, if the court does not expressly rule on evidentiary objections, the objections are preserved on appeal. This holding, however, has been criticized by other districts (see *Sambrano v City of San Diego* (2001) 94 CA4th 225, 114 CR2d 151) as well as by a later First District opinion (*Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 57 CR3d 204). See also *Swat-Fame, Inc. v Goldstein* (2002) 101 CA4th 613, 623, 124 CR2d 556, disapproved on other grounds in *Zamos v Stroud* (2004) 32 C4th 958, 973, 12 CR3d 54.

CAUTION: With a wealth of authority supporting the position adopted by the supreme court in *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137 that objections not expressly ruled on by the trial court are waived and are not preserved on appeal (see California Summary Judgment §12.28 (Cal CEB 2010)), there has been concern about continued validity of the *Biljac* opinion. The California Supreme Court granted review in *Reid v Google, Inc.* (review granted Jan. 30, 2008, S158965; superseded opinion at 155 CA4th 1342, 66 CR3d 744). In *Reid,* the Sixth District Court of Appeal followed *Biljac* when considering the admissibility of statistical evidence of age discrimination; the supreme court granted review on this issue. Counsel should check on *Reid*'s status and, until the supreme court decides *Reid,* be cautious whenever a court indicates reliance on that portion of *Biljac*. See Summary Judgment §§9.4-9.6.

On waiver of objections after a party requests rulings, see California Civil Appellate Practice §2A.15 (3d ed Cal CEB 1996).

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§36.204 (e) Implied Overruling of Objections Not Specifically Sustained

If the trial court states that it considered only admissible evidence in ruling on the summary judgment motion, the appellate court considers that statement to be an implied overruling of any objection not specifically sustained. *Laird v Capital Cities/ABC, Inc.* (1998) 68 CA4th 727, 736, 80 CR2d 454. See *Alexander v Codemasters Group Ltd.* (2002) 104 CA4th 129, 140, 127 CR2d 145 (applying *Laird,* court of appeal found that trial court's oral and written statements that it would consider only admissible evidence impliedly overruled defendant's evidentiary objections except to extent that objections were specifically sustained by trial court).

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§36.205 f. Supplemental Briefing

Under CCP §437c(m)(2), before the reviewing court may affirm an order granting summary judgment on a ground not relied on by the trial court, it must give the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include the argument that additional evidence on the new ground exists but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based on the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue.

NOTE: If the court does not allow supplemental briefing, a rehearing must be ordered on any party's timely petition. CCP §437c(m)(2).

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§36.206 B. When Summary Adjudication Is Granted

After a motion for summary adjudication has been granted, the cause or causes of action within the action, affirmative defenses, claim for damages, or issues of duty adjudicated are "deemed to be established," and the action proceeds only for the issues "remaining." CCP §437c(n)(1). The granting of a motion for summary adjudication may be challenged by certain trial court procedures, and by writ of mandate in the appellate court. See §§36.194-36.195.

See chart summarizing post-ruling options and timing in §§36.211-36.212.

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§36.207 1. Trial Court Options

When a summary adjudication motion is granted, the opposing party may challenge the grant directly in the trial court by the following motions:

- Motion for reconsideration (see California Summary Judgment §12.34 (Cal CEB 2010)); or
- Motion for relief under CCP §473 (see Summary Judgment §12.35).

See chart summarizing post-ruling options and timing in §§36.211-36.212.

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§36.208 2. Appellate Court Review

An order granting summary adjudication is immediately reviewable only by petition for a peremptory writ of mandate. CCP §437c(m). See *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 7 CR3d 628.

NOTE: An order granting a motion for summary adjudication is a preliminary nonappealable order; appeal must be taken from the final judgment ultimately entered in the case. *Etienne v DKM Enters.* (1982) 136 CA3d 487, 489, 186 CR 321. If, however, the order granting summary adjudication disposes of all causes of action for one party, the disposition is final for that party who, after judgment is entered, may seek review on appeal. *Etienne v DKM Enters., supra*. But see *Don Jose's Restaurant, Inc. v Truck Ins. Exch.* (1997) 53 CA4th 115, 61 CR2d 370.

On writ review of order under CCP §437c, see California Civil Writ Practice §§16.66-16.77 (4th ed Cal CEB 2008). See also Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide February 2009). On the appealability of orders and judgments, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

See chart summarizing post-ruling options and timing in §§36.211-36.212.

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C. When Motion for Summary Judgment or Summary Adjudication Is Denied

§36.209 1. Trial Court Options

When a summary judgment or summary adjudication motion is denied, the opposing party may challenge the denial in the trial court by the following motions:

- Motion for reconsideration (see California Summary Judgment §12.34 (Cal CEB 2010));
- Renewal of motion on new or different facts, circumstances, or law under CCP §1008(b) (see Summary Judgment §§12.39-12.41); or
- If motion was for summary adjudication, make a subsequent motion for summary judgment on same evidence (see Summary Judgment §12.46).

In addition to the parties' motions for reconsideration under §1008(a), courts have inherent authority, on their own motion, to reevaluate their own interim rulings at any time before entry of judgment, and can reconsider a previously denied motion for summary judgment or adjudication sua sponte despite the absence of new facts or law. *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249; *Abassi v Welke* (2004) 118 CA4th 1353, 1359, 14 CR3d 336. But see *Schachter v Citigroup, Inc.* (2005) 126 CA4th 726, 23 CR3d 920 (court's inherent power to correct its own rulings does not excuse party from complying with requirements of CCP §437c(f)(2)).

See chart summarizing post-ruling options and timing in §§36.211-36.212.

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§36.210 2. Appellate Court Review

An order denying a motion for summary judgment or summary adjudication may be reviewed by way of a petition for writ of mandate. CCP §437c(m); *Hill Bros. Chem. Co. v Superior Court* (2004) 123 CA4th 1001, 20 CR3d 530. See *Mallett v Superior Court* (1992) 6 CA4th 1853, 1863, 8 CR2d 829 (pretrial writ review is only speedy remedy available to review denial of summary judgment motion). In practice, however, writ review on the merits is not easy to obtain when summary judgment has been denied. See, *e.g., Lompoc Unified Sch. Dist. v Superior Court* (1993) 20 CA4th 1688, 1692, 26 CR2d 122 (courts "reluctant" to review denials of summary judgment by writ). But see *State Dep't of Health Servs. v Superior Court* (2003) 31 C4th 1026, 1036, 6 CR3d 441 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment, allowing defendant to raise defense to action under Fair Employment and Housing Act).

On writ from order denying motion for summary adjudication, see California Summary Judgment §12.47 (Cal CEB 2010). On writ review of order under CCP §437c, see California Civil Writ Practice §§16.66-16.77 (4th ed Cal CEB 2008). See also Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide February 2009). On the appealability of orders and judgments, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

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D. Charts: Challenges to Granting or Denial of Motions for Summary Judgment or Summary Adjudication

§36.211 1. Trial Court Procedures

Order	Motion	Timing
Granting Summary Judgment	Reconsideration (CCP §1008). See California Summary Judgment §§12.3-12.6, 12.34 (Cal CEB 2010).	**10 days** after service of written notice of entry of order.
	New Trial (CCP §659). See Summary Judgment §§12.8-12.10.	The earliest of the following: (a) After the court's decision and before entry of judgment; OR (b) Within **15 days** of: Date of clerk's mailing of notice of entry of judgment; or Clerk's service on any party of written notice of entry of judgment; OR (c) Within **180 days** after entry of judgment.
Granting Summary Judgment or Summary Adjudication	Discretionary Relief (CCP §473). See Summary Judgment §§12.11-12.13, 12.35.	Reasonable time, not to exceed **6 months**.
	Mandatory Relief (CCP §473(b)). See Summary Judgment §§12.14, 12.35.	Reasonable time, not to exceed **6 months**.
	Set Aside Judgment (CCP §473). See Summary Judgment §§12.15-12.17.	Any time after the time for appeal or other direct attack has expired.
Denying Summary Judgment or Summary Adjudication	Reconsideration (CCP §1008)	**10 days** after service of written notice of entry of order.
	Renewal of Summary Judgment	No later than approximately **105 days** before trial.

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§36.212 2. Appellate Court Review

Order	Filing	Timing
Order Granting Summary Adjudication	Peremptory Writ of Mandate (CCP §437c(m)(1)). See California Summary Judgment §12.36, §§12.47-12.49 (Cal CEB 2010).	**20 days** after service on petitioning party of written notice of entry of order.
Order Denying Summary Judgment or Summary Adjudication		
Judgment Granting or Denying Summary Judgment or Summary Adjudication	Appeal (CCP §437c(m)(1); Cal Rules of Ct 8.104). See Summary Judgment §§12.18-12.31, 12.37, 12.50.	On or before the earliest of: (a) **60 days** after: Clerk serves Notice of Entry of Judgment to party filing notice of appeal; or Clerk serves file-stamped copy of judgment accompanied by proof of service; or Party filing notice of appeal serves or is served with Notice of entry of Judgment; or> Party filing notice of appeal serves or is served with file-stamped copy of judgment; or (b) **180 days** after entry of judgment.

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E. Diagnostic Questions: Challenging the Ruling

An attorney considering a challenge to a court's ruling on motions for summary judgment or summary adjudication should ask the following questions:

1. Opposing Party

§36.213 a. If Summary Judgment or Summary Adjudication Is Granted

1. Are there new or different facts justifying a motion for reconsideration under CCP §1008(a)?

2. Has the 10-day limitation period after the order was made or known expired?

3. Is there a legally sufficient explanation of why these facts were not presented earlier?

4. Is there a basis to seek relief under CCP §473 on grounds of mistake, inadvertence, surprise, or excusable neglect, *e.g.,* inability to make a strong showing for legally excusable reasons?

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§36.214 b. Additional Procedures If Only Summary Judgment Is Granted

1. **Is there a basis for requesting a new trial under CCP §659, *e.g.,* newly discovered evidence not previously available?**
2. **Is there a basis to set aside the judgment by motion or separate action in the trial court on the ground of extrinsic fraud or mistake?**
3. **Has the motion been made diligently?**
4. **Can a meritorious claim be established?**
5. **Is there a basis for review by appeal after final judgment is entered?**

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§36.215 2. Moving Party: If Summary Judgment or Summary Adjudication Denied

1. **Does an alleged different state of facts exist that would justify a motion for reconsideration in the trial court?**
2. **Has the 10-day limitation period after the order was made or known expired?**
3. **Is there a legally sufficient explanation why these facts were not presented earlier?**
4. **If they do not exist now, can new facts be developed to fill gaps in the moving party's evidence? If so, the motion may be renewed later under CCP §1008(b).**
5. **Does the order denying summary judgment or summary adjudication comply with CCP §437c(g)? If not, there may be a basis for a writ.**
6. **Does the order identify at least one triable issue of fact?**
7. **Does the order refer to the evidence showing that the fact identified is disputed?**
8. **Does the order identify any other basis for the denial (*e.g.,* inability to obtain controverting evidence)?**
9. **Is there some other basis for a writ under CCP §437c(m)?**
10. **Should consideration be given to appealing the order denying the motion after final judgment is entered in the case?**

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XIII. FORMS

A. Moving Party's Forms

§36.216 1. Form: Sample Defendant's Notice of Motion for Summary Judgment or Summary Adjudication

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DEFENDANT** _ _[*NAME*]_ _**'S**
vs	)	**NOTICE OF MOTION AND**
	)	**MOTION FOR SUMMARY**
_ _[*Name(s)*]_ _,	)	**JUDGMENT OR SUMMARY**
Defendant(s)	)	**ADJUDICATION; SEPARATE**
	)	**STATEMENT OF UNDISPUTED**
	)	**MATERIAL FACTS;**
	)	**SUPPORTING**
	)	**MEMORANDUM;**
	)	**DECLARATION(S);**
	)	**PROPOSED ORDER**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, in _ _[*department*]_ _ of the _ _[*court*]_ _ located at _ _[*full address*]_ _, defendant _ _[*name*]_ _ will and hereby does move the Court under Code of Civil Procedure §437c for an order that summary judgment be entered in favor of this defendant and against plaintiff, _ _[*name*]_ _. The grounds for issuance of this order are that no triable issue exists for any material fact in this case, and defendant is entitled to a judgment as a matter of law.

If for any reason summary judgment cannot be granted, defendant moves in the alternative for summary adjudication and requests that the Court:

1. Order that the following causes of action and claims have no merit and are eliminated from this case:

a. Plaintiff's first cause of action for medical malpractice, which is barred by the statute of limitations as set forth in Code of Civil Procedure §340.5 (see separate statement of undisputed facts, fact nos. 1-3).

b. Plaintiff's claims for punitive damages asserted in the fourth count of the second cause of action and the fifth cause of action (see separate statement of undisputed facts, fact nos. 4-7).

2. Find that the defendant did not owe a duty to the plaintiff with respect to matters alleged in plaintiff's second and fourth causes of action (see separate statement of undisputed facts, fact no. 8).

These alternative motions are based on the attached documents and exhibits, including the separate statement of undisputed material facts; the signed transcript of plaintiff's deposition taken on _ _[*date*]_ _; the declarations of _ _[*name*]_ _ and _ _[*name*]_ _; specified contents of the file in this case, of which the Court is requested to take judicial notice, as shown in the notice of request to take judicial notice; the supporting memorandum; and any evidence received at the hearing.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of notice of motion, see §§36.53-36.46.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.217 2. Form: Sample Defendant's Memorandum in Support of Motion for Summary Judgment or Summary Adjudication

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**MEMORANDUM IN SUPPORT**
vs	)	**OF MOTION OF _ _[*NAME*]_ _**
	)	**FOR SUMMARY JUDGMENT**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**OR SUMMARY ADJUDICATION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

FACTS: _ _[*Succinctly state facts underlying motion*]_ _.

I. STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS IS THREE YEARS AFTER DATE OF INJURY OR ONE YEAR AFTER PLAINTIFF DISCOVERS, OR THROUGH USE OF REASONABLE DILIGENCE SHOULD HAVE DISCOVERED, INJURY.

Code of Civil Procedure §340.5. See also *Knowles v Superior Court (Labo)* (2004) 118 Cal. App. 4th 1290 *[13 CR3d 700]*.

Plaintiff _ _[*name*]_ _'s medical malpractice claim is barred by Code of Civil Procedure §340.5 because the alleged acts of so-called medical malpractice occurred on or before March 3, 2004, the date of surgery (plaintiff's amended complaint at p 3; defendant's declaration, Exhibit E). In addition, plaintiff became aware of defendant _ _[*name*]_ _'s alleged medical malpractice and all injuries allegedly sustained as a result on or before March 12, 2004 (defendant's declaration, Exhibit E; plaintiff's deposition at p 13, lines 5-8). This action was not filed until April 1, 2007 (plaintiff's original complaint). Accordingly, plaintiff's action is barred by the statute of limitations.

II. AN EMPLOYER IS NOT LIABLE FOR PUNITIVE DAMAGES BASED ON ACTS OF AN EMPLOYEE ABSENT ADVANCE KNOWLEDGE OF THE EMPLOYEE'S UNFITNESS.

Civil Code §3294(b); *College Hospital v Superior Court* (1994) 8 Cal 4th 704 *[34 Cal. Rptr. 2d 898]*.

Even if Defendant _ _[*name*]_ _ acted with malice, it is conceded that Defendant _ _[*name*]_ _ neither had, nor could have had, any knowledge of _ _[*name*]_ _'s alleged unfitness to act as a physician and surgeon. (See defendant's declaration at p 3; plaintiff's deposition at p 7, lines 13-16).

III. PLAINTIFF WAS FULLY INFORMED ABOUT THE POTENTIAL CONSEQUENCES AND COMPLICATIONS THAT COULD RESULT FROM THE SURGICAL PROCEDURE.

Plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of Liability," which included the following language: "I have discussed with my doctor in considerable detail the nature, extent, and dangers of the surgery to be performed, as well as the possible consequences, complications, and side effects of that surgery, all of which I fully understand. I still want the surgery. I do NOT want a second opinion."

(Defendant's declaration, Exhibit F; defendant's declaration at p 10; Exhibit E of defendant's declaration.)

Plaintiff read, dated, and executed this form after having been fully informed of the consequences and complications that could result from the surgical procedures (defendant's declaration at p 5; Exhibit E of defendant's declaration).

IV. NO PHYSICIAN-PATIENT RELATIONSHIP EXISTED BETWEEN PLAINTIFF AND DEFENDANT _ _[*NAME*]_ _.

***Felton v Schaeffer* (1991) 229 Cal. App. 3d 229, 235 [279 Cal. Rptr. 713].**

Plaintiff was the patient of Dr. _ _ _ _ _ _. He had no relationship with Dr. _ _ _ _ _ _, who was merely an observer at the surgery. (Exhibit E of defendant's declaration.)

V. _ _[*Continue stating points, citing authorities, and arguing position advanced*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of moving party's supporting memorandum, see §§36.57-36.61.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.218 3. Form: Sample Declaration Supporting Defendant's Motion for Summary Judgment or Summary Adjudication

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_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**MOTION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FOR SUMMARY JUDGMENT**
	)	**OR SUMMARY**
	)	**ADJUDICATION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am a licensed, practicing physician specialized in _ _[*state specialty*]_ _**.**

2. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could and would testify to those facts.

3. On _ _[*date*]_ _**, I verbally informed Plaintiff,** _ _[*name*]_ _**, regarding the consequences and complications that could result from the surgical procedure.**

4. I asked Plaintiff if he understood the consequences and complications that could result form the surgical procedure, and Plaintiff verbally expressed his understanding of the consequences and complications.

5. On _ _[*date*]_ _**, Plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of Liability," which included the following language: "I have discussed with my doctor in considerable detail the nature, extent, and dangers of the surgery to be performed, as well as the possible consequences, complications, and side effects of that surgery, all of which I fully understand. I still want the surgery. I do NOT want a second opinion."**

6. Plaintiff read, dated, and executed this form after I fully informed him of the consequences and complications that could result from the surgical procedure.

7. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of declarations, see §§36.106-36.121.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.219 4. Form: Sample Defendant's Separate Statement of Undisputed Material Facts

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Sample 1 (Sample Defendant's Separate Statement for Summary Judgment or Summary Adjudication in the Alternative)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**SEPARATE STATEMENT OF**
vs	)	**UNDISPUTED MATERIAL**
	)	**FACTS SUPPORTING**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**_ _[*NAME*]_ _'S MOTION FOR**
	)	**SUMMARY JUDGMENT OR**
	)	**SUMMARY ADJUDICATION**
	)	
	)	**Hearing: _ _[*date; time*]_ _**
	)	**Dep't: _ _[*number*]_ _**
	)	**Hearing judge: _ _[*if known*]_ _**
	)	**Action filed: _ _[*date*]_ _**
_____	)	**Trial date: _ _[*if set*]_ _**

Defendant, _ _[*name*]_ _, in support of his motion for summary judgment or summary adjudication of issues, submits that the following material facts are undisputed in this action:

ISSUE NO. 1—THE FIRST CAUSE OF ACTION FOR MEDICAL MALPRACTICE IS BARRED BY THE STATUTE OF LIMITATIONS OF CODE OF CIVIL PROCEDURE §340.5, WHICH PROVIDES THAT MEDICAL MALPRACTICE ACTIONS MUST BE BROUGHT THREE YEARS AFTER DATE OF INJURY OR ONE YEAR AFTER PLAINTIFF DISCOVERS, OR THROUGH USE OF REASONABLE DILIGENCE SHOULD HAVE DISCOVERED, INJURY.

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	**OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE**
1. The alleged acts of medical malpractice on which plaintiff _ _[*name*]_ _'s first cause of action is based occurred on or before March 3, 2004. **Plaintiff's second amended complaint, 3:15-23; plaintiff's answers to requests for admissions, answer no. 8, p 3 (copy attached as Exhibit E to defendant's declaration).**	
2. Plaintiff became aware of	

defendant's alleged medical malpractice, and of all injuries allegedly sustained as a result, on or before March 12, 2004. **Plaintiff's answers to requests for admissions, answer no. 14, p 3 (copy attached as Exhibit E to defendant's declaration); plaintiff's deposition, 13:5-8.**

3. This action was commenced on the filing of plaintiff's original complaint on April 1, 2007. **Filing stamp on plaintiff's original complaint in this action, of which the Court is requested to take judicial notice.**

ISSUE NO. 2 — THE FIRST CAUSE OF ACTION FOR MEDICAL MALPRACTICE IS BARRED BECAUSE PLAINTIFF WAS FULLY INFORMED OF THE CONSEQUENCES AND COMPLICATIONS THAT COULD RESULT FROM THE SURGICAL PROCEDURE.

4. Plaintiff verbally expressed his understanding of the consequences and complications that could result from the surgical procedure. **Defendant's declaration, 3:13-16; plaintiff's deposition, 8:3-8.**

5. Plaintiff read, dated, and executed a form titled "Consent to Surgery-Binding Waiver of Liability," which included the following language: "I have discussed with my doctor in considerable detail the nature, extent, and dangers of the surgery to be performed, as well as the possible consequences, complications, and side effects of that surgery, all of which I fully understand. I still want the surgery. I do NOT want a second opinion." **Defendant's declaration, 3:14-18; copy of form, attached as Exhibit F to defendant's declaration; plaintiff's answers to requests for admission, answer no. 13, p 4 (copy attached as Exhibit E to defendant's declaration).**

6. Plaintiff read, dated, and executed this form after having been fully informed regarding the consequences and complication that could result from the surgical procedure. **Defendant's declaration, 3:1-3; plaintiff's answers to requests for admissions, answer no. 14, p 4 (copy attached as Exhibit E to**

defendant's declaration).

ISSUE NO. 3

[*Continue as above*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Sample 2 (Defendant's Separate Statement for Summary Judgment)

Jane Doe [State Bar No. 038775]
DOE, DOE & DOE
123 Main Street, Suite 4
Anytown, CA 12345
Telephone: (555) 555-6666
Fax: (555) 555-6667
E-mail: jdoe@ceb.com
Attorneys for Defendant, JOHN ROE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PROVINCE

ROBERT THOMAS,	)	**No. 1234567**
Plaintiff,	)	**SEPARATE STATEMENT**
	)	**OF**
vs.	)	**UNDISPUTED FACTS IN**
	)	**SUPPORT**
JOHN ROE, et al.,	)	**OF SUMMARY JUDGMENT**
Defendant	)	**MOTION**
	)	**OF DEFENDANT JOHN**
	)	**ROE**
	)	**Hearing: April 15, 2010,**
	)	**10:00 a.m.**
	)	**Dep't: 10**
	)	**Hearing judge: Honorable Stephen Owens**
		Action filed: October 4, 2009
		Trial date: None assigned.

Defendant, JOHN ROE, asserts that the following material facts are established by the evidence referred to and it is shown that plaintiff cannot prevail on any causes of action:

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE:	**OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE:**
<u>Affirmative Defense to First Cause of Action: Nonexistence of Contract</u>	
1. The written contract that plaintiff relies on for the First Cause of Action is not signed by defendant. **Admitted by plaintiff in his deposition, Exhibit 1 to Declaration of Attorney Doe at 31:4-14; contract attached as Exhibit A to the deposition, and as Exhibit 3 to Declaration of Defendant Roe.**	
2. Plaintiff and defendant conducted oral	

negotiations. **Plaintiff's deposition, at 28:15-29:5 (Exhibit 1 to Declaration of Attorney Doe).**

3. Both plaintiff and defendant anticipated that the contract would be reduced to writing when they reached an agreement. **Plaintiff's deposition, at 30:7-12 (Exhibit 1 to Declaration of Attorney Doe); Defendant Roe's Declaration at 2:3-15.**

4. Defendant did not sign the contract prepared by plaintiff, because no agreement was reached. **Defendant Roe's Declaration at 2:16-23.**

Affirmative Defense to the Second Cause of Action: Breach of Oral Contract

5. Plaintiff and defendant did not reach an oral agreement. **Defendant Roe's Declaration at 2:16-23.**

6. Both plaintiff and defendant anticipated that the contract would be reduced to writing when they reached an agreement. **Plaintiff's deposition, at 30:7-12 (Exhibit 1 to Declaration of Attorney Doe); Defendant Roe's Declaration at 2:3-15.**

7. Defendant notified plaintiff that the written contract did not accurately reflect the oral negotiations, and was premature. **Plaintiff's deposition, at 30:12-24 (Exhibit 1 to Declaration of Attorney Doe); Defendant Roe's Declaration at 2:16-25.**

Dated: March 3, 2010

DOE, DOE & DOE

By_____

Jane Doe
Attorneys for Defendant JOHN ROE

Sample 3 (Sample Defendant's Separate Statement for Summary Adjudication)

R.S. ROECA [State Bar No. 058776]
JANE C. PETERSON
999 California Street, Suite 888
San Francisco, CA 94000
Telephone: (415) 555-4444
Fax: (415) 555-4445
E-mail: roeca@ceb.com
Attorneys for Defendant, BRUCE SMITH

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

JOHN F. JONES	**)**	**No. 2345678**
Plaintiff,	**)**	**SEPARATE STATEMENT**

	)	**OF**
vs.	)	**UNDISPUTED MATERIAL**
	)	**FACTS IN SUPPORT OF**
BRUCE SMITH,	)	**DEFENDANT BRUCE**
Defendant	)	**SMITH'S MOTION FOR**
	)	**SUMMARY**
	)	**ADJUDICATION**
	)	**Hearing: May 12, 2010,**
	)	**10:00 a.m.**
	)	**Dep't: 10**
	)	**Hearing judge: Honorable**
	)	**Stephen Owens**
		Action filed: December 3, 2009
		Trial date: August 25, 2010

Defendant Smith submits the following statement of undisputed material facts with references to supporting evidence pursuant to Code of Civil Procedure §437c(b)(1). These facts establish that defendant Bruce Smith did not owe any duty to plaintiff Jones and that plaintiff's first cause of action against Smith for premises liability has no merit.

ISSUE NUMBER 1: BECAUSE DEFENDANT SMITH DID NOT OWN THE PREMISES UPON WHICH PLAINTIFF JONES WAS INJURED, DEFENDANT DID NOT OWE PLAINTIFF ANY DUTY TO MAINTAIN THE PREMISES, AND PLAINTIFF CANNOT RECOVER AGAINST DEFENDANT SMITH ON HIS FIRST CAUSE OF ACTION FOR PREMISES LIABILITY.

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE:	**OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE:**
1. Defendant Bruce Smith owned the house at 123 Tenth St., Anytown, California, from January 10, 1988, until March 13, 2009. **Declaration of Smith, Exhibit 1 at 1:5-8. Certified copy of original deed attached to Smith declaration as Exhibit 1(a).**	
2. On March 13, 2009, defendant Bruce Smith sold his entire interest in the house at 123 Tenth St., Anytown, California, to Steve Smart. **Declaration of Smith, Exhibit 1 at 1:12-16. Certified copy of grant deed attached to Smith declaration as Exhibit 1(b). Deposition of Steve Smart, Exhibit 2(a) at 3:5-10, attached to Peterson declaration, Exhibit 2.**	
3. Since March 13, 2009, defendant Bruce Smith has held no interest in the property, received no income from the property, and paid no taxes on the property. **Declaration of Smith, Exhibit 1 at 2:11-18. Deposition of Steve Smart, Exhibit 2(a) at 4:2-20, attached to Peterson declaration, Exhibit 2. Tax records of Smart, exhibit 2(b), attached to Peterson declaration, Exhibit 2.**	
4. Plaintiff John Jones slipped and fell on	

the steps of the property at 123 Tenth St., Anytown, California, on August 31, 2009, more than 5 months after defendant Smith sold the property. **Plaintiff Jones' complaint at paragraph 5. Deposition of Jones, Exhibit 2(c) at 4:8-15, attached to Peterson declaration, Exhibit 2.**

By _____

Dated: April 30, 2010

Jane C. Peterson
Attorney for Defendant
BRUCE SMITH

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of preparation and format of the moving party's separate statement, see §§36.62-36.66.

Note: The moving party's separate statement in support of a motion for summary judgment or summary adjudication is governed by Cal Rules of Ct 3.1350(d) and must follow the format set out in the sample in Cal Rules of Ct 3.1350(h).

On request, a party must, within 3 days, provide to any other party or the court an electronic version of its separate statement. Cal Rules of Ct 3.1350(i), discussed in §36.62.

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.220 5. Form: Sample Defendant's Proposed Order Granting Summary Judgment

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**ORDER GRANTING**
vs	)	**SUMMARY JUDGMENT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for summary judgment or summary adjudication of issues was heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering the papers filed in support of and in opposition to the motion, the Court finds that defendant is entitled to judgment as a matter of law under Code of Civil Procedure §437c.

IT IS ORDERED that:

1. Motion for summary judgment be granted.

2. Judgment be entered in favor of defendant _ _[*name*]_ _ and against plaintiff _ _[*name*]_ _.

3. _ _[*State any additional orders*]_ _.

[*It can be useful, in a proposed order, to formulate for the judge specifications of reasons, with references to supporting and opposing evidence, for determinations that there is no triable issue of material fact. See CCP §437c(g), discussed in §36.168. For example:*]

There is no triable issue of material fact with respect to the following matters for the reasons indicated:

1. Defendant _ _[*name*]_ _ owed no duty to plaintiff _ _[*name*]_ _ with respect to obtaining the latter's informed consent to the surgery performed on March 12, 2004, because they had no contractual or physician-patient relationship as shown by _ _[*name*]_ _'s uncontradicted declaration.

2. Defendant _ _[*name*]_ _ cannot be liable to pay punitive damages to plaintiff _ _[*name*]_ _, because this defendant had no knowledge of any unfitness on the part of its employee, Dr. _ _[*name*]_ _, as is shown by the declaration of _ _[*name*]_ _. The declaration of _ _[*name*]_ _, stating that there was such knowledge, is insufficient to raise a triable issue of fact because it contains no factual statements showing that the declarant had personal knowledge of what this defendant knew or could have known.

[*Continue with other formulations*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On the form of court orders for summary judgment motions, see §§36.184-36.191.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.221 6. Form: Sample Defendant's Proposed Order Granting Summary Adjudication

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**ORDER GRANTING**
vs	)	**SUMMARY ADJUDICATION**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for summary judgment or summary adjudication was heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering the papers filed in support of and in opposition to the motion, the Court finds that the following causes of action and claims have no merit and are eliminated from this action:

1. Plaintiff _ _[*name*]_ _'s first cause of action for alleged medical malpractice, which is barred by the statute of limitations as set forth under Code of Civil Procedure §340.5 (see separate statement of undisputed facts, fact nos. 1-3).

2. Plaintiff _ _[*name*]_ _'s claims for punitive damages asserted in the fourth count of the second cause of action and in the fifth cause of action.

The Court also finds that defendant _ _[*name*]_ _ owed no duty to plaintiff _ _[*name*]_ _ with respect to plaintiff's second and fourth causes of action.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On the form of court orders for summary judgment motions, see §§36.184-36.191.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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B. Opposing Party's Forms

§36.222 1. Form: Sample Plaintiff's Response to Separate Statement of Disputed and Undisputed Facts

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**RESPONSE OF PLAINTIFF**
vs	)	**_ _[*NAME*]_ _ TO SEPARATE**
	)	**STATEMENT OF DISPUTED**
_ _[*Name(s)*]_ _,	)	**AND UNDISPUTED MATERIAL**
Defendant(s)	)	**FACTS**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Plaintiff, _ _[*name*]_ _, submits this separate statement of disputed and undisputed facts in opposition to the motion of defendant, _ _[*name*]_ _, for summary judgment or summary adjudication and in response to defendant's separate statement of undisputed material facts:

ISSUE NO. 1—THE FIRST CAUSE OF ACTION FOR MEDICAL MALPRACTICE IS NOT BARRED BY THE STATUTE OF LIMITATIONS OF CODE OF CIVIL PROCEDURE §340.5 BECAUSE PLAINTIFF DID NOT DISCOVER THE INJURY UNTIL APRIL 3, 2006, LESS THAN ONE YEAR PRIOR TO FILING THE ACTION.

Opposing statement:

1. The alleged acts of "medical malpractice" on which plaintiff _ _[*name*]_ _'s first cause of action is based occurred on or before March 3, 2004.	**Undisputed**
Plaintiff's second amended complaint, 3:15-23; plaintiff's answers to requests for admissions, answer no. 8, p 3 (copy attached as Exhibit E to defendant's declaration).	

2. Plaintiff became aware of defendant's alleged medical malpractice, and of all injuries allegedly sustained as a result, on or before March 12, 2004.	**Disputed. The date on which plaintiff became aware of defendant's medical malpractice was April 3, 2006. Plaintiff's declaration, 3:12-14.**
3. This action was commenced on the filing of plaintiff's original complaint on April 1, 2007. **Filing stamp on plaintiff's original complaint in this action, of which the Court is requested to take judicial notice.**	**Undisputed**
4. Plaintiff was fully informed of the consequences and complications that could result from the surgical procedure. **Defendant's declaration, 3:20; plaintiff's deposition, 13:5-8.**	**Undisputed**
5. Plaintiff verbally expressed his understanding of the consequences and complications that could result from the surgical procedure. **Defendant's declaration, 3:13-16; plaintiff's deposition, 8:3-8.**	**Undisputed**
6. Plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of Liability," which included the following language: "I have discussed with my doctor in considerable detail the nature, extent, and dangers of the surgery to be performed, as well as the possible consequences, complications, and side effects of that surgery, all of which I fully understand. I still want the surgery. I do NOT want a second opinion." **Defendant's declaration, 3:14-18; copy of form, attached as Exhibit F to defendant's declaration; plaintiff's answers to requests for admission, answer no. 13, p 4 (copy attached as Exhibit E to defendant's declaration).**	**Undisputed**
7. Plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of	**Undisputed**

Liability" after having been fully informed regarding the consequences and complications that could result from the surgical procedure.	
Defendant's declaration, 3:1-3; plaintiff's answers to requests for admissions, answer no. 14, p 4 (copy attached as Exhibit E to defendant's declaration).	

PLAINTIFF SUBMITS THAT THE FOLLOWING ADDITIONAL FACTS ARE BOTH MATERIAL AND DISPUTED IN THIS CASE:

Disputed Facts	**Supporting Evidence**
1. Plaintiff was not informed of the possible consequences and complications of the surgery until March 15, 2004, after it had been completed.	**Plaintiff's declaration, 2:23.**
2. Plaintiff signed the form titled "Consent to Surgery—Binding Waiver of Liability" on March 15, 2004, after the surgery had been completed.	**Plaintiff's declaration, 2:25.** **Copy of form, attached as Exhibit B to defendant's declaration supporting this motion.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion, see §§36.75-36.80. The separate statement filed in opposition is governed by Cal Rules of Ct 3.1350(f) and must follow the two-column format set out in the sample in Cal Rules of Ct 3.1350(h). On request, a party must within 3 days provide to any other party or the court an electronic version of its separate statement. Cal Rules of Ct 3.1350(i).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.223 2. Form: Sample Plaintiff's Proposed Order Denying Summary Judgment and Summary Adjudication

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**PROPOSED ORDER**
vs	)	
	)	**Hearing:** _ _[*date; time*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for summary judgment or summary adjudication was heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering the papers filed in support of and in opposition to the motion, the Court finds that defendant is not entitled to either summary judgment or summary adjudication.

The Court finds that there is a triable issue as to each of the following material facts:

1. Whether the date plaintiff became aware of defendant's alleged medical malpractice was March 12, 2004.

CONFLICTING EVIDENCE: Plaintiff's answers to requests for admissions, answer no. 4 at p 3; transcript of defendant's deposition at p 27, lines 3-5.

2. Whether plaintiff was not informed of the possible consequences and complications of surgery until March 15, 2004, after the surgery had been completed.

CONFLICTING EVIDENCE: Plaintiff's declaration at p 2; defendant's declaration at p 3.

3. Whether plaintiff did not sign the form titled "Consent to Surgery—Binding Waiver of Liability" until March 15, 2004, after the surgery had been completed.

CONFLICTING EVIDENCE: Plaintiff's declaration at p 2; defendant's declaration at p 3.

4. Whether plaintiff sustained loss of wages as a result of defendant's acts.

CONFLICTING EVIDENCE: Plaintiff's answers to requests for admissions, answer no. 3; plaintiff's declaration at p 1, lines 12-14.

IT IS ORDERED that defendant's motion for summary judgment or for summary adjudication be denied.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ __

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.
Comment: For discussion of opposing parties' proposed order, see §36.90.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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C. Orders and Judgments

§36.224 1. Form: Order for Entry of Summary Judgment

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**ORDER FOR ENTRY OF**
vs	)	**SUMMARY JUDGMENT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, for summary judgment was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering (1) the papers filed in support of and in opposition to the motion and (2) the oral argument of counsel, the Court finds that _ _[*e.g., defendant*]_ _ is entitled to judgment as a matter of law under Code of Civil Procedure §437c.

The reasons for this determination are _ _[*stated in an oral order recorded in the minutes of this proceeding/ as follows: _ _ _ _ _ _*]_ _.

[*If not done by oral order or in a separate written order, list reasons for court's determination, with specific reference to the evidence that supports (and, if applicable, that opposes) the determination that no triable issue of material fact exists.*]

IT IS ORDERED that:

1. Motion for summary judgment be granted.

2. Judgment be entered in favor of _ _[*e.g., defendant*]_ _ and against _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _.

3. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: On court orders, see §§36.184-36.191; see also chap 12 (use of proposed orders; formal requirements).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.225 2. Form: Judgment by Court Under CCP §437c

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No. _ _ _ _ _ _**
vs	**JUDGMENT BY COURT UNDER CCP §437c**
_ _[*Name(s)*]_ _, **Defendant(s)**	

On _ _[*date*]_ _, this Court granted the motion for summary judgment of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _.

IT IS ORDERED that:

1. _ _[*E.g., Plaintiff*]_ _, _ _[*name*]_ _, take nothing by the complaint.

2. _ _[*E.g., Defendant*]_ _ recover from _ _[*e.g., plaintiff*]_ _ costs in the amount of $_ _ _ _ _ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature; then file); ___ copies for service (one for each other party); ___ office copies.

Comment: On court orders, see §§36.184-36.191.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.226 3. Form: Order Denying Motion for Summary Judgment

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**ORDER DENYING MOTION**
vs	)	**FOR SUMMARY JUDGMENT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, for summary judgment was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering (1) the papers filed in support of and in opposition to the motion and (2) the oral argument of counsel, the Court denies _ _[*e.g., defendant's*]_ _ motion.

In accordance with Code of Civil Procedure §437c(g), the Court finds that a triable controversy exists as to the following material facts: _ _[*List*]_ _.

The evidence indicating that a triable issue exists follows: _ _[*Describe evidence*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: On court orders, see §§36.184-36.191; see also chap 12 (use of proposed orders; formal requirements).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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D. Postjudgment Forms

§36.227 1. Form: Notice of Motion for Reconsideration of Order Granting Motion for Summary Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION FOR SUMMARY JUDGMENT;** _ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §1008(a) for reconsideration of the order made on** _ _[*date*]_ _**, granting** _ _[*e.g., defendant*]_ _ _ _[*name*]_ _**'s motion for summary judgment and for an order vacating and setting aside the order made and entered on that date. The grounds for issuance of this order are that a different state of facts exists.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _, _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§36.192-36.212 (options for challenging court order), chap 12 (formal requirements for notices of motion). On motions for reconsideration of order granting summary judgment, see California Summary Judgment

§§12.3-12.7 (Cal CEB 2010). This document must be accompanied by a memorandum in support of the motion. See Cal Rules of Ct 3.1112(a), 3.1113. Declarations of counsel should be prepared and attached to the moving papers as appropriate.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§36.228 2. Form: Notice of Intention to Move for New Trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF INTENTION TO**
vs	)	**MOVE FOR NEW TRIAL;**
	)	_ _[*SUPPORTING*
_ _[*Name(s)*]_ _,	)	*MEMORANDUM;*]_ _
Defendant(s)	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, moves the Court under Code of Civil Procedure §657 for an order to vacate and set aside the order of the Court made and entered on** _ _[*date*]_ _**, and to grant** _ _[*e.g., plaintiff*]_ _ **a new trial of the action. The grounds for issuance of this order are that there is newly discovered evidence material to** _ _[*e.g., plaintiff*]_ _**'s case, which** _ _[*he/she/it*]_ _ **could not with reasonable diligence have discovered and produced at trial, and because of which** _ _[*he/she/it*]_ _ **was denied a fair trial.**

The hearing will take place on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ __

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§36.192-36.212 (options for challenging court order). On motions for a new trial made after grant of summary judgment, see California Summary Judgment §§12.8-12.10 (Cal CEB 2010). A memorandum and declarations of counsel should be attached. For further discussion, see California Trial Practice: Civil Procedure During Trial §§25.22-25.63 (3d ed Cal CEB 1995).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading

paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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37

Judicial Arbitration

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I. INTRODUCTION

§37.1 A. Scope of Chapter

This chapter covers "judicial arbitration," a procedure by which certain civil actions are heard and decided by a court-appointed arbitrator before they become eligible to proceed to a court or jury trial. It discusses placing the action on the arbitration hearing list (see §§37.6-37.14), the arbitrator (see §§37.15-37.23), prehearing preparation (see §§37.24-37.33), the hearing (see §§37.34-37.42), the award (§§37.43-37.45), trial after arbitration (see §§37.46-37.49), and vacation of the judgment (see §37.50).

It also contains a checklist (see §37.51) and forms (see §§37.52-37.58).

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§37.2 B. Governing Law

Judicial arbitration is governed by the following statutes and rules:

- Code of Civil Procedure §§1141.10-1141.31;
- California Rules of Court 3.810-3.830 (which prevail over other provisions of law except CCP §§1141.10-1141.31); and
- Local court rules and policy manuals that are consistent with the above code sections or statewide court rules (see, *e.g.,* Los Angeles Ct Arbitrator's Handbook).

WARNING: Despite efforts by the Judicial Council and the California Supreme Court to provide statewide uniform court rules that preempt local rules (see Cal Rules of Ct 3.20, 2.100(a)), local rules, procedures, and practices remain a trap for the unwary. Counsel should investigate the local procedures and practices, and follow all local rules, for judicial arbitration.

Arbitrators in the judicial arbitration program are subject to the ethics standards set out in CCP §1141.18(d), Cal Rules of Ct 3.816, and the California Code of Judicial Ethics (see Code of Judicial Ethics, Canon 6(D)). On judicial arbitrators' ethics rules, see A Litigator's Guide to Effective Use of ADR in California §§11.55-11.58 (Cal CEB 2005).

NOTE: Although the contractual arbitration statutes (CCP §§1282-1294.2) are exclusive and independent of the judicial arbitration statutes (CCP §§1141.1-1141.31), the ethics standards for contractual arbitrators must be consistent with the ethics standards for arbitrators in the judicial arbitration program. CCP §1281.85(a). Thus, statutory and case developments in disclosure requirements and the grounds for disqualification of contractual arbitrators may sound a cautionary note for arbitrators and parties participating in judicial arbitration. On ethics standards for contractual arbitrators, see Effective Use of ADR, chap 10.

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§37.3 C. Judicial Arbitration Defined

Statutory arbitration under CCP §§1141.10-1141.31 is generally referred to as "judicial arbitration." This phrase is somewhat of a misnomer, however, because neither is the arbitration judicially conducted nor is the arbitration award immediately irrevocably binding. Rather, a judicial arbitration hearing is conducted by a neutral appointed by the court or selected by the parties (usually an attorney or a retired judge or commissioner). The arbitration hearing occurs before any trial, and is conducted under specific procedures and rules found in Cal Rules of Ct 3.823 for the introduction of documentary evidence. See §§37.37-37.42. Within a limited time after the arbitration hearing, any party may elect not to accept the arbitrator's decision and elect a trial de novo under CCP §1141.20. See §37.46. If that party does not obtain a judgment more favorable than the arbitration award, however, the party may be assessed certain costs and prevented from recovering his or her own costs. See §37.49.

Mandatory judicial arbitration will be ordered "if the amount in controversy in the opinion of the court will not exceed fifty thousand dollars ($50,000) for each plaintiff." CCP §1141.11(a). If the parties stipulate in writing that the amount exceeds $50,000, the court will not make a determination of the amount in controversy. CCP §1141.16(a). See §§37.11-37.13.

On history and purpose of judicial arbitration, and how judicial arbitration differs from arbitration by contractual agreement, see A Litigator's Guide to Effective Use of ADR in California §§11.3, 11.5 (Cal CEB 2005).

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§37.4 D. Actions Subject to Judicial Arbitration

In a superior court with 18 or more judges, all nonexempt unlimited civil cases (see CCP §88) must be submitted to arbitration if, in the court's opinion, the amount in controversy is $50,000 or less for each plaintiff. CCP §1141.11(a). In a superior court of fewer than 18 judges, the court may provide by local rule that all nonexempt unlimited civil cases be submitted to arbitration if the amount in controversy will not exceed $50,000 for each plaintiff. CCP §1141.11(b). Each superior court may provide by local rule that all nonexempt limited civil cases be submitted to arbitration. CCP §1141.11(c) (excluding small claims and unlawful detainer actions).

Judicial arbitration is mandated in the following cases under California Rules of Court 3.811(a), unless otherwise exempted (see Cal Rules of Ct 3.811(b)):

- Any action in any court regardless of the amount in controversy if the parties stipulate to arbitration (see §37.7; see also CCP §1141.12);
- Any action in any court if the plaintiff files an election for arbitration and agrees that the award will not exceed $50,000 (see §§37.8-37.9); and
- All civil actions in a superior court with 18 or more judges if the amount in controversy does not exceed $50,000 for any plaintiff.

California Rules of Court 3.811(a)(2)-(3) permits the courts to make arbitration mandatory by local rule in the following actions:

- All unlimited civil cases in a superior court with fewer than 18 judges if the amount in controversy does not exceed $50,000 for any plaintiff; and
- Any limited civil case.

WARNING: As noted in §37.2, it is extremely important to consult local rules regarding which actions are subject to judicial arbitration.

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§37.5 E. Actions Not Subject to Judicial Arbitration

Certain actions are exempt from judicial arbitration under Cal Rules of Ct 3.811(b), including class actions, unlawful detainer proceedings, and small claims cases. See §37.13. The judicial arbitration statute expressly excludes actions for equitable relief unless the prayer for equitable relief is "frivolous or insubstantial." CCP §1141.13. See Cal Rules of Ct 3.811(b).

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§37.6 II. PLACING ACTION ON ARBITRATION HEARING LIST

There are three ways that a case may proceed to judicial arbitration:

- The parties' voluntary stipulation, regardless of the amount in controversy (see §37.7);
- The plaintiff's election, if the plaintiff also voluntarily agrees that the amount in controversy does not exceed $50,000 (see §§37.8-37.9); and
- By court order, after the court makes a determination that the amount in controversy does not exceed $50,000 and the case is nonexempt (see §§37.10-37.14).

NOTE: Submission of a case to arbitration—whether by court order or plaintiff's election—does not suspend the time periods specified in CCP §§583.110-583.430 governing dismissal for failure to prosecute (CCP §1141.17(a)), *except* that the 5-year period specified in CCP §583.310 does not include any time that the action is under submission to arbitration in the period that begins 4 years and 6 months after the date the plaintiff filed the action and ends on the date on which a request for a de novo trial is filed under CCP §1141.20. CCP §1141.17(b).

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§37.7 A. Arbitration by Stipulation

Parties may stipulate to judicial arbitration in any case, regardless of the amount in controversy. CCP §1141.12(a). When the parties stipulate to arbitration, the case must be set for arbitration forthwith. The stipulation must be filed no later than the time the initial case management statement is filed, unless the court orders otherwise. Cal Rules of Ct 3.812(a).

NOTE: A stipulation to arbitrate may affect a party's ability to engage in discovery after a date 15 days before the hearing. See §37.24. It will also affect the running of the 5-year period under CCP §§583.310-583.360. See §37.6.

In addition to stipulating to arbitration, the parties may stipulate to, *e.g.,* who will act as arbitrator, the maximum amount of any award, and whether the arbitration will be binding. On these and other areas for possible stipulation, see A Litigator's Guide to Effective Use of ADR in California §11.9 (Cal CEB 2005).

For form Stipulation to Submit to Judicial Arbitration, see §37.52.

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B. Plaintiff's Election to Arbitrate

§37.8 1. Use of Election

A plaintiff may file a written election to arbitrate if the plaintiff agrees that the arbitration award will not exceed $50,000. CCP §§1141.11, 1141.12(b). See form in §37.53. On written election of all plaintiffs to submit a case to arbitration, the case must be set for arbitration immediately, subject to a motion by the defendant for good cause to delay the arbitration hearing. The election must be filed at the time the initial case management statement is filed, unless the court orders otherwise. Cal Rules of Ct 3.812(b).

PRACTICE TIP: Although neither the California Rules of Court nor the Code of Civil Procedure expressly requires that the plaintiff's election be served on other parties to the action, it is advisable to do so because certain other matters are keyed to the date of a notice of election, *e.g.,* defendant's motion in opposition to plaintiff's election (see §37.9) and the parties' ability to engage in discovery after an arbitration award. See §37.47.

The court may, on motion, remove a case from judicial arbitration when the amount in controversy changes to exceed the amount specified in CCP §1141.11. *Invicta Plastics, Ltd. v Superior Court* (1981) 120 CA3d 190, 174 CR 476 (plaintiff initially filed election to submit cause to judicial arbitration, agreeing that arbitration award should not exceed arbitration limit, but thereafter plaintiff filed amended complaint seeking award in excess of limit).

PRACTICE TIP: Plaintiff's counsel should evaluate the case fully before deciding to limit the plaintiff's claim to the arbitration amount. For an example of the possible ramifications of not doing so, see *Robinson v Superior Court* (1984) 158 CA3d 98, 204 CR 366 (court held that plaintiff, who made CCP §1141.12(b) election for judicial arbitration and who received arbitration award for full amount requested, could not obtain trial de novo even though plaintiff later concluded that case was worth more than award).

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§37.9 2. Motions Opposing Plaintiff's Election to Arbitrate

When the plaintiff elects to arbitrate, the defendant may move to delay the arbitration hearing for good cause. Cal Rules of Ct 3.812(b).

PRACTICE TIP: The time between the plaintiff's election and the hearing will vary greatly depending on the county and the local calendar, but in making a motion to delay a hearing, the defendant should act promptly to avoid prejudicing the plaintiff.

In cases involving a cross-complaint in which all plaintiffs have elected to arbitrate, a cross-complainant may move to remove the matter from the arbitration hearing list within 15 days after receiving notice of the plaintiff's election on the ground that the amount in controversy relating to the cross-complaint exceeds $50,000. Cal Rules of Ct 3.812(c).

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C. Arbitration by Court Order

§37.10 1. Requirements

A court will order judicial arbitration if it finds that the case is not exempt from arbitration (see §37.5), that any prayer for equitable relief is merely frivolous or insubstantial (see §37.13), and that the amount in controversy does not exceed $50,000 for any plaintiff (see §37.11). The determination of the amount in controversy and whether a prayer for equitable relief is frivolous or insubstantial is not appealable. CCP §1141.16(a).

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§37.11 a. Amount-in-Controversy Determination

The court must make its determination of the amount in controversy after all named parties have appeared or defaulted. CCP §1141.11(a).

The amount in controversy is based on each party's claim; amounts are not aggregated. If the action has more than one plaintiff, each claim that is less than $50,000 may be ordered to arbitration.

In determining the amount in controversy, the court does not consider questions of liability, defenses, and comparative negligence. CCP §1141.16(a). Any determination and stipulation to the amount in controversy will be without prejudice to any finding by an arbitrator or in a subsequent trial de novo. CCP §1141.16(b).

WARNING: See *Robinson v Superior Court* (1984) 158 CA3d 98, 204 CR 366, in which the court held that the plaintiff, who made a CCP §1141.12(b) election for judicial arbitration and who received an arbitration award for the full amount requested, could not obtain a trial de novo even though plaintiff later concluded that the case was worth more than the award.

If all parties stipulate in writing that the amount in controversy exceeds the amounts specified in CCP §1141.11, the court will not make a determination under CCP §1141.16. CCP §1141.16(a).

NOTE: The court, on its own motion, can remove a case from judicial arbitration when the amount in controversy has changed to exceed the amount specified in CCP §1141.11. See *Invicta Plastics, Ltd. v Superior Court* (1981) 120 CA3d 190, 174 CR 476. See also §37.8.

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Source: Civil Litigation/California Civil Procedure Before Trial/37 Judicial Arbitration/§37.12 b. When Determination Is Made

§37.12 b. When Determination Is Made

The amount in controversy must be determined at the first case management conference or review under Cal Rules of Ct 3.720-3.730 that takes place after all named parties have appeared or defaulted. Cal Rules of Ct 3.812(d); CCP §1141.16(a).

WARNING: Counsel attending the case management conference must have sufficient knowledge of the case to inform the court about the suitability of arbitration. Cal Rules of Ct 3.722(a), 3.727(6), 3.728(2). The case management conference may be used for setting trial or trial-setting dates for cases not ordered to arbitration. Cal Rules of Ct 3.727(14), 3.729. The court may also conduct settlement discussions if appropriate. Cal Rules of Ct 3.727(7).

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§37.13 c. "Frivolous or Insubstantial" Equitable Relief

When the court makes its amount-in-controversy determination, it must also determine whether any prayer for equitable relief is "frivolous or insubstantial," *i.e.*, whether the case is nonexempt and subject to arbitration. CCP §1141.16. If the case meets both the amount-in-controversy and equitable relief requirements, and the case is not otherwise exempt from judicial arbitration (see §37.5), the court must order the case to be arbitrated. See CCP §§1141.11, 1141.13, 1141.16; Cal Rules of Ct 3.811(a)-(b).

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§37.14 2. Scheduling of Arbitration Hearing

Except as provided in CCP §1141.16, the arbitration hearing may not be held until 210 days after filing of the complaint, or 240 days after the filing of a complaint if the parties have stipulated to a continuance under Govt C §68616(d). CCP §1141.16(c). A case must be submitted to arbitration at an earlier time in any of the following events (CCP §1141.16(c)):

- The stipulation of the parties to an earlier arbitration hearing;
- The written request of all plaintiffs, subject to a motion by a defendant for good cause shown to delay the arbitration hearing; or
- An order of the court if the parties have stipulated, or the court has ordered under CCP §1141.24, that discovery other than that permitted under CCP §§2034.210-2034.730 will be permitted after the arbitration award is rendered.

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III. THE ARBITRATOR

A. Selection of Arbitrator

§37.15 1. By Stipulation

Parties may stipulate to any arbitrator, including a nonattorney. CCP §1141.18(a); see Cal Rules of Ct 3.815(a). For tips on selecting an arbitrator, see A Litigator's Guide to Effective Use of ADR in California §11.18 (Cal CEB 2005).

WARNING: Local rules may encourage parties to stipulate to an arbitrator who is a member of the court panel (see §37.16). See *e.g.,* Alameda Ct R 3.720.

If the parties select a person who is not on the court's arbitration panel to serve as the arbitrator, the stipulation will be effective only if:

- The selected person completes a written consent to serve and the oath required of panel arbitrators under Cal Rules of Ct 3.810-3.830; and
- Both the consent and the oath are attached to the stipulation.

The oath of office may be obtained from the arbitration administrator.

A stipulation may specify the maximum amount of the arbitrator's award. The stipulation must be filed no later than 10 days after the case has been set for arbitration under Cal Rules of Ct 3.812. Cal Rules of Ct 3.815(a). See form in §37.52.

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2. By Appointment From Arbitration Panel

§37.16 a. Panels of Arbitrators

Every court is required to have a panel of arbitrators for personal injury cases, as well as additional panels as the presiding judge deems necessary. Cal Rules of Ct 3.814(a). Lists showing the names of panel arbitrators available to hear cases must be accessible to public inspection in the ADR program administrator's office. Cal Rules of Ct 3.814(e); see *e.g.,* San Francisco Ct R 4.1(F). On composition of arbitrator panels and appointment of arbitrators to a panel, see A Litigator's Guide to Effective Use of ADR in California §11.19 (Cal CEB 2005).

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§37.17 b. Local Selection Procedures

A court that has an arbitration program may, by local rule or by procedures adopted by its ADR committee, establish any fair method of selecting an arbitrator that (1) gives each side an opportunity to challenge at least one list arbitrator peremptorily and (2) ensures that an arbitrator is appointed within 30 days from the submission of a case to arbitration. The local rule or procedure may require that all steps leading to the arbitrator's selection occur during or immediately following the case management conference or review under Cal Rules of Ct 3.720-3.730, at which the court determines the amount in controversy and the suitability of the case for arbitration. Cal Rules of Ct 3.815(c).

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§37.18 c. Selection Absent Stipulation or Local Procedures

If the arbitrator is not selected by stipulation (see Cal Rules of Ct 3.815(a)) and the court has not adopted local rules or procedures for the selection of the arbitrator as permitted under Cal Rules of Ct 3.814(c), the arbitrator will be selected under the procedures set out in Cal Rules of Ct 3.815.

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§37.19 d. Procedure if Arbitrator Declines to Serve

If the first arbitrator selected declines to serve, the administrator must vacate the arbitrator's appointment and may do either of the following (Cal Rules of Ct 3.815(d)):

- Return the case to the top of the arbitration hearing list, restore the arbitrator's name to the list of those available for selection to hear cases, and appoint a new arbitrator; or
- Certify the case to the court.

If the second arbitrator selected declines to serve, or if the arbitrator does not complete the hearing within 90 days after the date of his or her assignment to the case, including any time due to continuances granted under Cal Rules of Ct 3.818, the administrator must certify the case to the court. Cal Rules of Ct 3.815(e).

When a case is certified to the court under either Cal Rules of Ct 3.815(d) or (e), the court must summon the parties or their counsel. If the inability to hold a hearing is due to the neglect or lack of cooperation of a party who elected or stipulated for arbitration, the cause must be removed from the arbitration hearing list and restored to the civil active lists. In all other circumstances, cases may be ordered reassigned for arbitration, or the court may make any other appropriate order to expedite disposition of the case. Cal Rules of Ct 3.815(f); but see Los Angeles Ct R 12.2 (if ADR hearing has been scheduled, action cannot be ordered or referred to ADR again).

NOTE: In *Cabrera v Plager* (1987) 195 CA3d 606, 612, 241 CR 731, the court held that the remedy for violation of former Cal Rules of Ct 3.815(b) (which provided that if arbitrator failed to hold hearing within 60 days of assignment, administrator must vacate arbitrator's appointment) was to return the case to the top of the hearing list and appoint a new arbitrator. The court further held that the party's objection to the arbitrator, which was based on the delay, was waived by the party's appearance and participation at the arbitration without raising the objection. 195 CA3d at 613 n8.

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B. Rejection or Disqualification of Arbitrator

§37.20 1. Rejection

When presented with a list of arbitrator names under Cal Rules of Ct 3.815(b), each side has 10 days from the date of mailing of the list of arbitrators to file a written rejection of one arbitrator from the list; if there are multiple parties on one side, they must agree on the rejection. Cal Rules of Ct 3.815(b)(3). See §37.55 for a rejection form.

If each side rejects the maximum number of arbitrators, one name will remain, and that person is automatically the arbitrator unless otherwise disqualified. If more than one name remains on the list, the arbitration administrator must randomly select the arbitrator from the remaining names. The administrator then assigns the case to the arbitrator selected and notifies all parties. Cal Rules of Ct 3.815(b)(4)-(5).

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2. Disqualification

§37.21 a. Disqualification by Arbitrator

A proposed arbitrator must determine whether any cause exists for his or her disqualification on the grounds set out in CCP §170.1 (which governs disqualification of judges). If any member of the proposed arbitrator's law firm would be disqualified under the provisions of CCP §170.1(a)(2), the proposed arbitrator is disqualified. Cal Rules of Ct 3.816(a).

Unless the grounds for disqualification are disclosed to the parties in writing and expressly waived by all parties in writing, the proposed arbitrator must notify the court's ADR program administrator of his or her inability to serve, and another arbitrator must be selected as provided in Cal Rules of Ct 3.815. Cal Rules of Ct 3.816(a).

NOTE: Certain grounds for disqualification cannot be waived, *e.g.,* personal bias or prejudice about a party, and service as an attorney or material witness in the matter. CCP §170.3(b)(1)-(2).

On grounds for disqualification and process by which an arbitrator is disqualified, see A Litigator's Guide to Effective Use of ADR in California §§11.24-11.25 (Cal CEB 2005).

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§37.22 b. Disqualification by Party

Any party may seek to disqualify a proposed arbitrator on the grounds and under the procedures in CCP §170.1 or §170.6. CCP §1141.18.

If the arbitrator should disqualify himself or herself under CCP §§170.1-170.5 and refuses or fails to do so, any party may file with the court clerk a verified written statement of objection, including facts constituting grounds for disqualifying the arbitrator. CCP §170.3(c)(1). This statement must be presented "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." CCP §170.3(c)(1); see also CCP §170.4(c)(1). Under CCP §170.6, an affidavit of prejudice is filed or an oral motion is made under oath (the oral procedure is frequently used in court but rarely used in arbitration); a request for disqualification under §170.6 must be made within 5 days after the arbitrator is named. CCP §1141.18(d).

PRACTICE TIP: It is not clear if filing the arbitrator disqualification request with only the arbitration administrator fulfills the "file with the clerk" procedural requirements of a CCP §170.1 or §170.6 disqualification under CCP §1141.18(d). In any event, any arbitrator disqualification request under CCP §§170.1-170.5 should also be served on all parties and the proposed arbitrator. CCP §170.3(c). Although not required, an affidavit under CCP §170.6 should be served on all parties as a professional courtesy. For a disqualification form, see California Civil Litigation Forms Manual §43.14 (Cal CEB 1980). Local rules should also be consulted for procedures and forms. For examples of local rules regarding disqualification, see A Litigator's Guide to Effective Use of ADR in California §11.25 (Cal CEB 2005).

On motion of any party, made as promptly as possible under CCP §§170.1 and 1141.18(d) *before the arbitration proceedings are concluded,* the court must vacate the arbitrator's appointment to the case if the court finds the following (Cal Rules of Ct 3.816(d)):

- The party has demanded that the arbitrator disqualify himself or herself;
- The arbitrator has not done so; and
- Any of the grounds for disqualification specified in CCP §170.1 exist.

If the arbitrator's appointment has been vacated, the ADR administrator must return the case to the top of the arbitration hearing list and appoint a new arbitrator. The disqualified arbitrator's name must be returned to the list of those available for selection to hear cases unless the court orders that the circumstances of the disqualification be reviewed by the ADR administrator, the ADR committee, the presiding judge, or a judge designated by the presiding judge for appropriate action. Cal Rules of Ct 3.816(d).

NOTE: Failure to complete a hearing within the 90-day period required by Cal Rules of Ct 3.815(e) is not grounds for disqualification of the arbitrator under Cal Rules of Ct 3.816 and 3.828(d) and is not a basis on which the judgment can be set aside. See *Cabrera v Plager* (1987) 195 CA3d 606, 241 CR 731 (decided under former Cal Rules of Ct 1605(b), see now Rule 3.815(b), and holding that arbitrator's failure to hold timely hearing is not ground for disqualification).

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§37.23 C. Communication With Arbitrator

No disclosure of any settlement offers may be made to the arbitrator before the award is filed. Cal Rules of Ct 3.820(a). An arbitrator must not initiate, permit, or consider ex parte communications or consider other communications made to the arbitrator outside the presence of all the parties regarding a pending or impending arbitration, except as follows (Cal Rules of Ct 3.820(b)):

- An arbitrator may communicate with a party without the other parties regarding administrative matters, such as setting the time and place of hearings or making arrangements for the conduct of the proceedings, only if the arbitrator reasonably believes that such communication will not result in a procedural or tactical advantage for any party. When such a communication occurs, the arbitrator must promptly inform the other parties and must give them an opportunity to respond before making any final determination concerning the matter discussed.
- An arbitrator may initiate or consider any ex parte communication when expressly authorized to do so by law.

PRACTICE TIP: Problems can arise when the arbitrator or local procedures require that documents be filed with the arbitrator before the hearing. If such prehearing filing is required, counsel can avoid the prohibition on ex parte communication by serving copies of documents on the other side or by obtaining an agreement from the other party waiving the prohibition solely for specific and limited activities.

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IV. PREHEARING PREPARATION

§37.24 A. Discovery

In judicial arbitration, the parties may use all conventional discovery rights, remedies, and procedures in preparing for the arbitration hearing; however, they must complete discovery no later than 15 days before the arbitration hearing, unless the court grants a time extension based on good cause. Cal Rules of Ct 3.822(a)-(b).

WARNING: Under CCP §1141.24, in cases ordered to arbitration (as opposed to those proceeding by stipulation or plaintiff's election), no discovery is permitted after an arbitration award other than discovery permitted by CCP §§2034.010-2034.730 (*e.g.,* the exchange of expert witness lists) except by the parties' stipulation or leave of the court. In light of Cal Rules of Ct 3.822, which requires that discovery be completed before the arbitration hearing, counsel seeking the court's permission to engage in discovery after an arbitration award should be prepared to explain to the court why discovery was not completed before arbitration.

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B. Using Documentary Evidence

§37.25 1. Admissibility

The court rules governing judicial arbitration facilitate the admission in a judicial arbitration hearing of a wide variety of documentary material that would face hearsay and foundational objections at trial. Cal Rules of Ct 3.823(b). All evidence must be admitted in the presence of all parties and the arbitrator, unless a party has waived the right to be present or is absent after due notice of the hearing. Cal Rules of Ct 3.823(a).

The arbitration hearing is governed by the same rules of evidence that govern civil cases; however, there are certain rules on admissibility that apply specifically in the judicial arbitration context, including rules regarding written reports and other documentary evidence (Cal Rules of Ct 3.823(b)(1); see §37.27), written witness statements (Cal Rules of Ct 3.823(b)(2); see §37.29), and depositions (Cal Rules of Ct 3.823(b)(3); see §37.31).

PRACTICE TIP: Given the expedited rules for admitting evidence at a judicial arbitration hearing, it is vital that all parties make prehearing preparation a priority. Counsel should identify the evidentiary items that might be subject to objection and prepare arguments regarding admissibility. It may also be advisable, and the arbitrator may require, that counsel meet and confer to narrow the issues and to reach stipulations regarding what documents and exhibits they intend to use at the hearing.

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§37.26 2. Requirement of Delivery Before Hearing

To avail oneself of the expedited procedures for admitting documentary evidence under the judicial arbitration Rules of Court and as an exception to the California Rules of Evidence, a party must deliver copies of certain types of documentary evidence to all opposing parties at least 20 days before the hearing, and a party who intends to offer a deposition into evidence must deliver notice of this intent to all opposing parties at least 20 days before the hearing. Cal Rules of Ct 3.823(b)(1)(A), (3)(A). See form of notice in §37.56.

A party may deliver the document and notice either manually or by mail (see CCP §1013). If service is by mail, the times prescribed in Cal Rules of Ct 3.823 for delivery of documents, notices, and demands are increased by 5 days. Cal Rules of Ct 3.823(d).

An opposing party who does not wish to have the material offered into evidence must take appropriate action before the hearing. See §§37.28, 37.30, 37.32.

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3. Reports, Records, and Bills

§37.27 a. Admission Into Evidence

Under Cal Rules of Ct 3.823(b)(1), if the party has complied with the required prehearing delivery (see §37.26), the arbitrator must receive into evidence any of the following items:

- Written reports of any expert witness;
- Medical records and bills, including physiotherapy, nursing, and prescription bills;
- Documentary evidence of income loss;
- Property damage repair bills or estimates (for additional admission requirements, see Cal Rules of Ct 3.823(b)(1)(C));
- Police reports of an accident that gave rise to a case (but see Cal Rules of Ct 3.823(b)(1)(D) (arbitrator may not consider any opinion about ultimate fault expressed in police report)); and
- Other bills, invoices, purchase orders, checks, written contracts, and similar documents prepared and maintained in the ordinary course of business.

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§37.28 b. Opponent's Procedures

Any other party may subpoena the author or custodian of documents admitted under Cal Rules of Ct 3.823(b)(1)(A) and examine him or her at the hearing as if it were cross-examination. Cal Rules of Ct 3.823(b)(1)(B). See §37.36 on subpoenas.

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4. Written Statements of Witnesses

§37.29 a. Admission Into Evidence

Any other witness's written statement (not otherwise qualified as a report, record, or bill under Cal Rules of Ct 3.823(b)(1)) may be offered and must be admitted into evidence if (Cal Rules of Ct 3.823(b)(2)):

- They are made by affidavit or declaration under penalty of perjury;
- Copies have been delivered to all opposing parties at least 20 days before the hearing (see §37.26); and
- No opposing party has delivered a written demand that the witness be produced in person to testify at the hearing. See §37.30.

The arbitrator must disregard any portion of a statement received under this rule that would be inadmissible if the witness were to testify in person; however, the inclusion of inadmissible matter does not render the entire statement inadmissible. Cal Rules of Ct 3.823(b)(2)(C).

See §37.56 for form of notice. The statements may include opinions that the witness would be qualified to express if testifying in person.

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§37.30 b. Opponent's Procedures

The opponent can preclude admission of a written statement by delivering to the proponent, at least 10 days before the hearing, a written demand that the witness be produced in person to testify. Cal Rules of Ct 3.823(b)(2). See §37.57 for a form of demand to produce a witness. This demand does not operate as a subpoena requiring the attendance of the statement's author; it operates only to prevent the written statement's admission into evidence under Rule 3.823(b). If the opponent wants to assure attendance and testimony of the author, a subpoena is necessary. See §37.36 on subpoenas.

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5. Depositions

§37.31 a. Admission Into Evidence

The deposition of any witness may be offered by any party and must be received in evidence, subject to objections available under CCP §2025.410, notwithstanding that the deponent is not "unavailable as a witness" within the meaning of Evid C §240 and no exceptional circumstances exist, if (Cal Rules of Ct 3.823(b)(3)):

- The deposition was taken in the manner provided for by law or by stipulation of the parties and within the time provided for in these rules; and
- At least 20 days before the hearing, the deposition's proponent delivered to all opposing parties notice of intention to offer the deposition in evidence (see §37.26).

See §§37.25-37.30 for a discussion of requirements for admission of documentary evidence.

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§37.32 b. Opponent's Procedures

An opposing party may subpoena the deponent as a witness. If the witness is subpoenaed, the arbitrator may either refuse to admit the deposition or admit it and allow the deponent to be further cross-examined by the party who subpoenaed the witness. Notwithstanding this rule, a deposition that would be admissible at a trial under CCP §2025.620 is admissible at an arbitration hearing even if the deponent is subpoenaed. Cal Rules of Ct 3.823(b)(3)(B). See §37.36 on subpoenas.

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§37.33 C. Settlement

When a case settles, each plaintiff or other party seeking affirmative relief must notify the arbitrator and the court as required in Cal Rules of Ct 3.1385 (duty to notify court and others of settlement). Cal Rules of Ct 3.829.

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V. THE HEARING

§37.34 A. Setting the Hearing

The arbitrator, within 15 days after appointment, must set the date, time, and place of the arbitration hearing and provide written notice of date, time, and location to each party and the administrator. Cal Rules of Ct 3.817(a). Unless all parties and the arbitrator agree otherwise, the arbitration date must not be set at either of the following times (Cal Rules of Ct 3.817(b)):

- Earlier than 30 days after the date the arbitrator sends the notice of the hearing under Cal Rules of Ct 3.817(a); or
- On Saturdays, Sundays, or legal holidays.

The hearings must be scheduled so that they will be completed no more than 90 days from the arbitrator's assignment to the case, including time due to continuances granted under Cal Rules of Ct 3.818. Cal Rules of Ct 3.817(c).

WARNING: Counsel should check local rules; courts may differ on scheduling.

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§37.35 B. Continuances

The parties may stipulate to a continuance with the arbitrator's consent, which must be given if it appears that good cause exists. Notice of the continuance must be sent to the arbitration administrator. Cal Rules of Ct 3.818(a).

If the arbitrator does not consent to the continuance, the court may grant a party's motion for continuance based on good cause. A party who successfully moves for continuance must notify the arbitrator, who will reschedule the hearing and notify all parties. Cal Rules of Ct 3.818(b).

NOTE: The arbitration hearing cannot be continued more than 90 days after the case's assignment to the arbitrator, including any time due to continuances granted under this rule, except by court order on the motion of a party. Cal Rules of Ct 3.818(c). If the arbitration is not held within the 90-day period, including any time due to continuances granted under Cal Rules of Ct 3.818, the administrator must certify the case to the court. Cal Rules of Ct 3.815(e). On cases certified to the court, see §37.19.

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§37.36 C. Subpoenas

Subpoenas may be used to compel the attendance of witnesses. The party requesting the subpoena must modify its form to show that the appearance is before an arbitrator, and give the time and place set for the arbitration hearing. Cal Rules of Ct 3.823(c)(1).

PRACTICE TIP: You may use the Civil Subpoena for Personal Appearance at Trial or Hearing (Judicial Council Form 982(a)(15)), with the modifications discussed above, to request the subpoena for the judicial arbitration hearing.

At the arbitrator's discretion, the hearing may be adjourned or continued because of the nonappearance of a properly subpoenaed witness. Cal Rules of Ct 3.823(c)(2). Further, a properly subpoenaed witness's nonappearance or refusal to be sworn or to answer may be the basis for proceedings before the superior court to compel compliance with the subpoena on penalty of contempt under CCP §1991. Cal Rules of Ct 3.823(c)(3).

On when to use the subpoena process, see A Litigator's Guide to Effective Use of ADR in California §11.39 (Cal CEB 2005).

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D. Conduct of Hearing

§37.37 1. Civil Trial Concept

The hearing normally progresses like a civil trial without a jury. The arbitrator has powers similar to those of a judge, although the arbitrator's powers are limited to those listed in Cal Rules of Ct 3.824(a). See §37.38 on arbitrator powers. The arbitrator sets the tone of the hearing, which is often less formal than a court trial. For example, an arbitrator may be more inclined to permit leading questions or to take witnesses out of a particular order than would a judge.

PRACTICE TIP: If the parties are to submit briefs after the close of evidence, counsel for the parties should ensure that the arbitration hearing is "concluded" only after they complete such briefing. A short stipulation and order, which provides for a briefing schedule and a "submission to the arbitrator for award" date, can be handwritten before leaving the arbitration hearing room and signed by the parties or their attorneys and by the arbitrator. Be sure to pick a submission date that enables the arbitrator to review the evidence, formulate a reasoned award, and file it within the time period required of the arbitrator. The arbitrator will appreciate your consideration of his or her time constraints.

On suggested topics to include during closing argument at the hearing, see A Litigator's Guide to Effective Use of ADR in California §11.40 (Cal CEB 2005).

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§37.38 2. Arbitrator Powers

The arbitrator's powers, including the power to permit testimony and evidence to be offered and deciding the law and facts of the case, are listed in Cal Rules of Ct 3.824(a). Orders outside the scope of the arbitrator's specified powers, *e.g.,* contempt, are reserved for the court.

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§37.39 3. Evidence

The rules of evidence governing civil cases apply to the conduct of arbitration hearings, with some exceptions. Cal Rules of Ct 3.823(b). See §37.25. The arbitrator rules on the admissibility and relevancy of the evidence offered and decides what evidence will be received.

PRACTICE TIP: If possible, stipulate with opposing counsel before the hearing regarding evidence that will be admitted. If you cannot reach agreement and expect an objection, be prepared to provide the arbitrator with a short brief outlining the legal arguments. Additionally, if the arbitrator rules against admission of your evidence on the basis of your failure to comply with the judicial arbitration court rules, do not overlook the possibility that your evidence still may be admissible under a standard exception in the California Rules of Evidence. Renew your request for admission of the evidence on those grounds. For example, your failure to give notice of intent to introduce a party's deposition under Cal Rules of Ct 3.823(b)(3)(A)(ii) does not preclude you from offering portions of the party's deposition on other grounds. See, *e.g.,* Evid C §§1220, 1290-1294.

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§37.40 4. Record of Proceedings

The arbitrator may, but is not required to, record the arbitration proceedings. Cal Rules of Ct 3.824(b)(1). Any such records made by or at the direction of the arbitrator are deemed the arbitrator's personal notes and are not subject to discovery.

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§37.41 5. Representation by Counsel

The parties have the right to be represented by counsel at any arbitration hearing or proceeding. Parties may choose to waive the right to counsel. If a party waives the right to counsel and then later revokes that waiver, the other party will be entitled to a reasonable continuance to obtain counsel. Cal Rules of Ct 3.821(a).

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§37.42 6. Absence or Nonparticipation of Party

The arbitration may proceed despite the absence of a party if the absent party received due notice of the proceeding and fails to be present and fails to obtain a continuance. However, any award must not be based solely on a party's absence. If the defendant defaults, the arbitrator must require the plaintiff to submit such evidence as may be appropriate to make an award. Cal Rules of Ct 3.821(b).

Refusal to participate in the arbitration hearing may justify sanctions. See *Rietveld v Rosebud Storage Partners, LP* (2004) 121 CA4th 250, 256, 16 CR3d 791 (court awarded monetary sanctions against plaintiffs' attorney for failure to participate in judicial arbitration proceedings). A party's failure to participate, however, is not sufficient to justify dismissal of the action. See *Lyons v Wickhorst* (1986) 42 C3d 911, 231 CR 738; *Salowitz Org. v Traditional Indus.* (1990) 219 CA3d 797, 268 CR 493, superseded by statute on other grounds (trial court's denial of request for trial de novo was inappropriate sanction for failure to participate in judicial arbitration).

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VI. THE AWARD

§37.43 A. Formal Aspects of Award

The award must be in writing and signed by the arbitrator. CCP §1141.23. It should determine all issues properly raised by the pleadings, including a determination of any damages and, if appropriate, an award of costs. The arbitrator's award may exceed the amount in controversy as specified in CCP §1141.11. CCP §1141.26. An arbitrator is not required to make findings of fact or conclusions of law. Cal Rules of Ct 3.825(a).

NOTE: Generally, attorney fees are determined postjudgment on a noticed motion. See CCP §1033.5(c)(5). When the arbitrator awards costs but does not specify the amount of recoverable costs, the portion of the court's judgment awarding specific costs, under the cost bill, is appealable. *Dickens v Lee* (1991) 230 CA3d 985, 281 CR 783. The only way to challenge a judicial arbitrator's denial of costs is by requesting a trial de novo. *Wagy v Brown* (1994) 24 CA4th 1, 7, 29 CR2d 48. On trial de novo, see §37.48.

The award must be filed with the clerk, together with proof of service on each party, within 10 days "after the conclusion of the arbitration hearing." Cal Rules of Ct 3.825(b)(1); CCP §1141.23. If the case is unusually lengthy or complex, the arbitrator may ask the court to allow 20 additional days to file and serve the award. Cal Rules of Ct 3.825(b)(1). The arbitrator's jurisdiction to amend an award is limited to the time within which the award must be filed. Cal Rules of Ct 3.825(b)(2).

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§37.44 B. Entry as Judgment

The award will be entered by the clerk as a judgment if, within 30 days after the award was filed with the clerk, no party has filed and served a request for trial de novo and the award is not vacated. CCP §1141.23; Cal Rules of Ct 3.827(a). On entry of the award as a judgment, the clerk must mail notice of the entry of judgment to all parties that have appeared in the case, and he or she must execute a certificate of mailing and place it in the court's file in the case. Cal Rules of Ct 3.827(b).

A judgment so entered has the same force and effect as a regular civil judgment and may not be appealed or attacked, except as set out in CCP §473 (relief from mistake, inadvertence, surprise, or excusable neglect), CCP §1286.2 (vacation of contractual arbitration award), or Cal Rules of Ct 3.828 (arbitration award may be vacated on ground that arbitrator failed to disclose grounds for disqualification of which arbitrator was aware). CCP §1141.23; Cal Rules of Ct 3.827-3.828. See *Pierson v Honda* (1987) 194 CA3d 1411, 240 CR 148. See also, *e.g., Yeap v Leake* (1997) 60 CA4th 591, 70 CR2d 680 (application of CCP §473 to grant relief from arbitration award). On the finality of an arbitration award, see A Litigator's Guide to Effective Use of ADR in California, chap 9 (Cal CEB 2005); and on vacating the judgment, see §37.50.

PRACTICE TIP: In a case in which settlement is reached before an arbitrator, one of the surest ways to guarantee that the case remains settled is to have the arbitrator file the award (which reflects all the terms of the settlement reached before the arbitrator, together with the parties' signed stipulation waiving a trial de novo) so that it will be entered "automatically" as a judgment. Under certain circumstances, parties to an arbitration may also have a stipulated settlement entered as a judgment under CCP §664.6. See, *e.g., Marriage of Assemi* (1994) 7 C4th 896, 30 CR2d 265; see also Effective Use of ADR, chap 13.

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§37.45 C. Arbitrator Fees

Before the arbitrator's fee is paid, the arbitrator must either timely file the award with the court clerk (as required by Cal Rules of Ct 3.825(b)) or file a notice of settlement. Cal Rules of Ct 3.819(a); CCP §1141.18(b). On the arbitrator's verified ex parte application, the court may for good cause authorize payment of a fee in the following situations (Cal Rules of Ct 3.819(b)):

- If the arbitrator devoted a substantial amount of time to a case that settled without a hearing; or
- If the award was not timely filed.

The arbitrator must submit a fee statement to the administrator promptly after completing the arbitrator's duties. For contents of the fee statement, see Cal Rules of Ct 3.819(c). Compensation for arbitrators may not be less than $150 per case, or $150 per day, whichever is greater. A court may set a higher level of compensation for that court. CCP §1141.18. However, because CCP §1141.18 also provides that "[a]rbitrators may waive compensation in whole or in part," local rules, custom, or practice often result in arbitrators' serving for a lesser sum or zero fee on a pro bono publico basis.

PRACTICE TIP: Before the arbitration, request a copy of the arbitrator's fee schedule, which should specify how fees will be assessed. This will eliminate the element of surprise regarding the fee.

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VII. TRIAL AFTER ARBITRATION

§37.46 A. Requesting Trial After Arbitration

A party dissatisfied with a judicial arbitration award may request a trial de novo, by court or jury, by filing a request

- With the court clerk with proof of service of a copy on all other parties appearing in the case. Cal Rules of Ct 3.826(a); see *Usher v Soltz* (1981) 123 CA3d 692, 176 CR 746 (filing with arbitration administrator is not sufficient); and
- Within 30 days after the arbitrator files the award with the court. CCP §1141.20.

A request for trial filed after the parties have been served with a copy of the award by the arbitrator, but before the arbitrator has filed the award with the court clerk, is deemed valid. Cal Rules of Ct 3.826(a).

PRACTICE TIP: If you want a jury trial, you should state this in the trial de novo request to avoid possible waiver arguments. However, it is possible that this jury demand may be treated as ineffective if the court administration takes the position that the initial Case Management Order irrevocably governs. See Cal Rules of Ct 3.728(4). Always check local practice to determine the required timing for a jury demand.

California Rules of Court 3.826(a) states that the 30-day limit for requesting a new trial begins when the arbitration award is filed with the court clerk and may not be extended. Nevertheless, in *Domingo v Los Angeles County Metro. Transp. Auth.* (1999) 74 CA4th 550, 88 CR2d 224, the court held that the 30-day period does not start until the arbitration award is *served* on the parties. In the absence of proper service, the 30-day period does not begin to run until the party requesting trial de novo receives actual notice of the arbitrator's award. 74 CA4th at 554. The trial court has no authority to modify the 30-day period in which to file the request for a trial de novo. *Karamzai v Digitcom* (1996) 51 CA4th 547, 551, 59 CR2d 139 (court is prohibited from extending 30-day period (see Cal Rules of Ct 3.826(a)) and lacks any authorization to shorten the 30-day period).

NOTE: Although the statutory language states that any party may obtain a trial de novo on a timely request, the court in *Robinson v Superior Court* (1984) 158 CA3d 98, 204 CR 366, concluded that a plaintiff who elects to arbitrate and who obtains an arbitration award in the full amount sought is not ordinarily entitled to a trial de novo, because that would frustrate the purpose of the Judicial Arbitration Act as a means for speedy resolution of disputes.

If a party requests trial de novo, the court is required to recalendar the case for trial as near as possible to the same position it had on the civil active list before the arbitration was ordered, or with civil priority on the next setting calendar. CCP §1141.20(b); see Cal Rules of Ct 3.826(b).

NOTE: Although it would be unusual for a case to be in the legal system for so long, given court rules requiring judges to manage cases in accordance with the Trial Court Delay Reduction Act (Govt C §§68600-68620), counsel should be aware that trial must be set before the 5-year period to bring a case to trial under CCP §583.110 expires.

A plaintiff who loses at arbitration may not request a trial de novo and then voluntarily dismiss the case to avoid an arbitration award in favor of the defendant. *Kelley v Bredelis* (1996) 45 CA4th 1819, 53 CR2d 536 (dismissal with prejudice); *Herbert Hawkins Realtors, Inc. v Milheiser* (1983) 140 CA3d 334, 189 CR 450 (dismissal without prejudice). The courts reason that to permit otherwise would defeat the purpose of judicial arbitration. Instead, a dismissal filed after a request for trial de novo will operate to reinstate the arbitration award.

A trial de novo that is requested by only one of the parties in a multiparty judicial arbitration covers all claims and vacates the award in its entirety if those claims are interdependent. *Southern Pac. Transp. Co. v Mendez Trucking Inc.* (1998) 66 CA4th 691, 696, 78 CR2d 236; *Trump v Superior Court* (1981) 118 CA3d 411, 417, 173 CR 403. However, when the claims of those requesting a trial de novo are separate and distinct from the remaining claims, one court of appeal has held that a trial de novo need cover only those separate and distinct claims. *Demirgian v Superior Court* (1986) 187 CA3d 372, 231 CR 698. But see *Lewco Iron Metals, Inc. v Superior Court* (1999) 76 CA4th 837, 842, 90 CR2d 671 (*Demirgian* result is inconsistent with plain meaning of statutory scheme, which permits entry of judgment on arbitration award only if no party requests trial de novo).

PRACTICE TIP: In practice, parties may choose to accept the judicial arbitration award rather than request a trial de novo because the party requesting a trial de novo may be liable for specified fees and costs incurred in

connection with the action if the outcome of the trial is not more favorable to that party in either the amount of damages awarded or the type of relief granted. See CCP §1141.21(a); §37.49. For similar reasons, parties are often able to negotiate a settlement soon after a party requests a trial de novo, by using the arbitrator's award in the settlement negotiations as evidence of a neutral view of the value of the case and using the avoidance of the additional costs as additional incentive. On the use of objective standards, such as an arbitrator's valuation, in settlement negotiations, see A Litigator's Guide to Effective Use of ADR in California §§3.201-3.216 (Cal CEB 2005).

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§37.47 B. Postarbitration Discovery

Absent extraordinary circumstances, courts are reluctant to permit postarbitration discovery. Under CCP §1141.24, no discovery other than that permitted by CCP §§2034.010-2034.730 (exchange of information and depositions concerning expert witnesses) is permissible after an arbitration award, except by parties' stipulation or by leave of court on a showing of good cause. The court in *Regan v Lanet* (1987) 197 CA3d 353, 361, 243 CR 20, lists the following six factors to determine whether good cause for postarbitration discovery exists:

- The necessity and reasons for discovery;
- The diligence of the party requesting discovery;
- Whether discovery will delay trial;
- Whether the purposes of arbitration, *i.e.,* prompt, equitable, and efficient conflict resolution, will be thwarted;
- Whether the party seeking discovery is also the party requesting trial de novo; and
- The prejudice or hardship to both parties.

In *McCormick v Sentinel Life Ins. Co.* (1984) 153 CA3d 1030, 200 CR 732, the court found that the unavailability of a long-known witness and the alleged complexity of the case were insufficient grounds to establish the required "good cause" to permit further discovery after judicially mandated arbitration. The court noted that "if the case is unduly complex now it was also complex prior to arbitration." 153 CA3d at 1051. But see 153 CA3d at 1052 n20 (court expresses concern about underlying policy assumptions of CCP §1141.24).

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§37.48 C. The Trial De Novo

In a trial de novo following judicial arbitration, the case will be tried as if no arbitration had occurred, and no reference to any phase of the arbitration or to the fact that there was arbitration may be made at trial. CCP §1141.25. Further, nothing occurring at the arbitration may be used as evidence, even for purposes of impeachment. Cal Rules of Ct 3.826(c). See *Jimena v Alesso* (1995) 36 CA4th 1028, 43 CR2d 18 (expert witness's testimony from judicial arbitration is not admissible to impeach his testimony at subsequent trial); *Weber v Kessler* (1981) 126 CA3d 1033, 179 CR 299 (after trial de novo requested, court required to make independent determination and could not rely on arbitrator's findings in reaching its decision). However, if the arbitrator makes a record of the arbitration proceedings, that record is subject to subpoena issued in a criminal investigation or perjury prosecution. Cal Rules of Ct 3.824(b)(2). On the arbitrator's record, see §37.40 and A Litigator's Guide to Effective Use of ADR in California §11.43 (Cal CEB 2005).

NOTE: The rule of CCP §1141.25, forbidding reference to an arbitration proceeding or award during any subsequent trial, does not apply to *pretrial* proceedings. See *Shannon v Sims Serv. Ctr.* (1985) 164 CA3d 907, 914, 210 CR 861.

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§37.49 D. Costs and Fees After Trial De Novo

If the party requesting a trial de novo does not receive a judgment from the trial that is more favorable than the arbitration award, either for the amount of damages awarded or the type of relief granted, the court will order the party requesting the trial de novo to pay the following costs (CCP §1141.21(a)(1); see Cal Rules of Ct 3.826(d)):

- The arbitrator's compensation payable to the court less compensation paid under CCP §1141.28 (see below);
- "All costs" incurred by the other parties;
- Reasonable costs of expert witnesses (not regular employees of a party) actually incurred or reasonably necessary to the case's preparation and trial; and
- Compensation paid under CCP §1141.28 by the other parties to the arbitrator.

Except for the arbitrator's compensation, the costs allowed include only those incurred from the time of election of the trial de novo. CCP §1141.21(a)(2). Attorney fees are not included in the phrase "all costs." See CCP §1021 on recovery of attorney fees.

NOTE: A party may be relieved of the obligation of costs if, on motion, the court finds in writing that the imposition of such costs and fees would create substantial hardship not in the interest of justice. CCP §1141.21(a)(1); see also CCP §1141.28(b).

A party who elects to have a trial de novo and does not receive a judgment more favorable than the arbitration award may not recover costs on the trial de novo. CCP §1141.21(a)(1)(B). Although subject to some question, CCP §1141.21(a)(2) appears to limit this cost disallowance to those costs incurred after the party has elected the trial de novo.

If the arbitration award exceeds $50,000 and the judgment after a trial de novo is also in excess of that amount, the cost provisions in CCP §1141.21 do not apply. CCP §1141.26.

NOTE: If the party electing a trial de novo proceeds in forma pauperis and does not obtain a more favorable judgment after trial, the costs listed in CCP §1141.21(a) can only be assessed and used as an offset against damages awarded in favor of that party. CCP §1141.21(b).

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§37.50 VIII. SEEKING TO VACATE JUDGMENT

An appeal from the judgment entered on the arbitrator's award is not permitted. CCP §1141.23. However, a party against whom a judgment based on an arbitration award was entered may move to vacate the judgment within 6 months of its entry. Cal Rules of Ct 3.828(d). Courts view such motions with disfavor and they must meet rigid criteria. The grounds for moving to vacate a judgment based on an arbitration award are limited to the following (CCP §1141.22; Cal Rules of Ct 3.828(d)); see also CCP §1286.2 (vacation of arbitration award), discussed in A Litigator's Guide to Effective Use of ADR in California §9.83 (Cal CEB 2005):

- The arbitrator's failure to disclose before the hearing that he or she was subject to a disqualification of which he or she was then aware or the arbitrator's failure to disqualify himself or herself as required by CCP §1282 on receipt of a timely demand;
- The award was obtained by fraud, corruption, or other undue means;
- Corruption of the arbitrator;
- Substantial and prejudicial misconduct of a neutral arbitrator;
- The arbitrator exceeded his or her power and the award cannot be corrected without affecting the merits of the decision; or
- Any of the grounds listed in CCP §473.

A party moving to vacate the judgment must serve notice on the arbitrator and the adverse parties. The court may grant the motion only on clear and convincing evidence that the grounds alleged are true and the motion was made as soon as practicable after the moving party learned of the existence of the grounds. Cal Rules of Ct 3.828(d). Declarations accompanying the motion should show clearly that the motion was brought promptly. On vacation of judgments, see generally California Trial Practice: Civil Procedure During Trial §§25.72-25.77 (3d ed Cal CEB 1995).

An order denying a motion to vacate is appealable. *Cabrera v Plager* (1987) 195 CA3d 606, 241 CR 731. However, at this point, neither the arbitrator's award nor the judgment on the award may be modified. *Pierson v Honda* (1987) 194 CA3d 1411, 240 CR 148.

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§37.51 IX. CHECKLIST: PROCEDURES FOR JUDICIAL ARBITRATION

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Placing Action on Arbitration Hearing List

- By stipulation:
- File stipulation (and timely demand for jury if desired) no later than the time the initial case management statement is filed, unless the court orders otherwise (CCP §1141.12(b); Cal Rules of Ct 3.812(a)).
- Case is placed on arbitration hearing list forthwith (Cal Rules of Ct 3.812(a)).
- By plaintiff's election:
- File election (and timely demand for jury if desired) no later than the time the initial case management statement is filed, unless the court orders otherwise (CCP §1141.12(b); Cal Rules of Ct 3.812(b)).
- Case is placed on the hearing list subject to motion by defendant to delay arbitration hearing for good cause (Cal Rules of Ct 3.812(b)).
- Cross-complainant has 15 days after notice of election to arbitrate to move court to remove case from hearing list on ground that amount in controversy on cross-complaint exceeds $50,000 (Cal Rules of Ct 3.812(c)).
- By court order:
- Case is placed on hearing list at case management conference or review under Cal Rules of Ct 3.720-3.730 that takes place after all named parties have appeared or defaulted (CCP §1141.16(a); Cal Rules of Ct 3.812(d)). (Make timely demand for jury if desired.)

Assigning Arbitrator

- Arbitrator is assigned to hear case within 30 days after its submission to arbitration (CCP §1141.18(c)).
- Parties may stipulate to nonpanel arbitrator effective on written consent and required oath of such person (see Cal Rules of Ct 3.815(a)).
- Arbitration administrator, within 15 days after case is placed on arbitration hearing list (Cal Rules of Ct 3.815(b)),
- Sends parties nominees equal to number of sides plus one;
- Each side has 10 days to reject a name, after which
- Arbitration administrator appoints at random a nonrejected person as arbitrator and gives notice to all parties.

Setting for Hearing

- Arbitrator, within 15 days after appointment,
- Sets date, time, and place for hearing; and
- Gives notice in writing to each party and the administrator (Cal Rules of Ct 3.817(a)).
- Arbitrator may consent to continue hearing date up to 90 days, or court may grant a continuance (Cal Rules of Ct 3.818).

Award and Judgment

- Arbitrator files award with proof of service on each party within 10 days after conclusion of hearing. (If trial de novo has been waived, file properly executed stipulation to that effect with the award.)
- Court may allow up to 20 additional days (Cal Rules of Ct 3.825(b)(1)).
- Award is entered as judgment 30 days after filing unless during that interval:
- Request for trial de novo is made (Cal Rules of Ct 3.825(c)(1)). (Repeat jury demand if jury is desired.)

This checklist reflects statewide statutes and rules; local variations should be checked.

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X. FORMS

§37.52 A. Form: Stipulation to Submit to Judicial Arbitration

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**STIPULATION TO SUBMIT TO**
vs	)	**JUDICIAL ARBITRATION**
	)	_ _[*AND*]_ _ _ _[*, TO APPOINT*
_ _[*Name(s)*]_ _,	)	*ARBITRATOR, AND*]_ _ _ _[*TO*
Defendant(s)	)	*FIX MAXIMUM AWARD*]_ _
	)	**(CAL RULES OF CT**
_____	)	**3.811(a)(4), 3.812(a))**

The parties stipulate and agree that:

1. This matter will be submitted to judicial arbitration under Code of Civil Procedure §§1141.10-1141.31 and California Rules of Court 3.810-3.830.

[*Add if appropriate*]

2. _ _[*Name*]_ _ **will act as arbitrator.**

[3.] The arbitration award will not exceed $_ _[*dollar amount*]_ _**.**

[4.] The arbitration award will be in favor of plaintiff _ _[*name*]_ _ **and will not be less than $**_ _[*dollar amount*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant

I agree to serve as arbitrator in this action.

Date: _ _ _ _ _ _ __[*Signature of arbitrator*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.
Comment: See §37.7.

NOTE: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details

required, see chap 11.

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Source: Civil Litigation/California Civil Procedure Before Trial/37 Judicial Arbitration/§37.53 B. Form: Plaintiff's Election of Judicial Arbitration

§37.53 B. Form: Plaintiff's Election of Judicial Arbitration

To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**PLAINTIFF'S ELECTION OF JUDICIAL ARBITRATION (CAL RULES OF CT 3.811(a)(5), 3.812(b))**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

Under Code of Civil Procedure §§1141.11 and 1141.12(b) and California Rules of Court 3.812(b), plaintiff, _ _[*name*]_ _, elects judicial arbitration in this action and expressly consents that the arbitration award not exceed the total sum of $50,000.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for plaintiff

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

NOTE: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11.

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§37.54 C. Form: Stipulation to Judicial Arbitrator

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**STIPULATION TO JUDICIAL ARBITRATOR (CAL RULES OF CT 3.815(a))**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

The parties stipulate and agree that _ _[*name*]_ _ **will act as arbitrator in this judicial arbitration matter**

[*Add any or all of the following, if appropriate*]

and that the arbitration award will not exceed _ _[*dollar amount*]_ _

and that the arbitration award will be in favor of plaintiff [*name*] **and will not be less than** _ _[*dollar amount*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for plaintiff

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant

I agree to serve as arbitrator in this action.

Date: _ _ _ _ _ _ __[*Signature of arbitrator*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: Even though the court orders arbitration, parties may stipulate to their arbitrator if they act before the arbitration administrator appoints an arbitrator. If the parties select as the arbitrator a person who is not on the court's arbitrator panel, the stipulation will be effective only if (1) the selected person completes a written consent to serve and the oath required of panel arbitrators under Cal Rules of Ct 3.810-3.830, and (2) both the consent and the oath are attached to the stipulation. A stipulation may specify the maximum amount of the arbitrator's award. The stipulation to an arbitrator must be filed no later than 10 days after the case has been set for arbitration under Cal Rules of Ct 3.812. The oath of office may be obtained from the arbitration administrator. Parties stipulating to a particular arbitrator should follow up to be sure that their choice files the oath of office on time. See §37.15.

NOTE: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11.

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§37.55 D. Form: Rejection of Arbitrator

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[*Letterhead*]

_ _[*Date*]_ _

Arbitration Administrator

_ _[*Name of court*]_ _
_ _[*Address of court*]_ _

Re: _ _[*Case name and number*]_ _

Under California Rules of Court 3.815(b), _ _[*name of party*]_ _, _ _[*a/the*]_ _ _ _[*capacity of party*]_ _**, rejects** _ _[*name of arbitrator*]_ _ **from the list of proposed arbitrators for this action.**

Very truly yours,
__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: California Rules of Court 3.815(b) does not require that the opposing parties be notified of an arbitrator's rejection. Under certain circumstances, counsel may find it useful to confer with opposing counsel both on possible rejections and on possible agreed selections before filing a rejection with the court, to see whether there is any agreement on the choice of an arbitrator. See §§37.15-37.20.

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Source: Civil Litigation/California Civil Procedure Before Trial/37 Judicial Arbitration/§37.56 E. Form: Plaintiff's Notice of Intention to Introduce Documents and Depositions Into Evidence

§37.56 E. Form: Plaintiff's Notice of Intention to Introduce Documents and Depositions Into Evidence

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To download **WordPerfect** version, right click and choose *Save Target As*

[*Letterhead*]

_ _[*Date*]_ _

_ _[*Name of opposing counsel*]_ _
_ _[*Address*]_ _

Re: Arbitration Hearing
_ _[*Case name and number*]_ _
Documents to Be Offered Into Evidence by Plaintiff

Dear _ _[*name of opposing counsel*]_ _:

Under California Rules of Court 3.823(b), plaintiff, _ _[*name*]_ _, intends to offer the following documentary material into evidence at the arbitration hearing set for _ _[*time*]_ _ on _ _[*date*]_ _:

1. The following medical and hospital reports, records, and bills:

a. Bill from _ _[*specify*]_ _, dated _ _[*specify*]_ _ (attached);

b. Report of Dr. _ _[*name*]_ _, dated _ _[*specify*]_ _ (attached); and

c. Plaintiff's medical records from office of Dr. _ _[*name*]_ _ (delivered to defendant at deposition taken on _ _[*date*]_ _).

2. Evidence of loss of income in the form of a declaration dated _ _[*specify*]_ _, from _ _[*name*]_ _, plaintiff's employer (attached).

3. Property damage repair estimate dated _ _[*specify*]_ _, from _ _[*name*]_ _ (delivered to defendant at deposition taken on _ _[*date*]_ _). Repairs have been made in part. See item 4 for details of repairs and costs to date.

4. Invoice no. _ _ _, dated _ _[*specify*]_ _, from _ _[*name*]_ _ (attached).

5. Police report by Officer _ _[*name*]_ _, dated _ _[*specify*]_ _ (attached).

6. Declaration of _ _[*name*]_ _, dated _ _[*specify*]_ _ (attached).

Plaintiff intends to offer into evidence the depositions of _ _[*name*]_ _, taken on _ _[*date*]_ _, pursuant to notice, and _ _[*name*]_ _, taken on _ _[*date*]_ _, pursuant to stipulation.

Very truly yours,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for plaintiff _ _[*name*]_ _

Comment: See §§37.25-37.32.

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§37.57 F. Form: Demand That Witness Appear and Testify in Person

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[*Letterhead*]

_ _[*Date*]_ _

_ _[*Name of opposing counsel*]_ _
_ _[*Address*]_ _

Re: Arbitration Hearing
_ _[*Case name and number*]_ _
Appearance of _ _[*name of witness*]_ _

Dear _ _[*name of opposing counsel*]_ _**:**

Under California Rules of Court 3.823(b)(2), defendant [or plaintiff], _ _[*name*]_ _**, demands that** _ _[*name of witness*]_ _ **appear in person to testify at the arbitration hearing. Defendant [or plaintiff] objects to the admission into evidence of the written statement of** _ _[*name of witness*]_ _**, dated** _ _[*specify*]_ _**.**

Very truly yours,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: Although this demand may be sufficient to block the admission into evidence of a witness's written statement under Cal Rules of Ct 3.823, a subpoena served on the witness personally is necessary to ensure the witness's attendance at the hearing. See §§37.29, 37.36.

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Source: Civil Litigation/California Civil Procedure Before Trial/37 Judicial Arbitration/§37.58 G. Form: Request for Trial De Novo After Judicial Arbitration (Alternative Dispute Resolution) (Judicial Council Form ADR-102)

§37.58 G. Form: Request for Trial De Novo After Judicial Arbitration (Alternative Dispute Resolution) (Judicial Council Form ADR-102)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
REQUEST FOR TRIAL DE NOVO AFTER JUDICIAL ARBITRATION	CASE NUMBER:

NOTE:
If you do not want the arbitrator's award to become the judgment in the case, you must file a request for a trial de novo within 30 days after the arbitration award is filed with the clerk. If you do not request a trial de novo by this deadline, the arbitrator's award will be final and it will be entered as the judgment in the case. The 30-day period cannot be extended (California Rules of Court, rule 3.826).

Copies of the request for a trial de novo must be served on all parties and the request and a proof of service must be filed with the clerk.

☐ Plaintiff ☐ Defendant ☐ Other *(specify):*

(name):

requests trial de novo in this action, under Code of Civil Procedure, section 1141.20 and rule 3.826 of the California Rules of Court.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
ADR-102 [Rev. January 1, 2007]

REQUEST FOR TRIAL DE NOVO AFTER JUDICIAL ARBITRATION
(Alternative Dispute Resolution)

Code of Civil Procedure, § 1141.20;
Cal. Rules of Court, Rule 3.826
www.courtinfo.ca.gov

Print

SHORT TITLE:	CASE NUMBER:

PROOF OF SERVICE

☐ Mail ☐ Personal Service

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My residence or business address is *(specify):*

3. I mailed or personally delivered a copy of the *Request for Trial De Novo After Judicial Arbitration* as follows *(complete either a or b):*

   a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
      (1) I enclosed a copy in an envelope and
         (a) ☐ **deposited** the sealed envelope with the United States Postal Service, with the postage fully prepaid.
         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
      (2) The envelope was addressed and mailed as follows:
         (a) Name of person served:
         (b) Address on envelope:
         (c) Date of mailing:
         (d) Place of mailing *(city and state):*

   b. ☐ **Personal delivery.** I personally delivered a copy as follows:
      (1) Name of person served:
      (2) Address where delivered:
      (3) Date delivered:
      (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On requesting trial after arbitration, see §37.46. Attorneys may draft a request for trial de novo instead of using this optional Judicial Council form.

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38

Default

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I. INTRODUCTION

§38.1 A. Scope of Chapter

A default occurs when a defendant served with a complaint fails to file the appropriate response (see §§38.20-38.28) within the time allowed (see §38.19). CCP §§585-586. After a defendant is in default, a plaintiff may file a request for entry of default (see §§38.35-38.39) and then apply for a default judgment (see §§38.41-38.74). This chapter covers procedural and substantive requirements for entry of default and for obtaining a default judgment. The procedure for setting aside a default judgment is covered in §§38.75-38.107.

In addition to a timely filed answer (chap 25) or demurrer (chap 23), certain timely filed motions, *e.g.*, a motion to strike, to remove to federal court (chap 22), to change venue (chap 20), to dismiss or stay for inconvenient forum (chap 21), will prevent entry of default. See §38.20.

Checklists appear in §§38.109-38.110. For forms, see §§38.111-38.117.

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§38.2 1. Governing Law

The statutory authority for obtaining a default judgment is CCP §§585-587.5. Additional procedures are prescribed by Cal Rules of Ct 3.110(g)-(h), 3.1800. The statutory authority for obtaining relief from default or default judgment is CCP §§473 and 473.5.

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2. Definitions

§38.3 a. Default

A **default** occurs when a defendant served with a complaint fails to file the appropriate responsive paper (see §§38.21-38.28) within the time specified in the summons (see §38.19). CCP §§585-586.

NOTE: The term "responsive paper" rather than "pleading" is used in this chapter to refer to the documents that would prevent default. See §38.20 for a list of appropriate responsive papers. The term "defendant" is used in this chapter to refer to the party who is in default for having failed to file a responsive paper, and the word "plaintiff" is used for the party who seeks that party's default. The term "defendant" includes cross-defendants served with a cross-complaint, and the term "plaintiff" includes cross-complainants. See CCP §587.5.

The critical act is failure to file the response; it is immaterial whether the responsive paper was served on the plaintiff. *Fletcher v Maginnis* (1902) 136 C 362, 68 P 1015.

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§38.4 b. Entry of Default

A default has no legal consequences unless the court clerk enters the default into the court records. The entry of default does not happen automatically; the plaintiff must request it within 10 days of the date the defendant's response was due. Cal Rules of Ct 3.110(g). See also §§38.14, 38.18-38.20. Cal Rules of Ct 3.110(g)-(i). After default has been entered, the defendant's ability to file an answer, or any motion other than a motion for relief from default, is cut off. *Devlin v Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 CA3d 381, 385, 202 CR 204; *Forbes v Cameron Petroleums, Inc.* (1978) 83 CA3d 257, 262, 147 CR 766. See §38.15.

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§38.5 c. Default Judgment

A default judgment is a judgment entered by the clerk or court on the plaintiff's application at or after entry of the defendant's default, depending on the nature of the action. See §38.42. A default judgment may be entered by either the clerk (see §§38.42-38.60) or the court (see §§38.61-38.74), depending on the type of case involved. Once a default is entered, the plaintiff has 45 days to obtain a default judgment against the defaulting defendant, unless the court has granted an extension of time. Cal Rules of Ct 3.110(h).

A default judgment is a judgment on the merits in the plaintiff's favor and is res judicata for all issues pleaded in the complaint. *People v Sims* (1982) 32 C3d 468, 481, 186 CR 77, quoting *Fitzgerald v Herzer* (1947) 78 CA2d 127, 132, 177 P2d 364. For discussion of the res judicata effect of default judgment, see §38.13.

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B. Compare—Other Court Proceedings

§38.6 1. Dismissal

The court must, on its own motion or on motion of a nondefaulting defendant, dismiss an action that is not brought to trial within 5 years after it is commenced. CCP §583.360. The court has discretion to dismiss an action for delay in prosecution if it is not brought to trial within 2 years after the complaint is filed. CCP §§583.410-583.420; Cal Rules of Ct 3.1340. See §§39.25-39.62 (dismissal). However, a defendant whose default has been entered may not file a motion to dismiss under these sections. See *Devlin v Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 CA3d 381, 202 CR 204 (defaulting defendant can bring motion only for relief from default).

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§38.7 2. Uncontested Trials

A default judgment is generally not available when the defendant has answered but fails to appear at trial after having been given proper notice. Instead, the plaintiff's remedy is to proceed with the matter as an uncontested trial and introduce evidence on which the court may render judgment. CCP §594; *Wilson v Goldman* (1969) 274 CA2d 573, 79 CR 309; *Heidary v Yadollahi* (2002) 99 CA4th 857, 864, 121 CR2d 695. But see *Bill Benson Motors, Inc. v Macmorris Sales Corp.* (1965) 238 CA2d Supp 937, 48 CR 123 ("for certain purposes, [default] means a failure to appear at trial as well").

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§38.8 3. Default as Discovery Sanction

In some circumstances, a default judgment may be obtained against a defendant who has filed a timely answer but then fails to comply with the discovery laws. The court has the power to order terminating sanctions, including the entry of a default judgment for willful obstruction of the discovery process. CCP §2023.030(d)(4); *Greenup v Rodman* (1986) 42 C3d 822, 231 CR 220.

For discussion of terminating sanctions, see California Civil Discovery Practice §§15.99-15.101 (4th ed Cal CEB 2006).

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C. Preliminary Considerations

1. Restrictions on Default Judgments

§38.9 a. Relief Limited to Amount Demanded

The amount granted by a default judgment may not exceed the amount demanded in the complaint, the statement of damages (see §§38.29-38.31), or a statement reserving the right to seek punitive damages (see §38.32). CCP §580. See also CCP §585(a).

The purpose of these requirements is to inform a defendant of its maximum liability on default. *Marriage of Lippel* (1990) 51 C3d 1160, 1167, 276 CR 290 (due process requires notice of specific relief sought); *Greenup v Rodman* (1986) 42 C3d 822, 231 CR 220 (default judgment that exceeds demand would deny fair hearing to defaulting party).

PRACTICE TIP: An attorney who is entitled by statute or contract to fees should allege so in the complaint and include a demand for fees in the prayer. CCP §585(a); *Wiley v Rhodes* (1990) 223 CA3d 1470, 273 CR 279. In *Becker v S.P.V. Construction Co., supra,* the Supreme Court reversed an attorney fee award in a default judgment because the complaint did not pray for attorney fees.

A judgment rendered in excess of the proper amount is void. *Schwab v Rondel Homes, Inc.* (1991) 53 C3d 428, 280 CR 83. However, an appellate court will not void the entire judgment if the complaint will support a judgment for a lesser amount; it will simply modify the judgment to strike the excess damages. *Becker v S.P.V. Constr. Co.* (1980) 27 C3d 489, 165 CR 825; *Gudarov v Hadjieff* (1952) 38 C2d 412, 240 P2d 621; *Hearn v Howard* (2009) 177 CA4th 1193, 1208, 99 CR3d 642 (body of complaint alleged amount of damages sought, but because neither body of complaint nor prayer for relief specified amount of attorney fees, those were stricken); *Janssen v Luu* (1997) 57 CA4th 272, 66 CR2d 838 (complaint sought damages "in excess of $3000, and according to proof"; judgment modified to award $3000). See §38.95.

If the plaintiff alleges merely that damages exceed the superior court's jurisdictional minimum, that minimum sets the upper limit for the default judgment, which applies to punitive as well as compensatory damages. See *Greenup v Rodman* (1986) 42 C3d 822, 231 CR 220.

Limited civil cases. In a limited civil case, in which no statement of damages is required (see §38.29), the relief granted cannot exceed the demand of the complaint. CCP §580. See *Janssen v Luu* (1997) 57 CA4th 272, 275, 66 CR2d 838 (amount of damages specified in complaint sets ceiling for default recovery even if plaintiff proves greater damages). Even assuming that defendants have constructive notice of the amount-in-controversy limits of limited civil cases, due process requires they be given notice of the exact nature of the risk they are taking by not responding. 57 CA4th at 277.

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§38.10 b. No Default in Certain Proceedings

In the following proceedings, entry of default judgment without an evidentiary hearing before the court is prohibited by statute:

- Quiet title actions (CCP §764.010; but see *Yeung v Soos* (2004) 119 CA4th 576, 14 CR3d 502 (default judgment in quiet title action not rendered void by court's failure to properly conduct evidentiary hearing); see also CCP §585(c));
- Actions to reestablish destroyed land records (CCP §751.14);
- Actions to reestablish boundaries of land disturbed by earth movements (CCP §751.59);
- Proceedings for judgment of nullity (see Fam C §2336, which provides alternative procedure of proof by affidavit only for marital dissolution and legal separation proceedings);
- Mandamus proceedings (CCP §1088; but see *People ex rel Kottmeier v Superior Court* (1987) 194 CA3d 1536, 1540, 239 CR 920; *Coppinger v Superior Court* (1982) 134 CA3d 883, 885, 185 CR 24; *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 102 CR 45);
- Prohibition proceedings (CCP §§1105, 1088);
- Corporate dissolution proceedings under Corp C §1804 (former Corp C §4657; *Rosner v Benedict Heights, Inc.* (1963) 219 CA2d 1, 32 CR 764); and
- Class actions (*Kass v Young* (1977) 67 CA3d 100, 136 CR 469).

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§38.11 c. No Default Against Certain Defendants

A default judgment may not be obtained against the following defendants, regardless of the nature of the proceeding:

- A fictitiously named defendant, unless
- The copy of the summons, process, or pleading served on the defendant specifies in the statutory language that the defendant is being sued as, or on behalf of, a fictitiously named defendant;
- The proof of service states the name under which the defendant was served and that the notice was given; and
- The complaint is amended to state the defendant's true name. CCP §474; *Armstrong v Superior Court* (1956) 144 CA2d 420, 301 P2d 51.
- An unwilling plaintiff joined as a nominal defendant under CCP §382. See *Estate of Kuebler* (1978) 81 CA3d 500, 146 CR 481; *Watkins v Nutting* (1941) 17 C2d 490, 110 P2d 384.
- A defendant in the military service, unless the court appoints an attorney to represent the defendant's interests and directs entry of judgment in compliance with the Servicemembers Civil Relief Act of 2003 (50 USC App §§501-596).
- An indigent prisoner, unless the court appoints counsel. *Payne v Superior Court* (1976) 17 C3d 908, 927, 132 CR 405 (due process and equal protection require "meaningful opportunity to be heard").
- A debtor in bankruptcy. 11 USC §362(a); *Raczynski v Judge* (1986) 186 CA3d 504, 510, 230 CR 741 (trial court did not enter judgment on debtor's default until bankruptcy dismissed).

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§38.12 2. Ethical Considerations

Case law provides some standards of ethical conduct in using default procedures:

Notice. The plaintiff's attorney has an ethical duty to inform opposing counsel before requesting entry of default, and failure to do so is grounds for setting aside the default under CCP §473(b). *Fayusi v Permatex, Inc.* (2008) 167 CA4th 681, 701, 84 CR3d 351 (although defendant's legal department had helped plaintiff's counsel to effect service, plaintiff's counsel accepted default without any warning); *Smith v Los Angeles Bookbinders Union* (1955) 133 CA2d 486, 500, 284 P2d 194, disapproved on other grounds in *Grover v Tribune Publishing Co., Inc.* (1959) 52 C2d 536, 343 P2d 36 ("[t]he quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended"). See *Farrar v Steenbergh* (1916) 173 C 94, 159 P 707.

PRACTICE TIP: Plaintiff's counsel should always give written notice to known defense counsel of the intent to seek entry of default, and a reasonable extension of time to respond. Note, however, that local case management rules may prevent the plaintiff's counsel from granting more than a short extension of time to respond. On judicial case management and time disposition goals, see chap 40.

Robinson v Varela (1977) 67 CA3d 611, 136 CR 783, provides a good example of the attitude of the courts toward plaintiffs who obtain a default without giving notice to known defense counsel. The plaintiff filed an unlawful detainer action on Friday, December 19, and served the defendant on December 22. Defense counsel sought an extension of time to answer but was unable to reach the plaintiff's attorney on December 24. On December 29, defendant's attorney learned that the plaintiff had just filed for default. The appellate court upheld an order granting the defendant's motion to vacate the ensuing default judgment, either because the attorney's conduct was "excusable" under CCP §473 (see §38.79) in view of the limited office hours during Christmas week and the attorney's preoccupation with other litigation, or because "the quiet taking of default on the beginning of the first day on which defendant's answer was delinquent" was the sort of professional discourtesy that justified vacating the default. 67 CA3d at 616.

PRACTICE TIP: If counsel fails to give notice to opposing counsel, the court will probably set aside the default under CCP §473. However, the court may very well deny §473 relief (see §38.75) to a party who ignores the notice and extension of time to respond.

Use of deceit. The attorney taking the default must not use treachery or deceit to mislead opposing counsel. *Farrar v Steenbergh, supra* (court affirmed order setting aside default judgment on cross-complaint because cross-complaint was buried obscurely in document labeled "answer," which gave every appearance of being an answer). See *Westport Oil Co. v Garrison* (1971) 19 CA3d 974, 97 CR 287. Furthermore, the plaintiff's counsel may not lull the defendant's attorney into a false sense of security. *Westinghouse Elec. Corp. v Superior Court* (1983) 143 CA3d 95, 109, 191 CR 549.

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§38.13 3. Res Judicata Effect of Default Judgment

Whether entered by the court or the clerk (see §38.42), a default judgment is a judgment on the merits in the plaintiff's favor and "is res judicata as to all issues aptly pleaded in the complaint." *People v Sims* (1982) 32 C3d 468, 481, 186 CR 77, quoting *Fitzgerald v Herzer* (1947) 78 CA2d 127, 132, 177 P2d 364. By defaulting, the defendant admits the truthfulness of all material allegations of the complaint. *Robinson v Early* (1967) 248 CA2d 19, 56 CR 183. See also *Muller v Muller* (1965) 235 CA2d 341, 344, 45 CR 182. When a default judgment is entered, the defendant is treated as though there had been a trial on the material allegations and a judgment rendered in the plaintiff's favor (*Martin v General Fin. Co.* (1966) 239 CA2d 438, 48 CR 773 (citing *Fitzgerald v Herzer, supra*)).

However, a default judgment is not an admission of matters not raised by the complaint or unnecessary to uphold the judgment. *Mitchell v Jones* (1959) 172 CA2d 580, 342 P2d 503.

Admissions of the defaulting defendant cannot be used against other parties to the action. *Taliaferro v Hays* (1961) 188 CA2d 235, 10 CR 429. But see *Drinnon v Oliver* (1972) 24 CA3d 571, 101 CR 120 (plaintiff not estopped from enforcing default judgment in separate action against insurance company that denied coverage).

For a discussion of the collateral estoppel effect of a default judgment, see 7 Witkin, California Procedure, *Judgment* §§448-451 (5th ed 2008).

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II. ENTRY OF DEFAULT

A. Reasons to Seek Entry of Default

§38.14 1. Entry of Default Is Prerequisite for Obtaining Default Judgment

Entry of default by the court clerk is a statutory prerequisite to both a clerk's default judgment (CCP §585(a)) and a default judgment by the court (CCP §585(b)-(c)). However, even under §585(a)-(c) (*Norman v Berney* (1965) 235 CA2d 424, 429, 45 CR 467, citing *Drake v Duvenick* (1873) 45 C 455, 462),

> a valid default judgment may be rendered by the court even though no formal default has been entered.... The only purpose of a default is to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment.

Once the court has obtained jurisdiction over a defaulting defendant by proper service of the summons and complaint, it may enter a default judgment even though no default has been entered or the clerk erred in entering a default. *Crouch v H.L. Miller & Co.* (1915) 169 C 341, 146 P 880; *Herman v Santee* (1894) 103 C 519, 37 P 509. The same reasoning applies to a default judgment by the clerk entered under §585(a). *Norman v Berney, supra*.

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§38.15 2. Defendant Can No Longer File Responsive Paper

Once default has been entered, the defendant's ability to file an answer, or any motion other than a motion for relief from default, is cut off. *Devlin v Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 CA3d 381, 385, 202 CR 204; *Forbes v Cameron Petroleums, Inc.* (1978) 83 CA3d 257, 262, 147 CR 766. The defendant is "out of court"; *i.e.,* the defendant cannot oppose or object to the relief to which the complaint shows the plaintiff is entitled and need not be served with notice of subsequent proceedings or papers. *Heathman v Vant* (1959) 172 CA2d 639, 343 P2d 104. See also CCP §1010.

For example, once default is entered, the defendant

- Is not entitled to notice of trial or to request a trial continuance (*Hanson v Hanson* (1960) 178 CA2d 756, 3 CR 179);
- May not appear at the hearing to prove up the amount of damages to prevent entry of a default judgment (*Devlin v Kearny Mesa AMC/Jeep/Renault, Inc., supra*); and
- May not raise the issue of whether the judge who granted a default judgment was qualified to hear the matter (*Muller v Muller* (1965) 235 CA2d 341, 45 CR 182).

If the plaintiff substantively amends the complaint after obtaining entry of default, however, the defendant may respond to the amended complaint. The amended complaint supersedes the original complaint and reopens the default. See §38.40.

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§38.16 3. Court Rules Require Entry of Default if No Timely Response

If a responsive pleading is not served within the time limits specified in Cal Rules of Ct 3.110 and no extension of time has been granted, the plaintiff must, within 10 days after the time for service has elapsed, file a request for entry of default. Failure to timely file the request for the entry of default may result in an Order to Show Cause (OSC) being issued as to why sanctions should not be imposed. Cal Rules of Ct 3.110(g) (not applicable to unlawful detainer, family law proceedings, or proceedings with different service requirements prescribed by law).

NOTE: California Rules of Court 3.110(d) allows the parties to stipulate to one 15-day extension beyond the 30-day time period prescribed for the response after service of the initial complaint.

When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less than 5 calendar days before the hearing. Cal Rules of Ct 3.110(i). See also §38.33.

Once a default is entered, the party who requested the entry of default must obtain a default judgment against the defaulting party within 45 days after entry of default, unless the court has granted an extension of time. Cal Rules of Ct 3.110(h). See §§38.59-38.60.

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§38.17 B. Prerequisites to Entry of Default

Before plaintiff can seek entry of defendant's default, the following must occur:

- Defendant has been served (see §38.18);
- The time for defendant to respond has expired (see §38.19); and
- Defendant has failed to file a response (see §§38.20-38.28).

In addition, in certain cases, plaintiff must:

- Serve a statement of damages (see §38.29); and
- Serve a statement reserving the right to seek punitive damages (see §38.32).

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§38.18 1. Service of Process

Default may be entered against a defendant only if he or she has been served with the summons and complaint. CCP §585. A default entered against a defendant who has not been served as required by §585 is void and can be set aside at any time. *Westport Oil Co. v Garrison* (1971) 19 CA3d 974, 97 CR 287 (discussing personal service requirements of former CCP §585). See §§38.97-38.100. However, a defendant that took active steps to avoid being served and had actual notice of both the action and the request for entry of default may be denied relief from default. See *Khourie, Crew & Jaeger v Sabek, Inc.* (1990) 220 CA3d 1009, 269 CR 687.

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§38.19 2. Time for Response Has Expired

Default can be entered against a defendant only if he or she has not filed an appropriate response within the time specified in the summons or such further time as may be allowed. CCP §585.

Ordinarily, the summons specifies a 30-day period after service has been completed within which to file an appropriate responsive paper. CCP §412.20(a)(3); Cal Rules of Ct 3.110(d). See also CCP §586(a)(1) (30 days to respond to amended complaint). In unlawful detainer actions, however, the time to answer or demur cannot exceed 5 days, excluding judicial holidays. CCP §§1167, 1167.3, 1170.

Service is completed:

- If personal service was used, at the time of delivery (CCP §415.10; see §§17.27-17.29);
- If substituted service (CCP §415.20; see §§17.30-17.31), service by certified mail on an out-of-state defendant (CCP §415.40), or service by posting and mailing in an unlawful detainer action was used (CCP §415.45; see §§17.41-17.42), on the 10th day after mailing;
- If service by mail was used, on the date of signing the acknowledgment of receipt (CCP §415.30; see §§17.32-17.35); or
- If service by publication was used, on the 28th day after publication (Govt C §6064; CCP §415.50; see §17.36).

The time to respond may be extended by stipulation or by the court on motion for an order extending time. CCP §1054. However, an order extending time for more than 30 days without the plaintiff's consent under §1054 is void, and it does not prevent entry of default, although the defendant's reliance on the order might provide grounds for relief from default under CCP §473. See *Kennedy v Mulligan* (1902) 136 C 556, 69 P 291.

On late-filed responses, see §38.34.

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§38.20 3. Responses

A default may be entered only against defendant who has not filed one of the following (CCP §585(a)):

- Answer;
- Demurrer;
- Notice of motion to strike;
- Notice of motion to change venue under CCP §396b;
- Notice of motion to dismiss under CCP §§583.210-583.250 (failure to serve within 3 years);
- Notice of motion to quash service of summons under CCP §418.10(a)(1);
- Notice of motion to stay or dismiss the action under CCP §418.10(a)(2) (inconvenient forum); or
- Notice of filing a petition for writ of mandate as provided for in CCP §418.10(c).

NOTE: Filing certain papers (*e.g.,* a petition to compel arbitration under CCP §§1281.2, 1281.7) will have the practical effect of preventing entry of the defendant's default. See note in §38.23. However, not all motions or responsive papers will prevent entry of the defendant's default. See, *e.g., Barragan v Banco BCH* (1986) 188 CA3d 283, 232 CR 758 (motion for summary judgment not a "pleading" that would prevent entry of default). For further discussion, see §§38.21-38.28.

A default may be entered on an *amended* complaint when the defendant has failed to file an answer, demurrer, or notice of motion to strike of the type discussed in §§38.21-38.22. CCP §586(a)(1).

If the defendant has filed a responsive paper, the clerk may not review it to determine its legal sufficiency. *Stevens v Torregano* (1961) 192 CA2d 105, 13 CR 604. The clerk is entitled to rely on the document's caption to ascertain whether it is covered by CCP §585. Once the defendant has filed a response that appears to be one of the permissible responses, the clerk may not enter the defendant's default. *Stevens v Torregano, supra*.

WARNING: The reverse is also true. If the defendant files a permissible response that is miscaptioned, the clerk must rely on the title of the document, not on an examination of the document. See, *e.g., Wisdom v Ramirez* (1985) 177 CA3d Supp 1, 222 CR 923 (erroneously designated response will not prevent entry of default).

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a. Responsive Papers

§38.21 (1) Answer or Demurrer

A default cannot be entered when the defendant has filed an answer or demurrer to a complaint (CCP §585), amended complaint (CCP §586(a)(1)), or cross-complaint (CCP §585(e)) within the time allowed. Whether the answer or demurrer is legally sufficient is immaterial. *Stevens v Torregano* (1961) 192 CA2d 105, 112, 13 CR 604. On the time defendant is allowed for filing, see §38.19.

Effect of amended complaint. When the plaintiff intends to file an amended complaint that differs from the original in form only, the usual practice is for the parties to stipulate that the defendant's answer to the original complaint will stand as the answer to the amended complaint. If the plaintiff is allowed to file the amended complaint, and the defendant fails to obtain such a stipulation or order and fails to answer the amended complaint, the plaintiff may have the defendant's default entered if it is determined thereafter that the amendment is one of substance rather than form. *Bristol Convalescent Hosp. v Stone* (1968) 258 CA2d 848, 863, 66 CR 404. On what constitutes an "amendment of substance," see §38.40.

If a demurrer is sustained. If the defendant's demurrer is sustained with leave to amend, the defendant need not respond until the plaintiff serves and files an amended complaint. The defendant must respond to the amended complaint within 30 days unless the court orders otherwise (CCP §471.5), or within 5 days in an unlawful detainer case (CCP §1167.3). If the defendant fails to respond within the time allowed, the plaintiff may have default entered. CCP §586(a)(1).

If a demurrer is overruled. If the defendant's demurrer is overruled, the defendant must *answer* within the time allowed; otherwise, the plaintiff may take the defendant's default. CCP §586(a)(2). The time for the defendant to answer is usually stated in the court's ruling on the demurrer (CCP §472a(c)) but is 5 days in forcible or unlawful detainers and 10 days in all other actions when the order is silent (Cal Rules of Ct 3.1320(g)). The time begins to run when the defendant is served with notice of the order or decision unless notice is waived in open court and the waiver entered in the minutes. If an order sustaining a demurrer without leave to amend is reversed or remanded by a reviewing court, any amended complaint must be filed within 30 days after the clerk of the reviewing court mails notice of the remittitur. CCP §472b.

Plaintiff's demurrer to answer. A default may be taken against the defendant when the plaintiff's demurrer to the answer is sustained and the defendant fails to amend within the allotted time. CCP §586(a)(5).

NOTE: In federal practice, a motion to dismiss is the functional equivalent of a demurrer. In a removal action, when a motion to dismiss has been filed in federal court, a default may not be entered on remand to the state court. *Laguna Village, Inc. v Laborers' Int'l Union* (1983) 35 C3d 174, 197 CR 99.

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§38.22 (2) Motion to Strike

A default may not be entered when the defendant has filed a motion to strike the whole or any part of a complaint (CCP §585), amended complaint (CCP §586(a)(1)), or cross-complaint (CCP §585(e)) within the time allowed. The motion must be noticed for no more than 30 days after filing of the notice and served as required by CCP §1005. CCP §418.10(b). For discussion of setting the hearing on the motion, see §§12.97-12.103; for the time to file motion, see §38.19.

If motion to strike granted. A notice of motion to strike may be filed alone or with a demurrer. See CCP §586(a)(2). If the motion to strike the entire complaint is granted with leave to amend, the defendant need not respond further until the plaintiff has filed an amended complaint. If the motion is granted for part of the complaint, and no demurrer is pending or was overruled, the defendant must answer the unstricken portions of the complaint within the time allowed by the court; otherwise, the plaintiff may take the defendant's default regarding the unstricken portions. CCP §586(a)(3).

If motion to strike denied. If the defendant fails to answer the complaint within the time allowed, after a motion to strike is denied and any demurrer is overruled, the plaintiff may take the defendant's default. CCP §586(a)(2).

Plaintiff's motion to strike answer. If the plaintiff's motion to strike the defendant's answer in whole or in part is granted, and the defendant thereafter fails to amend the answer, the plaintiff may take the defendant's default. CCP §586(a)(7). The wording of §586(a)(7) could lead to an anomalous result if the court grants a motion to strike an insubstantial portion of a defendant's answer but leaves intact a substantial portion of the answer. If the defendant does not file an amended answer, the plaintiff could proceed to default even though a substantial portion of the original answer remains of record.

If a plaintiff files a motion to strike the entire answer and the motion is granted without leave to amend, the plaintiff may take the defendant's default. CCP §586(a)(7).

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§38.23 (3) Motion to Change Venue Under CCP §396b

A default cannot be entered when the defendant has filed a timely notice of motion to transfer the action under CCP §396b. CCP §585. On the time allowed for filing the motion, see chap 20 (motions to change venue), §38.19. Under CCP §396b, a motion to change venue is proper when the complaint was filed in a court having subject matter jurisdiction that is not the proper court for the trial of the action.

If motion to transfer denied. If the motion to transfer under §396b is denied, the court will set a time for the defendant to file another appropriate responsive paper. CCP §396b(e). If the defendant does not do so within the time allowed, the plaintiff may request entry of the defendant's default. CCP §586(a)(6)(A).

If motion to transfer granted. If a motion to transfer is granted and the action is transferred, the clerk of the transferee court will mail notice of the filing of the case and the case number. The defendant has 30 days after the mailing of the notice to file an appropriate responsive paper; otherwise, the plaintiff may take the defendant's default. CCP §586(a)(6)(B).

If review is sought. If review of an order granting or denying a motion to change venue is sought and a stay is granted, no default may be taken while the stay is pending. CCP §586(a)(6)(C). See chap 20 for discussion of review of venue orders. On termination of the stay, the court that has jurisdiction of the trial must afford the defendant a reasonable opportunity to file an appropriate responsive paper. Notice of the time for the defendant to file an appropriate responsive pleading must be given by the party who procured the order or by the court clerk if the order was made on the court's own motion. CCP §586(a)(6)(C). On motions to change venue generally, see chap 20.

NOTE: Although motions to change venue or transfer under CCP §§396 and 396a are not specified in CCP §§585-586 as appropriate responsive papers sufficient to prevent the entry of default, in some instances they have the same effect. If review is sought of an order granting or denying relief under CCP §396a, the time when a default may be entered is governed by the same rules pertaining to review of orders to transfer under §396b. CCP §586(a)(6)(C).

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b. Other Responses

§38.24 (1) Motion to Dismiss for Delay in Prosecution

A defendant may respond by filing a motion to dismiss for failure to serve the summons and complaint within 3 years after filing under CCP §§583.210-583.250. CCP §§418.10(a)(3), 585(a). On dismissal, see chap 39. The motion must be noticed for no more than 30 days after the notice is filed. CCP §418.10(b). The motion must be filed on or before the last day to plead. CCP §418.10(a). See §38.19. Service and filing the motion extends the time to plead to 15 days after service of written notice of the order denying the motion. The court may extend the time for up to 20 additional days for good cause. CCP §418.10(b).

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§38.25 (2) Motion to Quash Service of Summons or Stay or Dismiss for Inconvenient Forum

A default may not be entered when the defendant has filed, within the time allowed, a notice of motion to quash service of summons for lack of personal jurisdiction, or to stay or dismiss the action on the ground of inconvenient forum under CCP §418.10. CCP §§418.10, 585. On the time allowed for filing and hearing, see CCP §§418.10(a), 1167.4. See also §38.19. For discussion of motions to quash, see chap 19; for motions to dismiss on inconvenient forum grounds, see chap 21.

If the motion to quash or to stay under CCP §418.10 is denied, the defendant has 15 days after service of written notice of the order denying the motion to respond. The court for good cause may extend the time for an additional period not exceeding 20 days. CCP §§418.10(b), 586(a)(4). For time to respond in an unlawful detainer action, see CCP §1167.4.

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§38.26 (3) Motion Under CCP §418.10 and Simultaneous Answer, Demurrer, or Motion to Strike

A defendant may move under CCP §418.10 (to quash for lack of personal jurisdiction, to stay or dismiss on ground of inconvenient forum, or to dismiss for delay in prosecution) and simultaneously answer, demur, or move to strike the complaint or cross-complaint. CCP §418.10(e). Despite CCP §1014, no act by a party who makes a motion under CCP §418.10, including filing an answer, demurrer, or motion to strike, constitutes an appearance, unless the court denies the motion made under this section. If the court denies the motion under §418.10, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion. CCP §418.10(e)(1).

If the motion under §418.10 is denied and the defendant petitions for a writ of mandate under §418.10(c), the defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded. CCP §418.10(e)(2).

Failure to make a motion under §418.10 at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution. CCP §418.10(e)(3).

It was the legislature's intent in enacting §418.10(e) to conform California practice with respect to challenging personal jurisdiction to the practice under Fed R Civ P 12(b). Stats 2002, ch 69, §2.

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§38.27 (4) Petition for Writ of Mandate

Within 10 days after service of notice of denial of the motion, or within such further time as the court for good cause may allow (not exceeding 20 days), the defendant may seek review by petition for writ of mandate. CCP §418.10(c). If the defendant files a petition for a writ of mandate and gives notice of the petition to the trial court, default may not be entered until 10 days after service on the defendant (unless the court, for good cause, extends the time for an additional period not exceeding 20 days) of written notice of final judgment in the mandate proceeding. CCP §§418.10(c), 586(a)(4).

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Source: Civil Litigation/California Civil Procedure Before Trial/38 Default/§38.28 (5) Petition to Compel Arbitration

§38.28 (5) Petition to Compel Arbitration

A defendant may also file a petition to compel arbitration under CCP §1281.2 instead of answering the complaint. CCP §1281.7. See chap 45 (participating in alternative dispute resolution) for procedures for filing petition. The petitioning defendant has 15 days after the petition is denied to plead to the complaint. CCP §1281.7.

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4. Additional Requirements in Certain Cases

§38.29 a. Statement of Damages in Personal Injury or Wrongful Death Cases (CCP §425.11)

Before a default may be taken in an action for actual or punitive damages for personal injury or wrongful death (other than a limited civil case), the plaintiff must provide notice to the defendant of the actual amount of general and special damages sought. CCP §425.11; *Schwab v Rondel Homes, Inc.* (1991) 53 C3d 428, 280 CR 83 (prayer in complaint asking for statutory damages of at least $250 "according to proof" and punitive damages of $500,000 not sufficient notice to justify default judgment for general damages of $50,000 plus punitive damages of $100,000 for each of two plaintiffs).

NOTE: The requirement that a statement of damages be served before a default may be entered also applies when default is entered as a discovery sanction against the defendant. See *Morgan v Southern Cal. Rapid Transit Dist.* (1987) 192 CA3d 976, 237 CR 756, disapproved on other grounds in *Schwab v Rondel Homes, Inc.* (1991) 53 C3d 428, 434, 280 CR 83. Further, when seeking such a discovery sanction against a recalcitrant defendant, the plaintiff should make sure that a statement of damages has been served a reasonable time before the hearing on the motion. Otherwise, in the default prove-up hearing the plaintiff may be limited to damages in the amount of the court's jurisdictional minimum. On timing of service of statement of damages, see §38.31.

Exception in limited civil cases. In a limited civil case, no statement of damages is required. See CCP §425.10. The relief granted cannot exceed the demand of the complaint. CCP §580. See §38.9.

Other cases that may require statement of damages. The rationale behind the requirement of a statement of damages in personal injury and wrongful death cases—the avoidance of unfair surprise—is also potentially applicable to actions for accounting, *e.g.*, marital and partnership dissolutions, in which it may be difficult or impossible for the plaintiff to specify the amount of damages in the complaint. In *Ely v Gray* (1990) 224 CA3d 1257, 274 CR 536, the Court of Appeal for the Third District set aside the damage award in a default judgment for insufficient notice, holding that a plaintiff seeking an accounting of partnership assets must, before entry of a default judgment, serve a statement of damages on the defendant similar to that required under CCP §425.11.

In *Cassell v Sullivan, Roche & Johnson* (1999) 76 CA4th 1157, 90 CR2d 899, another court of appeal declined to follow *Ely v Gray, supra,* holding that, in an action by a former partner seeking an accounting, a complaint specifying the type of relief sought gives defendants adequate notice of their potential exposure. Compare *Marriage of Lippel* (1990) 51 C3d 1160, 276 CR 290 (setting aside default judgment in marital dissolution that included child support because complaint did not specify that wife was seeking child support), with *Marriage of Andresen* (1994) 28 CA4th 873, 34 CR2d 147 (upholding default and default judgment against defaulting husband; complaint that requested division of community assets and included property declaration listing assets and liabilities provided adequate notice of amount in controversy despite complaint's failure to specify amount of relief requested). For a detailed discussion of defaults in family law matters, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual).

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§38.30 (1) Printed Form; Service

Use of the Judicial Council form Statement of Damages (Personal Injury or Wrongful Death) (Judicial Council Form CIV-050) is mandatory. See *Fayusi v Permatex, Inc.* (2008) 167 CA4th 681, 688, 84 CR3d 351. This form may also be used to request punitive damages, if sought. See §38.32.

The statement of damages must be served in the same manner as a summons when the defendant has not appeared. CCP §425.11(d)(1). See *Sakaguchi v Sakaguchi* (2009) 173 CA4th 852, 860, 92 CR3d 717 (statement of damages may be served on prisoner by serving sheriff or jailer). Service may be by publication or substituted service if personal service cannot be made using reasonable diligence. CCP §415.20. See *Parish v Peters* (1991) 1 CA4th 202, 210, 1 CR2d 836 (statement of damages must be served in same manner as summons; demand in complaint for "compensatory damages according to proof" no substitute). One court, however, has held that a plaintiff's failure to serve a statement of damages does not prevent entry of default if an attempt to serve would be futile. See *Candelaria v Avitia* (1990) 219 CA3d 1436, 1441, 269 CR 32 (defendant's whereabouts unknown to plaintiff and defendant's insurer).

PRACTICE TIP: Some attorneys serve the statement of damages *with* the summons and complaint whenever there is a likelihood of default, *e.g.,* when the defendant is uninsured or when service is by publication. (Note: In the latter case, an order authorizing publication of summons and the statement of damages should be obtained at the same time, although at least one court has held that a plaintiff who obtains a court order allowing service of summons and complaint by publication need not obtain a separate order to simultaneously serve the statement of damages by publication. *Anastos v Lee* (2004) 118 CA4th 1314, 1318, 13 CR3d 716.) This method saves the time and expense of personally serving the defendant twice and permits filing a request for default 30 days later. See CCP §412.20.

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§38.31 (2) Timing for Service

One line of cases holds that the statement of damages must have been served at least 30 days before entry of defendant's default. See *Plotitsa v Superior Court* (1983) 140 CA3d 755, 761, 189 CR 769 (statement is in effect a substantial amendment to complaint). See also *Twine v Compton Supermarket* (1986) 179 CA3d 514, 224 CR 562 (trial court lacks jurisdiction to enter default 3 days after statement served by mail).

However, another line of cases holds that there is no hard and fast rule regarding the timing of service of the damages statement; the court must determine in each case whether minimum due process standards have been met. *Schwab v Southern Cal. Gas Co.* (2004) 114 CA4th 1308, 1322, 8 CR3d 627 (service of statement of damages 15 days before entry of default was reasonable; nothing in CCP §425.10, §425.11, or §585 provides minimum notice period before default may be entered); *California Novelties, Inc. v Sokoloff* (1992) 6 CA4th 936, 7 CR2d 795 (no hard and fast rule on timing of service of statement of damages; court required to determine in each case whether minimum standards of due process met; 17 days before entry of default was reasonable amount of time to respond); *Connelly v Castillo* (1987) 190 CA3d 1583, 236 CR 112 (CCP §425.11 requires merely reasonable notice; whether service 27 days before request to enter default was reasonable should be determined on timely CCP §473 motion, not 2 years later when defendant moved for relief from default judgment).

PRACTICE TIP: To eliminate the possibility that a court will find the timing of the service of the statement of damages unreasonable, it is a good idea to wait 30 days before having default entered.

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Source: Civil Litigation/California Civil Procedure Before Trial/38 Default/§38.32 b. Statement Reserving Right to Seek Punitive Damages (CCP §425.115)

§38.32 b. Statement Reserving Right to Seek Punitive Damages (CCP §425.115)

When a default judgment includes a request for punitive damages under CC §3294, counsel may use the Judicial Council form Statement of Damages (Personal Injury or Wrongful Death) (Judicial Council Form CIV-050). To preserve the right to seek punitive damages, the form must be served on the defendant's attorney or directly on an unrepresented defendant before a default may be taken. CCP §425.115(f). The requirements for service of the statement of punitive damages are similar to the requirements for service of the statement of damages required by CCP §425.11 and may be served as part of the statement of damages. CCP §425.115(e). See §§38.29-38.31. The statement should be in the following or a substantially equivalent form. CCP §425.115(b).

NOTICE TO _ _[*Name of defendant or cross-defendant*]_ _:

_ _[*Name of plaintiff or cross-complainant*]_ _ **reserves the right to seek $**_ _[*dollar amount*]_ _ **in punitive damages when** _ _[*name of plaintiff or cross-complainant*]_ _ **seeks a judgment in the suit filed against you.**

Date: _ _ _ _ _ __[*Name of attorney or party appearing in propria persona*]__

The statement of punitive damages must be served in the same manner as a summons when the defendant has not appeared. CCP §425.115(g)(1). When the defendant has appeared, the statement must be served on the defendant's attorney or the defendant, if he or she appeared in pro per, either in the same manner as a summons or in the manner provided for service of papers (CCP §§1010-1020). CCP §425.115(g)(2).

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C. Timing: When to Request Entry of Default

§38.33 1. Within 10 Days After Deadline for Responsive Paper Passes

If no timely responsive paper has been served and no extension of time has been granted, the plaintiff *must,* within 10 days after the time for service of a responsive paper has elapsed, file a request for entry of default. Cal Rules of Ct 3.110(g). Failure to file timely the request for the entry of default may result in the court issuing an Order to Show Cause about why sanctions shall not be imposed. Cal Rules of Ct 3.110(g) (not applicable to unlawful detainer, family law proceedings, or proceedings with different service requirements prescribed by law). When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less than 5 calendar days before the hearing. Cal Rules of Ct 3.110(i).

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§38.34 2. No Default if Responsive Paper Is Filed Late But Before Entry of Default

A default may not be entered if the defendant files a responsive pleading after the time to do so expires but before the plaintiff obtains entry of the defendant's default. The plaintiff's failure to request the entry of default is considered the equivalent of granting the defendant an extension of time to respond. *Reher v Reed* (1913) 166 C 525, 137 P 263; *Goddard v Pollock* (1974) 37 CA3d 137, 112 CR 215. However, the plaintiff may object to the defendant's responsive paper as untimely in a motion to strike; if the motion is granted, the defendant's default can then be entered. *Buck v Morrossis* (1952) 114 CA2d 461, 250 P2d 270.

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D. Procedure: How to Obtain Entry of Default

§38.35 1. Request for Entry of Default Form

The plaintiff must request entry of default on the printed form designated Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100), reproduced in §38.111. The form includes a venue declaration (CCP §585.5) that must be completed for entry of default under CCP §585(a) and a declaration of mailing (CCP §587) that must be completed before entry of default under CCP §585(a), (b), or (c). The form also contains a memorandum of costs and a declaration of nonmilitary service; completion of these sections is not required until the plaintiff is seeking entry of a default judgment. See §§38.53-38.55. See also Comment in §38.111.

The Judicial Council Request for Entry of Default form may be used to:

- Enter default only;
- Request a court judgment under, *e.g.*, CCP §§585(b)-(d), 989;
- Enter a clerk's judgment for restitution of the premises only and issue a writ of execution on the judgment;
- Enter a clerk's judgment under CCP §585(a); or
- Enter a clerk's judgment for a default previously entered.

Entry of default against several defendants can be requested on the same form. The names of the defendants against whom entry of default is requested should conform to the names as set forth in the caption of the summons and complaint. If entry of default is requested against defendants who have been fictitiously named or named incorrectly in the complaint, the plaintiff must amend the complaint to state their true names before filing the request. See CCP §§473-474. For forms and procedures to amend a complaint, see chap 16.

The Judicial Council has also adopted forms for mandatory use when requesting default in Family Law matters. See, *e.g.,* Request to Enter Default (Judicial Council Form FL-165). For a detailed discussion of defaults in family law matters, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual).

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§38.36 2. Venue Declaration (CCP §585.5)

Every application to enter default under CCP §585(a) (action on contract or judgment) must include "an affidavit stating facts showing that the action is or is not subject to Section 1812.10 or 2984.4 of the Civil Code or subdivision (b) of Section 395." CCP §585.5(a). A venue declaration is not required to enter default in other cases.

The purpose of the CCP §585.5 affidavit (or declaration under penalty of perjury (CCP §2015.5)) is to require a party to disclose whether the action is subject to the particular venue provisions of CC §§1812.10 and 2984.4, *e.g.*:

- Actions on installment sales contracts for consumer goods (Unruh Act (CC §§1801-1812.20));
- Actions involving automobile sales financing (Rees-Levering Act (CC §§2981-2984.6)); or
- Actions based on the sale of goods or services, or loans or extensions of credits intended primarily for household use (CCP §395(b)).

When the declaration discloses that the action is subject to these requirements, the clerk will examine the complaint to ascertain whether the venue allegations of the complaint meet the requirements of the particular statute. If the allegations are insufficient, the clerk will refuse to enter the default. Any default or default judgment entered without compliance with these venue provisions may be set aside by the defendant on noticed motion and the defendant may recover actual damages and costs, including reasonable attorney fees, unless the plaintiff shows reasonable diligence to avoid filing in the wrong court. CCP §585.5.

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§38.37 3. Declaration of Mailing (CCP §587)

Every request for entry of default under CCP §585(a), (b), or (c) must include an affidavit or declaration under penalty of perjury (CCP §2015.5) stating that a copy of the request has been mailed to the defendant's attorney of record, or if none, to the defendant at his or her last known address. CCP §587.

When the defendant's address is unknown to the plaintiff or the plaintiff's attorney, *e.g.* when service was by publication, the declaration must state that fact, and no mailing is required. CCP §587.

WARNING: The plaintiff must make a "reasonably diligent search" to ascertain the defendant's address, *e.g.,* by investigating city and county directories, utility companies, employers, friends, acquaintances, and relatives. Failure to conduct such a search is grounds for setting aside the default and default judgment. *Slusher v Durrer* (1977) 69 CA3d 747, 138 CR 265. A party who has not received actual notice may move to set aside a default or default judgment up to 2 years after entry of the default judgment under CCP §473.5 (see §§38.97-38.100). If the defendant simultaneously moves to quash service because the publication order was not based on sufficient evidence of "reasonable diligence," and the motion is granted more than 3 years after the complaint was filed, the complaint will be subject to mandatory dismissal under CCP §583.210. Courts, however, are reluctant to grant these motions because the court has already found reasonable diligence when it grants the publication order.

Even a valid publication order does not toll the time to bring a case to trial under CCP §583.340, because the finding required for service by publication—that a party cannot with reasonable diligence be served by another method—is not the same as a finding that the "defendant was not amenable to the process of the court" for purposes of computing the time within which service must be made under CCP §583.240(a). *Watts v Crawford* (1995) 10 C4th 743, 42 CR2d 81 (case dismissed for failure to serve within 3 years when order for publication issued 1 day before expiration of 3-year period).

No default can be entered unless the declaration of mailing has been filed. CCP §587. But see *Marriage of Harris* (1977) 74 CA3d 98, 141 CR 333 (default judgment held proper even though no declaration of mailing had been filed as required by §587, when respondent/defendant had actual notice of petitioner/plaintiff's intent to take default and no harm resulted from defect).

The mailing requirement is designed to prevent entry of a default against an unwary litigant (*Davis v Thayer* (1980) 113 CA3d 892, 907, 170 CR 328) or through chicanery (*Westport Oil Co. v Garrison* (1971) 19 CA3d 974, 978 n1, 97 CR 287). However, CCP §587 does not specify when the request must be mailed to the defendant or the defendant's attorney, only that it "has been mailed." In practice, the request is usually mailed immediately before filing, and it is probable that the request will not be received until after the request for default has been entered by the clerk. Moreover, nonreceipt of notice does not constitute grounds for setting aside the judgment. CCP §587; *Flood v Simpson* (1975) 45 CA3d 644, 119 CR 675. See also *Rodriguez v Henard* (2009) 174 CA4th 529, 94 CR3d 313 (no error to deny defendants' motion to set aside entry of default and default judgment, based on defendants' claim that incorrect zip code was used on affidavits of mailing and that they did not receive notice).

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§38.38 4. Other Papers Accompanying Request

The following documents should accompany the request for entry of default:

- Proof of service and copy of the summons (CCP §§417.10-417.30; see chap 17);
- Proof of publication, if service is by publication (CCP §585(c); see §17.36); and
- Proof that service of the statement of damages (if statement of damages is required) and service of statement of punitive damages (if punitive damages are sought) has been made in the same manner as the summons and complaint (CCP §§425.11(d), 425.115(g); see §§38.29-38.32).

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§38.39 5. Clerk Must Enter Default if Application Shows Conditions Exist

When the plaintiff files an application that shows that the conditions for entry of default exist, the clerk must enter the default. CCP §585(a)-(c). The clerk must determine whether the statutory conditions for entry of default are satisfied from the face of the record and must enter default if they are. The clerk's duties are ministerial; the clerk can neither take evidence nor determine disputed matters. See, *e.g., Wisdom v Ramirez* (1985) 177 CA3d Supp 1, 222 CR 923; *Baske v Burke* (1981) 125 CA3d 38, 177 CR 794; *Potts v Whitson* (1942) 52 CA2d 199, 125 P2d 947. The clerk enters the default in the register of actions of the court. Govt C §69845. Copies may be microfilmed (or similar process) in lieu of a register of actions. Govt C §68150.

If the clerk improperly fails or refuses to enter a default, the plaintiff can apply to the court for a default judgment even though no default has been entered. The plaintiff can also compel the clerk to enter the default by writ of mandate. *W.A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 1 CR 49.

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§38.40 E. Effect of Amended Complaint on Previously Entered Default

An amended complaint supersedes the previous complaint. Therefore, if the plaintiff enters default against a defendant, and later files an amended complaint that varies in substance rather than form from the complaint on which the plaintiff obtained the default, the default has no force and effect, and judgment cannot be entered on it. *Cole v Roebling Constr. Co.* (1909) 156 C 443, 105 P 255; *Engebretson & Co. v Harrison* (1981) 125 CA3d 436, 178 CR 77; *Leo v Dunlap* (1968) 260 CA2d 24, 66 CR 888. The amended complaint is said to open the default, because the defendant must be served with the amended complaint and has the right to respond to it. It is immaterial whether the amendment is accomplished by filing an amended complaint or an amendment to the complaint. *Ford v Superior Court* (1973) 34 CA3d 338, 109 CR 844.

Examples of amendments of substance, as opposed to those of form, include amendments that:

- Seek damages when the complaint contained only an open-ended prayer for damages (*Engebretson & Co. v Harrison, supra* (prayer sought damages "in excess of $5000"; plaintiff mistakenly believed that CCP §425.11 separate statement of damages was required and served statement concurrently with filing request for default; service of separate statement precluded simultaneous entry of default (see also §38.18));
- Seek substantially higher damages (*Leo v Dunlap, supra*); and
- Add a cause of action based on a different legal theory (*Ford v Superior Court, supra*).

Entry of default is not affected by a later amendment when the change affects only matters of form even though the defendant is not served with a copy of the amendment. *Rardin Logging Co. v Bullok* (1953) 120 CA2d 67, 260 P2d 81 (in action for conspiracy to destroy plaintiff's business, amendment stating facts having evidentiary value in proof of conspiracy was amendment of form only).

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III. DEFAULT JUDGMENTS

§38.41 A. Reasons to Seek Default Judgment

Under Cal Rules of Ct 3.110, a party that obtains an entry of default does not have the option to forego pursuing the default judgment, assuming the defaulting party remains in default, nor may the party wait indefinitely to obtain a default judgment. Once the entry of default is made, the party who obtained it *must* obtain default judgment against the defaulting party within 45 days after entry of default, unless the court has granted an extension of time.

Failure to obtain entry of judgment against a defaulting party or to request an extension of time to apply for a default judgment may result in an Order to Show Cause (OSC) being issued to state why sanctions should not be imposed. Cal Rules of Ct 3.110(h). When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less than 5 calendar days before the hearing. Cal Rules of Ct 3.110(i). See §38.18 and chap 17 for discussion of service of summons.

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B. Default Judgment by Clerk (CCP §585(a))

§38.42 1. Proceedings in Which Clerk Is Authorized to Enter Default Judgment

In an action on a contract or judgment for recovery of money or damages only, a plaintiff may apply to the clerk for entry of a default judgment if the defendant was served by means other than publication and the defendant failed to file an answer, demurrer, or motion to strike. CCP §585(a). For examples and further discussion of cases in which the clerk is or is not authorized to enter a default judgment, see §38.43.

In these cases, the clerk (or court, if there is no clerk) must, on the plaintiff's written application and on proof of service of summons, enter the defendant's default and, if the plaintiff requests, "immediately thereafter" enter a default judgment. CCP §585(a).

The clerk's duty under §585(a) is ministerial. The clerk may not take evidence or exercise discretion to determine the amount of damages. *Lynch v Bencini* (1941) 17 C2d 521, 110 P2d 662; *Liberty Loan Corp. v Petersen* (1972) 24 CA3d 915, 101 CR 395. If the clerk refuses to enter default and a default judgment on a proper written application and proof of service of the summons, the plaintiff may petition for a writ to compel performance. *W.A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 1 CR 49.

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§38.43 2. Examples

Because default judgments under CCP §585(a) are processed entirely by court clerks without any judicial intervention, courts have strictly limited the situations in which they may be used. Following are factors that may affect the clerk's authority to enter a default judgment.

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§38.44 a. Demand for Attorney Fees

Although the clerk has no authority to set the amount of attorney fees, the clerk may enter judgment on a complaint that demands attorney fees if the contract provides for fees in a fixed amount (see, *e.g.*, *Alexander v McDow* (1895) 108 C 25, 41 P 24 (clerk could enter default judgment when promissory note called for 10 percent as attorney fees)) or if the court has adopted a schedule of attorney fees. CCP §585(a). See Cal Rules of Ct 3.1800(b) (authorizing court by local rule to adopt schedule to be used in establishing reasonable attorney fees). Thus, if the court has not adopted a fee schedule, or if the plaintiff is unwilling to accept the scheduled amount, the plaintiff must apply to the court to set reasonable fees. See §38.65.

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§38.45 b. Cross-Complaint

The clerk cannot enter a separate default judgment on a cross-complaint. A default judgment on a cross-complaint can be obtained only if a separate judgment may properly be entered and the court determines that a separate judgment will not substantially delay the final disposition of the action between the parties. CCP §585(e).

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§38.46 c. Unlawful Detainer

The clerk's authority to enter default judgments in unlawful detainer cases is limited to cases in which the plaintiff seeks a default judgment for restitution of the premises only. Any request for a monetary award, including costs, is made by application to the court. CCP §1169. For instructions on completing the Judicial Council form in support of the clerk's default judgment for restitution, see §38.111.

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§38.47 d. Multiple Causes of Action

When a defendant is in default on a complaint that pleads several causes of actions, at least one of which justifies a clerk's judgment under CCP §585(a), the clerk can enter a default judgment on the qualifying cause of action. *Norman v Berney* (1965) 235 CA2d 424, 45 CR 467 (complaint included causes of action for breach of contract and to foreclose mechanics' liens); *Fallon & Co. v United States Overseas Airlines, Inc.* (1961) 194 CA2d 546, 15 CR 354 (complaint on account stated and for money lent). As with all clerk's judgments (see §38.42), entry of default judgment in a case with multiple causes of action is subject to strict rules.

A clerk's judgment is impermissible when an account stated is pleaded only as an alternative theory of recovery and not as a separate cause of action. *Brown v Superior Court* (1966) 242 CA2d 519, 525, 51 CR 633; *Liberty Loan Corp. v Petersen* (1972) 24 CA3d 915, 101 CR 395.

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§38.48 e. Defendants' Several Liability

Code of Civil Procedure §579 provides: "In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." Because §579 leaves the determination to the discretion of the court, the clerk has no authority to enter the judgment. *Lynch v Bencini* (1941) 17 C2d 521, 110 P2d 662; *Kooper v King* (1961) 195 CA2d 621, 15 CR 848 (court judgment required against defaulting defendant when two defendants sued on contract). The court's exercise of discretion is necessary to determine if defenses raised by an answering defendant affect the plaintiff's right to recover at all, *e.g.,* if the answering defendant alleges that the plaintiff is an unlicensed contractor.

A clerk's default judgment under CCP §585(a) is proper when all the defendants are in default, and they are jointly or jointly and severally liable on a contract. CC §1659; *Diamond Nat'l Corp. v Golden Empire Builders, Inc.* (1963) 213 CA2d 283, 28 CR 616. However, when the pleadings raise any question over whether defendants' liability may be exclusively several, the plaintiff will have to obtain a default judgment by court.

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§38.49 3. Clerk's Duty to Enter Default Judgment

If the case falls within §585(a) and all requirements are met, the clerk must enter the default judgment. *Fallon & Co. v United States Overseas Airlines, Inc.* (1961) 194 CA2d 546, 15 CR 354.

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§38.50 a. Remedies if Clerk Fails to Enter Default Judgment

The plaintiff may compel performance of the clerk's ministerial duty by prohibition or mandamus (*W.A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 1 CR 49), and the defendant acquires no rights if the clerk refuses to perform (*W.H. Marston Co. v Kochritz* (1926) 80 CA 352, 251 P 959).

When the clerk erroneously fails or refuses to enter a default (as opposed to a default judgment), and the defendant thereafter files an answer or other permitted pleading, the plaintiff's remedy is to move to strike the defendant's response. If the rules are adhered to strictly, the defendant's response should be stricken and the defendant would have to seek relief under CCP §473. See generally §§38.75-38.108. Alternatively, the plaintiff could file a petition for writ of mandate to compel entry of default. See, *e.g., W.A. Rose Co. v Municipal Court, supra* (mandate proper to compel trial court to enter default).

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§38.51 b. Judgment Void if Clerk Lacks Authority

If the court clerk enters a default judgment under CCP §585(a) without authority to do so, the judgment is void and may be set aside at any time. *Brown v Superior Court* (1966) 242 CA2d 519, 51 CR 633. The court has a duty to set aside the judgment on its own motion. *Lewis v LeBaron* (1967) 254 CA2d 270, 61 CR 903. See §38.95.

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4. Procedure: How to Obtain Default Judgment by Clerk

§38.52 a. Request for Entry of Judgment Form

Application for clerk's entry of judgment under CCP §585(a) must be made on the same form that is used to request entry of default (see §38.35), designated Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100), reproduced with commentary in §38.111. The form includes a venue declaration (see §38.36), a mailing declaration (see §38.37), a memorandum of costs (see §38.53), and a declaration of nonmilitary status (see §38.54).

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§38.53 (1) Memorandum of Costs

A party who is claiming costs must request costs on the Request for Entry of Default form when judgment is sought. Cal Rules of Ct 3.1700(a)(2). See form in §38.111. Although completion of the form is not required until a default judgment is requested, some court clerks require that the memorandum be completed before they will enter a default. Counsel should consult the court clerk for local practices. Recoverable costs include filing and motion fees, service of process fees, fees for service by publication, attachment fees and notary fees. CCP §1033.5. For further discussion of allowable pretrial costs, see California Trial Practice: Civil Procedure During Trial §§27.67-27.74 (3d ed Cal CEB 1995).

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§38.54 (2) Declaration of Nonmilitary Status

A default judgment cannot be obtained against a defendant who is in military service, as defined by the Servicemembers Civil Relief Act of 2003 (50 USC App §§501-596), unless certain requirements are met. See §38.11. A default judgment rendered without compliance with this act is voidable by defendant on a showing of prejudice within 90 days after leaving the service. *People v Vogel* (1956) 46 C2d 798, 299 P2d 850. Anyone with personal knowledge, including the plaintiff or the plaintiff's attorney, may sign the declaration of nonmilitary status. Occasionally, delays occur between execution of the declaration and filing the request for default judgment, *e.g.,* when the declaration is obtained from a process server.

NOTE: The declaration of nonmilitary status need not be filed before entry of default, but only before entry of judgment. Each court has its own policy on how recently the declaration must be filed before the date of entry of default judgment, and counsel should consult with the court clerk to ascertain local policy. In practice, the declaration is usually not filed when entry of default is requested unless the plaintiff's attorney is (a) reasonably certain that default judgment will be entered within the time in which the declaration is considered current by the court in which the action is pending, or (b) seeking a clerk's default judgment under CCP §585(a), and requests in the Judicial Council form that the clerk enter judgment immediately after entering the default (see form and Comment in §38.111). Some court clerks, however, may refuse to enter the default unless the declaration is executed and submitted with the request, and the attorney should consult the court clerk for local practices.

For further discussion of compliance with and waiver of the requirements in the Servicemembers Civil Relief Act of 2003 (50 USC App §§501-596). For the prerequisites to a default judgment, see Debt Collection Practice in California §7.7 (2d ed Cal CEB 1999).

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§38.55 b. Papers Accompanying Form

Other papers required for a clerk's default judgment under CCP §585(a) are:

- The original written contract (see §38.56);
- A request for dismissal of unserved defendants (required in some courts, see §38.57); and
- Additional papers that local rules may require (see §38.58).

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§38.56 (1) Written Contract

If the action in which entry of default is requested is on a written obligation to pay money, the clerk must, at the time of entry of judgment, note across the face of the original contract the fact of rendition of judgment, the date of the judgment, and the title of the court and cause. Cal Rules of Ct 3.1806. The apparent purpose of this rule is to note the merger of the written instrument into the judgment and prevent a second suit on the same instrument. *Bill Benson Motors, Inc. v Macmorris Sales Corp.* (1965) 238 CA2d Supp 937, 48 CR 123.

If the original written contract has been lost or destroyed, the clerk can decline to process a default judgment, and the plaintiff may proceed with a default judgment from the court. Alternatively, an ex parte order may be obtained from the court instructing the clerk to proceed with a clerk's default judgment based on a copy of the written obligation. See chap 13 for discussion of ex parte motions.

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§38.57 (2) Request for Dismissal of Unserved Defendants

Before entry of a clerk's default judgment under CCP §585(a), many courts require a dismissal of all named defendants who have not been served. Defendants should be dismissed without prejudice, so they can be sued again on the same cause of action if necessary.

The California Judicial Council has adopted a printed form for mandatory use when requesting a dismissal of unserved defendants called Request for Dismissal (Judicial Council Form CIV-110), available from the court clerk. It is reproduced in §39.130.

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§38.58 (3) Additional Papers

Many counties have local rules and unwritten local policies that require additional documentation before a clerk's default judgment will be issued. Counsel should consult local rules and contact the clerk's office in the court where the action is pending to learn what documentation is required in that court before the clerk will enter a default judgment. The following items are frequently required:

- **Declaration re open book account.** Because a large percentage of default judgments by the clerk arise from collection actions, and because the commonly used collection complaint contains generalized allegations in the form of common counts, courts are concerned with the potential for abuse afforded by those pleadings. For example, by pleading common counts, plaintiffs may seek to evade the venue provisions of CC §§1812.10 and 2984.4 or to circumvent the rule that the clerk cannot enter a deficiency judgment under CCP §585(a) after the plaintiff has resorted to the collateral (*Liberty Loan Corp. v Petersen* (1972) 24 CA3d 915, 101 CR 395), by seizing the collateral and suing for the deficiency. When there is any indication that the underlying debt was secured, the clerk will not enter a default judgment unless there is a verified allegation in the complaint that the plaintiff has not resorted to the security. Otherwise, the plaintiff will have to obtain the default judgment by court.

NOTE: To ensure that the generalized allegations of common counts used in a collection action have not been used as a subterfuge for an action for breach of a written contract, some courts require that a declaration re open book account be filed stating that there are no written agreements between the parties. The declaration is typically executed by an employee of the plaintiff. A form that includes the necessary statements for a declaration re open book account is set forth in §38.112.

- **Statements and invoices.** Some courts require additional documentation to support a default judgment in an action on an open book account, *i.e.,* copies of invoices and a complete statement of the account, including an interest calculation. From these the clerk can determine whether the complaint has included any nonrecoverable items, *e.g.,* late charges (*Garrett v Coast & S. Fed. Sav. & Loan Ass'n* (1973) 9 C3d 731, 108 CR 845) and unearned finance charges (58 Ops Cal Atty Gen 166 (1975); *Mann v Earls* (1964) 226 CA2d 155, 37 CR 877). A form declaration that combines the requirements of a declaration re open book account and sets forth necessary bookkeeping documents required by some clerks can be found in §38.112.

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5. Timing: When to Request Entry of Clerk's Judgment

§38.59 a. Generally When Request for Entry of Default Made

Generally, the application for entry of a clerk's default judgment is made at the same time as the request for entry of default, although it need not be done simultaneously. For instance, in a case involving multiple defendants, the plaintiff may request entry of the defendants' defaults as they occur and wait until all defendants are served to request entry of judgment.

PRACTICE TIP: Alternatively, plaintiff's counsel may not be able to secure the original of a written contract to file with the clerk (see §38.56) by the time the defendant's time to plead has expired. In these situations, counsel should have default entered before the request for the entry of a clerk's default judgment if he or she wishes to cut off the defendant's opportunity to respond.

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§38.60 b. 45-Day Time Limit

Under Cal Rules of Ct 3.110, once the entry of default is made, the party who obtained it *must* obtain default judgment against the defaulting party within 45 days after entry of default, unless the court has granted an extension of time. Failure to obtain entry of judgment against a defaulting party or to request an extension of time to apply for a default judgment may result in an Order to Show Cause (OSC) being issued to state why sanctions shall not be imposed. Cal Rules of Ct 3.110(h). When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less than 5 calendar days before the hearing. Cal Rules of Ct 3.110(i).

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C. Default Judgment by Court

§38.61 1. Proceedings in Which Judgment Must Be by Court, Not Clerk

A court may enter a default judgment in any case, including a case in which a clerk's judgment is available. *Only* the court may enter a default judgment, however, in the following three basic situations (CCP §585(b), (c)):

- An action arising on a contract or a judgment when the damages are not fixed or determinable from the contract;
- Cases not arising on a contract or judgment; and
- All actions in which the defendant has been served by publication.

NOTE: Entry of default judgment by the court is also required if the plaintiff is seeking reasonable attorney fees when (1) the court has not adopted a fee schedule or (2) the plaintiff is seeking more than the scheduled fee. CCP §585(a). See §38.65.

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2. Procedure: How to Obtain Default Judgment by Court

§38.62 a. Required Papers

The basic papers required to set a matter for a court judgment are the same as those required to obtain a clerk's default judgment. To request a court judgment, the plaintiff must use the same multipurpose Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100, reproduced in §38.111) that is used to request entry of default (see §§38.35-38.38) or a clerk's judgment (see §§38.52-38.58). Under Cal Rules of Ct 3.1800, a plaintiff seeking a default judgment on declarations must, except in unlawful detainer cases, include the following with the documents filed:

- A brief summary of the case identifying the parties and the nature of the plaintiff's claim;
- Declarations or other admissible evidence in support of the requested judgment;
- Any necessary interest computations;
- A memorandum of costs (Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100), question 7) (see §§38.53, 38.111);
- A declaration of nonmilitary status for each defendant against whom judgment is sought (Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100), question 8) (see §§38.54, 38.111);
- A proposed form of judgment;
- A dismissal of all parties against whom judgment is not sought or an application for separate judgment under CCP §579;
- Any necessary exhibits; and
- A request for attorney fees, if agreed on between the parties or allowed by statute (see §38.65).

If suit is on a written contract, the original contract should be submitted. See §38.56.

As is the case with a clerk's default judgment, the attorney should consult the clerk of the court to determine whether other papers are required under local practice. See §38.58.

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b. Additional Requirements

§38.63 (1) If Summons Was Served by Publication

If the summons was served by publication, the plaintiff must show proof of the dates on which the summons was published. CCP §585(c). For service by publication, see §17.36.

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§38.64 (2) Actions Affecting Real Property

In a hearing for entry of default judgment following service by publication in a suit involving title to or possession of real property, the plaintiff must establish more than mere occupancy of the property unless that occupancy was of sufficient character to confer title by prescription. In an action involving only the possession of real property, the plaintiff must show by proper allegations in a verified complaint that no other party claims title (either by prescription, accession, transfer, will, or succession) but rather only possession. The court may render default judgment on proof of occupancy by the plaintiff and ouster by the defendant. When the plaintiff's claim is based on a "paper title" the court must require evidence of the plaintiff's equitable right to judgment. CCP §585(c).

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§38.65 (3) Attorney Fees Under CCP §585(a)

In an action that is otherwise amenable to a clerk's judgment, but in which the plaintiff seeks reasonable attorney fees (*e.g.,* under a contract provision providing for a fee award) and either (1) the court has not adopted a fee schedule or (2) the plaintiff seeks fees in excess of the scheduled fee, the plaintiff must file a written request at the time the entry of default is requested to have the court set reasonable fees. CCP §585(a). Once the default is entered, the court must hear the plaintiff's application for determination of attorney fees and must render judgment for the fees and the other relief demanded in the complaint, less any credits acknowledged. CCP §585(a).

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§38.66 3. Timing: When to Request Default Judgment by Court

The party who obtained a default *must* obtain default judgment against the defaulting party within 45 days after entry of default, unless the court has granted an extension of time. Cal Rules of Ct 3.110. Failure to obtain entry of judgment against a defaulting party or to request an extension of time to apply for a default judgment may result in an Order to Show Cause (OSC) being issued to state why sanctions shall not be imposed. Cal Rules of Ct 3.110(h). When the court issues an OSC under this rule, responsive papers to the OSC must be filed and served no less than 5 calendar days before the hearing. Cal Rules of Ct 3.110(i).

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4. Hearing Required

§38.67 a. Calendaring the Hearing

Counsel must usually contact the court clerk to calendar a hearing on default judgment, often referred to as a "prove-up" hearing. In some courts, the court clerk sets the matter for a prove-up hearing on receipt of the application and any supporting documents.

When a court default judgment is sought on affidavits or declarations, there usually is no formal hearing; the matter is determined by a judge or commissioner in chambers without the presence of counsel. If the court finds that the documents are defective or insufficient, counsel is usually notified of the nature of the deficiencies and given an opportunity to cure them.

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Source: Civil Litigation/California Civil Procedure Before Trial/38 Default/§38.68 b. Evidence

§38.68 b. Evidence

At the hearing on a default judgment (CCP §585(b)-(c)):

> the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum (not exceeding the amount stated in the complaint, in the statement required by [CCP §]425.11, or in the statement provided for by [CCP §]425.115) as appears by such evidence to be just.

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§38.69 (1) Sufficiency of Evidence

The plaintiff must introduce sufficient evidence to support the claims for relief. CCP §585(b). The court may not disregard any uncontested credible evidence that is presented by affidavit, declaration, or oral testimony. When such evidence is offered, the court must enter judgment in the plaintiff's favor. *Morehouse v Wanzo* (1968) 266 CA2d 846, 853, 72 CR 607; *Csordas v United Slate Tile & Composition Roofers* (1960) 177 CA2d 184, 2 CR 133. The default is deemed an admission by the defendant of the material allegations of the complaint, which can replace the need for the plaintiff to introduce evidence in support of the admitted allegations. *City of Los Angeles v Los Angeles Farming & Milling Co.* (1907) 150 C 647, 89 P 615; *Bristol Convalescent Hosp. v Stone* (1968) 258 CA2d 848, 66 CR 404.

NOTE: A complaint on which a default judgment is sought must state a cause of action against the defendant. If it does not, no amount of testimony can cure the defect. *Taliaferro v Davis* (1963) 216 CA2d 398, 31 CR 164. But see *Trans-Pacific Trading Co. v Patsy Frock & Romper Co.* (1922) 189 C 509, 209 P 357, quoted with approval in *Thorson v Western Dev. Corp.* (1967) 251 CA2d 206, 59 CR 299 (when court has jurisdiction over parties and subject matter, judgment not void regardless of whether complaint states cause of action, as long as complaint apprises defendant of nature of plaintiff's demand).

In a matter involving a long account, the court may send the matter out for a reference. The court may also order that any question of fact, *e.g.,* the amount of damages, be determined by a jury, even if a reference has been ordered. CCP §585(b). However, the findings of the jury or the referee are not binding on the court (*Cyrus v Haveson* (1976) 65 CA3d 306, 318, 135 CR 246); the court must render the judgment (CCP §585).

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§38.70 (2) Burden of Proof

The plaintiff in a default proceeding need establish merely a prima facie case to show that he or she is entitled to an award of damages. That is because the defaulting party generally admits the material allegations of the complaint by the act of default, and, when the complaint states a cause of action, and the plaintiff introduces supporting evidence, the court must render judgment in the amount stated or in an amount that appears to be just. *Johnson v Stanhiser* (1999) 72 CA4th 357, 85 CR2d 82 (trial court erred in finding that plaintiff should receive only costs and fees, because plaintiff established prima facie case that he was damaged by defendant's misrepresentations, deceit, and conversion of plaintiff's assets to his own use).

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§38.71 (3) Hearsay Testimony

The plaintiff may use hearsay testimony to support the allegations of the complaint to obtain a default judgment when the testimony is of a witness present in court. See, *e.g., City Bank v Ramage* (1968) 266 CA2d 570, 584, 72 CR 273. If the testimony is offered in a declaration or affidavit, the testimony must be competent evidence, because the statute requires that the facts stated in the declaration be within the witness's personal knowledge. The witness must affirmatively establish that he or she could competently testify to the facts set forth if sworn as a witness. CCP §585(d). But see *Flood v Simpson* (1975) 45 CA3d 644, 119 CR 675 (court permitted use of declaration containing hearsay statements to support default judgment).

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§38.72 (4) Affidavits or Declarations

The court may permit the plaintiff to present evidence by affidavit or declaration under penalty of perjury (CCP §2015.5) in lieu of personal testimony. CCP §585(d). The affidavit or declaration must be based on the personal knowledge of the witness and must set forth the facts with particularity. The affidavit or declaration must also affirmatively show the declarant's competency to make the statements set forth. CCP §585(d).

NOTE: Proceeding by affidavit or declaration is a common practice. Some courts even require it. However, the court always has the discretion to require live testimony and will usually exercise its discretion when the case involves a large personal injury or wrongful death claim or when the plaintiff fails to present sufficient evidence by affidavit or declaration.

When counsel is uncertain whether the court will accept affidavits or declarations in lieu of oral testimony, the plaintiff may seek, before the hearing, an order permitting the use of affidavits or declarations. This procedure enables counsel to present the case as scheduled and not have to seek a continuance at the time of the hearing. See Cal Rules of Ct 3.1800(a) for documents that the plaintiff must file when seeking default judgment on declarations.

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§38.73 (5) If Evidence Is Insufficient

If the plaintiff fails to present sufficient evidence to support the claim, the court may refuse to enter judgment, even though default has been entered. *Taliaferro v Hoogs* (1963) 219 CA2d 559, 33 CR 415. For example, a default judgment may be denied in a contract action when the complaint demands an amount different from that specified in the contract or when the contract does not specify the amount of liquidated damages. *Lynch v Bencini* (1941) 17 C2d 521, 110 P2d 662.

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§38.74 D. Entry of Default Judgment

In all courts, when the complaint has not been answered by any defendant, the summons and complaint, proof of service, the request to enter default—together with a memorandum indorsed on it and showing entry of default (see bottom of page 1 of Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100) in §38.111)—and a copy of the judgment are included within the judgment roll. CCP §670(a). If service was by publication, the judgment roll also includes the affidavit for publication and the order directing publication.

The defaulting defendant is not entitled to a statement of decision under CCP §632 because (1) there has been no trial as required by that section and (2) there are no factual issues in controversy, *i.e.,* on the entry of default, the allegations of the complaint are deemed admitted.

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IV. RELIEF FROM DEFAULT OR DEFAULT JUDGMENT

A. Introduction

§38.75 1. Overview of Available Relief

Default due to mistake, inadvertence, surprise, or neglect. Most requests for relief from entry of default or default judgment are made when the defendant has not filed a responsive pleading within the time permitted, despite having received actual notice of the action. Requests for relief in this situation usually rely on a showing of mistake, inadvertence, surprise, or excusable neglect by the defendant or the defendant's attorney, or inexcusable neglect by the defendant's attorney, and must be made within a reasonable time, not exceeding 6 months from the entry of the default or the default judgment. CCP §473(b). See §§38.79-38.88.

Default due to extrinsic fraud or mistake. If the request for relief is not made within 6 months after entry of default, the defendant will have to establish that the failure to respond is because of extrinsic fraud or mistake. This relief may be sought at any time, but the party must act with due diligence. The court's authority to grant this relief arises from its equitable powers. For discussion, see §§38.89-38.94.

Void default judgment. In addition to any other grounds for relief, the defendant may seek relief at any time if the original default judgment was void. CCP §473(d). See §§38.95-38.96.

Default due to lack of actual notice. If defendant is seeking relief from a default that was entered after defendant failed to appear because he or she did not receive actual notice of the action in time to defend—either because personal service was defective or because service was accomplished by means other than personal service, *e.g.,* by substituted service or publication—relief must be sought within 2 years after the judgment or 180 days after service of notice of the judgment, whichever is earlier. CCP §473.5. For discussion, see §§38.97-38.100.

Excessive damages in default judgment due to judicial error. If the judge erroneously awarded default damages that are "excessive as a matter of law," a motion under CCP §473 is not the proper means of seeking relief; rather, the defendant should move for a new trial, *i.e.,* "a new judgment." *Don v Cruz* (1982) 131 CA3d 695, 704, 182 CR 581 (defendant's motion treated as motion for new trial although not framed as such). See also *Misic v Segars* (1995) 37 CA4th 1149, 1154, 44 CR2d 100.

If court has assumed jurisdiction of attorney's practice. If a judgment is taken against a party represented by an attorney after the court has assumed jurisdiction over that attorney's practice under Bus & P C §§6180 and 6190, relief from the judgment may be sought under CCP §473.1. For discussion of this ground for relief, see §38.101.

Mandatory or discretionary relief. Except for a motion based on mistake, inadvertence, surprise, or neglect by the moving party's *attorney*, all motions for relief from default are addressed to the discretion of the court. CCP §473(b). If the attorney files an affidavit of fault, the court *must* grant the application for relief "unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." CCP §473(b). See §38.83.

NOTE: Discretionary relief from attorney or client mistake, inadvertence, surprise, or neglect may also be granted for events other than default, such as "judgment, dismissal, order or other proceeding." CCP §473(b).

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§38.76 2. Who Seeks Relief?

In most cases, the party moving for relief under CCP §473(b) is the defendant. However, the plaintiff may also seek relief, *e.g.,* from a dismissal based on discovery violations. See *Aldrich v San Fernando Valley Lumber Co.* (1985) 170 CA3d 725, 216 CR 300. *Elston v City of Turlock* (1985) 38 C3d 227, 211 CR 416.

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§38.77 3. Compare—Independent Action in Equity

An independent action in equity may be brought to set aside the default or default judgment; the grounds for this action are the same grounds that form the basis of a motion to set aside a default or default judgment. *Engebretson & Co. v Harrison* (1981) 125 CA3d 436, 178 CR 77. An independent action in equity is seldom used, however, because filing a motion is quicker and less costly.

PRACTICE TIP: Unlike an equitable motion, filing an independent action also permits a party to (1) conduct discovery proceedings and (2) present its case by oral testimony instead of declarations. It is likely that the court will be able to devote more attention to the matter in a trial setting than in a law and motion hearing.

The procedures for filing an independent action in equity are similar to those for filing any other action. The time limits for commencing the action are the same as for the filing of a motion addressed to the court's equity powers. The defendant should attach a proposed answer or other responsive paper to the complaint and incorporate it by reference. See CCP §473; *Shields v Siegel* (1966) 246 CA2d 334, 342, 54 CR 577. Because the action seeks equitable relief, there is no right to a jury trial. *Holt v Parmer* (1951) 106 CA2d 329, 235 P2d 43.

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§38.78 4. Judicial Policy in Favor of Deciding Case on Merits

A long-standing judicial preference in favor of determining a matter on its merits guides the court in deciding a motion for relief from entry of default or default judgment. *Rappleyea v Campbell* (1994) 8 C4th 975, 980, 35 CR2d 669. Courts look with disfavor on a party who, regardless of the merits, seeks to capitalize on the adversary's mistake, surprise, inadvertence, or neglect. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620.

Appellate courts are more disposed to affirm an order that compels a trial on the merits than one that permits a default judgment to stand—particularly when it appears that a meritorious defense can be made. *Weitz v Yankosky, supra; Slusher v Durrer* (1977) 69 CA3d 747, 138 CR 265. See also *Ford v Herndon* (1976) 62 CA3d 492, 133 CR 111. On appellate review, see §38.108.

This judicial policy applies regardless of whether relief is sought by motion under CCP §473(b) (*Elston v City of Turlock* (1985) 38 C3d 227, 211 CR 416), by equitable motion in the trial court (*Weitz v Yankosky, supra*), or by an independent action in equity to set aside a default judgment (*Shields v Siegel* (1966) 246 CA2d 334, 54 CR 577).

However, some courts have shown an willingness to sustain the entry of defaults and default judgments; counsel for defendants can not expect that such motions will routinely be granted. See, *e.g., Transit Ads, Inc. v Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 281, 75 CR 848 (moving party must make substantial showing, and "unusual pressure of business" is not by itself sufficient). See also *Davis v Thayer* (1980) 113 CA3d 892, 170 CR 328; *Goodhue v Tureaud* (1979) 100 CA3d 205, 160 CR 677; *Uva v Evans* (1978) 83 CA3d 356, 147 CR 795. But see *Hamm v Elkin* (1987) 196 CA3d 1343, 242 CR 545 (court questioned analysis in *Uva* and set aside default judgment on similar facts).

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B. Relief in Cases of Mistake, Inadvertence, Surprise, or Neglect

§38.79 1. Discretionary Relief Under CCP §473(b)

If the defendant was served in a manner that gives the defendant actual notice of the litigation, the court *may* relieve a party or the party's attorney from a "judgment, dismissal, order or proceeding taken against him or her" based on "his or her mistake, inadvertence, surprise, or excusable neglect." CCP §473(b). For the time limits to seek relief on this basis, see §§38.85-38.88.

A motion for relief from entry of default or default judgment under CCP §473(b) must be accompanied by a copy of the answer or other pleading proposed to be filed. *Carmel, Ltd. v Tavoussi* (2009) 175 CA4th 393, 401, 95 CR3d 694 (finding that movants "substantially complied" with requirement by proffering answer at motion hearing).

A motion seeking relief under CCP §473(b) is addressed to the court's discretion, unless the attorney files an affidavit of fault. On mandatory relief in cases of attorney affidavit of fault, see §38.83. Because of the strong judicial preference for deciding matters on the merits, the court's discretion under §473(b) is extremely broad, and the court's ruling will be reversed on appeal only on a clear showing of abuse of discretion. *Shamblin v Brattain* (1988) 44 C3d 474, 243 CR 902; *Uriarte v United States Pipe & Foundry Co.* (1996) 51 CA4th 780, 59 CR2d 332.

NOTE: The same rule applies when the motion is addressed to the court's equity powers, although to the extent the court's power to grant relief under its equity powers is different from its power under §473, its power is narrower. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620.

A defendant may be entitled to *discretionary* relief under CCP §473(b) for an attorney's excusable neglect regardless of whether his or her attorney submits the "affidavit of fault" required for *mandatory* relief. See *State Farm Fire & Cas. Co. v Pietak* (2001) 90 CA4th 600, 610, 109 CR2d 256 (defendant entitled to discretionary relief from dismissal based on attorney's excusable misinterpretation of interpleader statute even though mandatory relief not proper); see §38.83. A motion under CCP §473 that seeks discretionary relief but is accompanied by an attorney's declaration suggesting attorney fault does not require the trial court to grant relief under §473's mandatory provisions. *Luri v Greenwald* (2003) 107 CA4th 1119, 1124, 132 CR2d 680.

On motions for discretionary relief under CCP §473 for summary judgment, see §§36.174, 36.211.

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§38.80 a. Mistake

Relief from default may be granted when the default occurs because of a reasonable mistake of fact or law of a party or the party's attorney. *City of Ontario v Superior Court* (1970) 2 C3d 335, 85 CR 149; *Salazar v Steelman* (1937) 22 CA2d 402, 71 P2d 79. However, mere ignorance of the law is no excuse. *City of Ontario v Superior Court, supra*. A self-represented plaintiff cannot assert that choosing to act as his or her own attorney is a mistake of law. *Burnete v La Casa Dana Apartments* (2007) 148 CA4th 1262, 1267, 56 CR3d 437. An honest mistake of law is a valid ground for relief when the legal problem posed "is complex and debatable." *McCormick v Board of Supervisors* (1988) 198 CA3d 352, 360, 243 CR 617; see also 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§152-155 (5th ed 2008). A paralegal's mistake that results in default is attributable to the attorney responsible for supervising the paralegal. *Hu v Fang* (2002) 104 CA4th 61, 63, 127 CR2d 756.

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§38.81 b. Excusable Neglect

"Excusable neglect" means neglect that might have been committed by a reasonably prudent person in the same or similar circumstances and that was the actual cause of the default. *Transit Ads, Inc. v Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 75 CR 848. The court will look to see whether the default could have been avoided through the exercise of reasonable care. *Elms v Elms* (1946) 72 CA2d 508, 164 P2d 936. The court may grant relief from a default judgment that results from both attorney mistake or neglect and the client's unintentional conduct. *Benedict v Danner Press* (2001) 87 CA4th 923, 927, 104 CR2d 896.

The moving party must be sure that the neglect shown in the declaration is the actual cause of the default. *Transit Ads, Inc. v Tanner Motor Livery, Ltd., supra*. For example, the declarations may show excusable neglect by the defendant in relying on his insurer but fail to show that the insurer's failure to respond was excusable. See, *e.g., Scognamillo v Herrick* (2003) 106 CA4th 1139, 131 CR2d 393.

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§38.82 c. Examples

Examples of excusable neglect include:

- Illness or disability of the defendant or the defendant's attorney (*Stone v McWilliams* (1919) 43 CA 490, 185 P 478);
- Fraud or unfair conduct of the plaintiff or the plaintiff's attorney (*Starkweather v Minarets Mining Co.* (1935) 5 CA2d 501, 43 P2d 321);
- Accident or inadvertence (*Bernards v Grey* (1950) 97 CA2d 679, 218 P2d 597);
- Reasonable reliance on a third party to defend (*Fayusi v Permatex, Inc.* (2008) 167 CA4th 681, 697, 84 CR3d 351);
- Reliance on opposing counsel to warn before taking default (*Robinson v Varela* (1977) 67 CA3d 611, 136 CR 783);
- An attorney's abandonment of the client (*Seacall Dev., Ltd. v Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 86 CR2d 229); and
- Death in defendant's family (*Shapiro v Clark* (2008) 164 CA4th 1128, 1137, 80 CR3d 398).

In contrast, the following has been found not to be excusable:

- When an attorney-defendant's excuse was that his answer was stolen from his mailbox even though (1) he was fully aware of the complaint against him and (2) after he did not receive a conformed copy from the court, he failed to check to see if an answer had in fact been filed (*Lockyer v Brar* (2005) 134 CA4th 659, 36 CR3d 272).
- Attorney's unsupported, subjective belief that she had been served when court gave her courtesy copy of complaint and thus still had time to respond to complaint (*Hearn v Howard* (2009) 177 CA4th 1193, 1206, 99 CR3d 642).

See 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§158-172 (5th ed 2008) for additional examples of excusable and inexcusable neglect.

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2. Mandatory Relief Under CCP §473(b)

§38.83 a. Attorney Affidavit of Fault Required

Under CCP §473(b), the court *must* grant relief from default or a default judgment for "attorney neglect," even inexcusable neglect, when an application for relief:

- Is made within 6 months after entry of judgment;
- Is in proper form; and
- Is accompanied by "an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect."

This relief is often referred to as "mandatory" because the court *must* grant relief unless it finds that the attorney was not actually the cause of the neglect, *e.g.,* when the attorney is merely covering up for the client. See *Jerry's Shell v Equilon Enters., LLC* (2005) 134 CA4th 1058, 36 CR3d 637; *Rogalski v Nabers Cadillac* (1992) 11 CA4th 816, 14 CR2d 286. See also *Standard Microsystems Corp. v Winbond Elec. Corp.* (2009) 179 CA4th 868, 896, 102 CR3d 140 (error to deny motion for relief from default judgment, because facts establishing attorney fault entitled defendant to mandatory relief under CCP §473(b)); *Carmel, Ltd. v Tavoussi* (2009) 175 CA4th 393, 399, 95 CR3d 694 (no error to grant mandatory relief from default even though attorney expressly denied fault; facts in attorney's declaration clearly demonstrated his fault).

If relief is granted based on the attorney's affidavit of fault, the court must order the attorney to pay reasonable compensatory legal fees and costs to the opposing counsel or parties. CCP §473(c).

On motions for relief under CCP §473 for summary judgment, see §§36.174, 36.211.

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§38.84 b. Relief From Dismissal

Mandatory relief under CCP §473(b) applies to a dismissal only when it occurs under circumstances similar to a default. See *Yeap v Leake* (1997) 60 CA4th 591, 70 CR2d 680 (counsel's failure to calendar arbitration hearing triggered mandatory relief under CCP §473(b) because resulting zero award was analogous to default).

Thus, mandatory relief does not apply to a discretionary dismissal based on a plaintiff's failure to timely file an amended complaint, when dismissal is entered after a hearing in which the court evaluates the reasons for failure to meet the deadline. Such a dismissal is not the "procedural equivalent" of a default, but is a motion lost on the merits after an opposition is filed. *Leader v Health Indus. of Am., Inc.* (2001) 89 CA4th 603, 618, 107 CR2d 489. Similarly, mandatory relief from a dismissal that was a terminating sanction resulting from counsel's intentional strategy not to comply with discovery requests was impermissible in *Jerry's Shell v Equilon Enters., LLC* (2005) 134 CA4th 1058, 36 CR3d 637; it was also impermissible after a trial conducted in defendants' absence that resulted in amended judgment but was not a default in *Vandermoon v Sanwong* (2006) 142 CA4th 315, 47 CR3d 772.

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3. Timing: When to Request Relief Under CCP §473(b)

§38.85 a. 6-Month Time Limit

Under CCP §473(b), a motion for relief from the entry of default or default judgment must be made "within a reasonable time, in no case exceeding six months," after entry of the default or default judgment. See *Manson, Iver & York v Black* (2009) 176 CA4th 36, 42, 97 CR3d 522 (trial court lacked jurisdiction to grant motion for relief from entry of default, and default judgment, filed more than 9 years after entry of default, based on mistake, surprise, and excusable neglect).

The period begins to run when the clerk enters the default (*Koski v U-Haul Co.* (1963) 212 CA2d 640, 28 CR 398), not from the time the judgment is entered (*Rutan v Summit Sports, Inc.* (1985) 173 CA3d 965, 219 CR 381), unless the defendant wants relief from merely the default judgment, not entry of default. The motion is deemed to be made when the notice of motion is filed and served. CCP §1005.5; *First Small Bus. Inv. Co. v Sistim, Inc.* (1970) 12 CA3d 645, 90 CR 798.

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§38.86 b. Time Limit Computation

When relief is sought under CCP §473 outside the default judgment context, courts have held that the time period does not start on the date the deadline was missed; rather, it runs from either of the following dates: (1) when a procedural time limit is raised as an objection by an adversary or (2) when a procedural time limit is in some manner enforced by the trial court. *Lee v Wells Fargo Bank, N.A*. (2001) 88 CA4th 1187, 1196, 106 CR2d 726, citing *Save Our Forest & Ranchlands v County of San Diego* (1996) 50 CA4th 1757, 1700, 58 CR2d 708 (relief sought from order denying request for fees and costs). The Second District Court of Appeal in *Wells Fargo* concluded that, while courts have looked to both dates, the better rule is that relief under §473 begins on the date that the trial court enters an order enforcing a procedural time limit because using the alternative date when an objection is made by an adversary would be confusing and difficult to enforce. *Lee v Wells Fargo Bank, N.A., supra*.

If the action seeks a determination of ownership or right to possession of real or personal property, a shorter time period may apply. In these actions, if the defendant and the defendant's attorney of record are personally served in California with a written notice stating that the judgment or order has been entered and that the defendant's right to relief under CCP §473 expires 90 days after service of notice, the defendant's right to relief under §473 will expire 90 days after service on both the attorney and the defendant. CCP §473(b).

The limitations under §473 apply to an original motion as well as any renewed motion following denial of the original motion. *Northridge Fin. Corp. v Hamblin* (1975) 48 CA3d 819, 122 CR 109.

If the motion is made after entry of judgment, when the court has assumed jurisdiction over the practice of the party's attorney under Bus & P C §§6180-6190, see §38.101.

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§38.87 c. 6-Month Limitation Is Jurisdictional

The 6-month time limit of CCP §473(b) is jurisdictional; the court has no power to grant relief under §473(b) once the time has lapsed. *Manson, Iver & York v Black* (2009) 176 CA4th 36, 42, 97 CR3d 522 (no jurisdiction under §473(b) to grant motion for relief filed more than 9 years after entry of default); *Lee v An* (2008) 168 CA4th 558, 563, 85 CR3d 620 (judgment was void, not voidable); *Sporn v Home Depot, Inc*. (2005) 126 CA4th 1294, 24 CR3d 780 (no relief under §473(b) because motion was filed more than 6 months after entry of judgment and defendant had been served with complaint on both its designated agent and in-house counsel).

NOTE: Courts have construed "6 months" to mean either 182 days (*Davis v Thayer* (1980) 113 CA3d 892, 170 CR 328) or 182 days plus 10 days for mailing of notice of default (*National Diversified Servs. v Bernstein* (1985) 168 CA3d 410, 214 CR 113), not 6 calendar months (*e.g.,* March 20 to September 20).

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§38.88 d. Diligence Requirement — Motion Must Be Made Within "Reasonable" Time

In addition to the 6-month maximum time limit, CCP §473(b) requires that the motion be made "within a reasonable time." Whether this requirement has been met is a matter for the trial court's discretion, based on the circumstances of the particular case. *Benjamin v Dalmo Mfg. Co.* (1948) 31 C2d 523, 190 P2d 593; *Smith v Pelton Water Wheel Co.* (1907) 151 C 394, 90 P 934. The defendant has the burden of establishing by a preponderance of the evidence not only that the default or default judgment was entered as a result of the defendant's "mistake, inadvertence, surprise or excusable neglect" (CCP §473; *Luz v Lopes* (1960) 55 C2d 54, 10 CR 161 (see §38.79)), but also that the defendant sought relief diligently and that any delay in filing the motion is excusable (*Kendall v Allied Investigations, Inc.* (1988) 197 CA3d 619, 243 CR 42 (motion denied when there was 5-month, 24-day delay without explanation); *Benjamin v Dalmo Mfg. Co., supra* (no explanation for 3-month delay)). But see *Romer, O'Connor & Co. v Huffman* (1959) 171 CA2d 342, 341 P2d 62 (4-month delay excusable when defendant was out of the country and defense counsel promptly contacted plaintiff's attorney); *Waite v Southern Pac. Co.* (1923) 192 C 467, 221 P 204 (5-month delay owing to mistake of law held excusable when no prejudice to adverse party shown).

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C. Equitable Relief in Cases of Extrinsic Fraud or Mistake

§38.89 1. Court's Equitable Authority

The trial court has inherent equitable power to set aside a judgment obtained through fraud or mistake whenever the fraud or mistake is discovered. The burden is on the movant to prove the elements of extrinsic fraud or mistake. See *Moghaddam v Bone* (2006) 142 CA4th 283, 47 CR3d 602.

A motion for equitable relief from the entry of default or default judgment will be granted only when the moving party shows that a different result is probable in a trial on the merits. *Smith v Busniewski* (1952) 115 CA2d 124, 251 P2d 697. Parties seeking equitable relief should attach a proposed answer or other responsive paper with the motion, indicating a probability of success on the merits. *Shields v Siegel* (1966) 246 CA2d 334, 342, 54 CR 577.

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§38.90 2. No Time Limitation

Although the grounds listed in CCP §473(b) for relief from entry of default or default judgment (party or attorney mistake, inadvertence, or excusable neglect (see §38.75)) are lost if the motion is not made within 6 months after entry of the judgment, no such limitation applies to a request for relief from a judgment obtained through *extrinsic* fraud or mistake. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620. See also *Sporn v Home Depot, Inc*. (2005) 126 CA4th 1294, 24 CR3d 780. The party moving for relief must, however, demonstrate diligence in having the default judgment set aside once it is discovered. *Manson, Iver & York v Black* (2009) 176 CA4th 36, 49, 97 CR3d 522.

To the extent that the court's equity power to grant relief from default after 6 months differs from its powers under CCP §473(b), the equity powers must be considered narrower, not wider. *Weitz,* 63 C2d at 857; *Jackson v Bank of America* (1986) 188 CA3d 375, 233 CR 162. However, the terms extrinsic fraud or mistake have been broadly construed to "encompass almost any set of extrinsic circumstances" that prevent a fair adversarial hearing. *Estate of Sanders* (1985) 40 C3d 607, 614, 221 CR 432. See also *U.S. v Throckmorton* (1878) 98 US 61, 65, 25 L Ed 93, which enumerates those circumstances:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.

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§38.91 3. Same Rules Apply to Limited Civil Cases

The same rules apply to limited civil cases. See chap 6. A court hearing a limited civil matter has equity jurisdiction to vacate a judgment or order obtained through "extrinsic fraud, mistake, inadvertence, or excusable neglect." CCP §86(b)(3). Unlike CCP §473(b), CCP §86(b)(3) contains no explicit time limits, but case law has established that a motion to set aside a default on the grounds of mistake, inadvertence, or excusable neglect by a party or attorney must be made within 6 months, whereas a motion based on extrinsic fraud or mistake may be made whenever the problem is discovered. *Marianos v Tutunjian* (1977) 70 CA3d 61, 64, 138 CR 529.

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4. Examples

§38.92 a. Extrinsic Fraud Found

Examples of extrinsic fraud include:

- Plaintiff's continued proceeding against defendant, even after realizing he had neither misnamed defendant in complaint nor served the wrong person with complaint (*Manson, Iver & York v Black* (2009) 176 CA4th 36, 48, 97 CR3d 522);
- Appellant's false offer to compromise claim on estate with children of deceased, which caused them to forgo opportunity to contest her claims (*Estate of Beard* (1999) 71 CA4th 753, 775, 84 CR2d 276);
- Plaintiff's granting defendant extension of time to plead and then requesting entry of default before extension expired (*H&H Inv. Co. v T-J Constr. Co.* (1969) 275 CA2d 58, 79 CR 890);
- Defendant's reliance on reasonable belief that defendant's employer would respond to complaint (*Desper v King* (1967) 251 CA2d 659, 59 CR 657); and
- Wife's reliance on husband's assurance that he would respond to complaint (*Higley v Bank of Downey* (1968) 260 CA2d 640, 67 CR 365; but see *Marriage of Stevenot* (1984) 154 CA3d 1051, 202 CR 116 (no extrinsic fraud in dissolution action when wife waited more than 1 year to seek legal advice and husband had done nothing to mislead her into believing that he would not proceed)).

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§38.93 b. No Extrinsic Fraud Found

The plaintiff's failure to enforce a default judgment until after expiration of the 6-month time limit does not in itself constitute extrinsic fraud. *Ford v Herndon* (1976) 62 CA3d 492, 496, 133 CR 111, disapproved on other grounds in *Salas v Cortez* (1979) 24 C3d 22, 154 CR 529; *Dahler v American Pipe & Constr. Co.* (1968) 257 CA2d 816, 65 CR 259. See 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§225-234 (5th ed 2008).

Intrinsic fraud or mistake (*i.e.,* fraud or mistake that goes to the merits of the action) when the defendant was not prevented from participating in the action is not a ground for relief. *Marriage of Stevenot* (1984) 154 CA3d 1051, 202 CR 116. For example, an attorney's mistaken belief about the applicable law is not extrinsic fraud or extrinsic mistake, but is intrinsic and as such cannot be the basis for equitable relief. *Westinghouse Credit Corp. v Wolfer* (1970) 10 CA3d 63, 88 CR 654. However, when the defendant's failure to answer results from the attorney's mistake of fact (*Hallett v Slaughter* (1943) 22 C2d 552, 140 P2d 3) or from the attorney's total failure to represent the defendant (*Orange Empire Nat'l Bank v Kirk* (1968) 259 CA2d 347, 66 CR 240), equitable relief is available if the attorney's failure to represent amounts to "positive misconduct" (*Lopez v Superior Court* (1986) 178 CA3d 925, 935, 223 CR 798).

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§38.94 c. Extrinsic Mistake

Extrinsic mistake occurs when the mistake of a third party prevents a defendant with a meritorious defense to the action from appearing. *Baske v Burke* (1981) 125 CA3d 38, 44, 177 CR 794. Examples of extrinsic mistake include:

- Incapacity or disability of the party or attorney (*Humes v MarGil Ventures, Inc.* (1985) 174 CA3d 486, 220 CR 186);
- Reliance on a third person (*Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620);
- Reliance on attorney who commits positive misconduct (*People v One Parcel of Land* (1991) 235 CA3d 579, 286 CR 739; *Aldrich v San Fernando Valley Lumber Co.* (1985) 170 CA3d 725, 216 CR 300); and
- Error of court clerk resulting in defendant's lack of notice of proceedings (*Baske v Burke* (1981) 125 CA3d 38, 177 CR 794).

An example of a court not finding extrinsic mistake is *Cruz v Fagor Am., Inc.* (2007) 146 CA4th 488, 506, 52 CR3d 862 (failure of corporate chairman or claims officer to receive properly served summons and complaint due to internal mistake).

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D. Relief if Default Judgment Is Void

§38.95 1. Relief May Be Requested at Any Time

If the default judgment is void, the court, on motion of one party with notice to the other parties, may set it aside at any time. See CCP §473(d) (court may set aside "any void judgment or order").

NOTE: The distinction between "void" and "voidable" judgments is important: Voidable judgments must be set aside before they become final. See *Johnson v E-Z Ins. Brokerage, Inc.* (2009) 175 CA4th 86, 95 CR3d 782 (judgment was not void but voidable and therefore could not be set aside under CCP §473(b) 12 years after entry of default and default judgment); *Lee v An* (2008) 168 CA4th 558, 565, 85 CR3d 620. See also §§38.79-38.94.

A judgment is void if a court lacks fundamental authority over the subject matter, question presented, or party (168 CA4th at 565), *e.g.*:

- The court that renders it lacks personal or subject matter jurisdiction (*Airlines Reporting Corp. v Renda* (2009) 177 CA4th 14, 99 CR3d 66; *Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1030, 230 CR 203);
- The court clerk enters a default judgment under CCP §585(a) without authority to do so (CCP §473(d); *Brown v Superior Court* (1966) 242 CA2d 519, 51 CR 633);
- The defendant received no actual notice (*Wisdom v Ramirez* (1985) 177 CA3d Supp 1, 222 CR 923); or
- The damages awarded in a default judgment are in excess of what is demanded in the complaint (*Marriage of Lippel* (1990) 51 C3d 1160, 1167, 276 CR 290; *Heidary v Yadollahi* (2002) 99 CA4th 857, 864, 121 CR2d 695).

NOTE: A default judgment that is not subject to set aside may be *modified* if the damage award is in excess of the prayer and thus violates CCP §580; *Becker v S.P.V. Constr. Co.* (1980) 27 C3d 489, 165 CR 825.

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§38.96 2. Examples

Examples of void default judgments that were set aside include:

- *Manson, Iver & York v Black* (2009) 176 CA4th 36, 43, 97 CR3d 522 (default judgment void because party was misnamed in complaint, service, and judgment; party had no notice that ex parte order substituted her name for incorrect name, 6 years after entry of judgment);
- *David S. Karton, a Law Corp. v Dougherty* (2009) 171 CA4th 133, 149, 89 CR3d 506 (default judgment void because it exceeded amount specified in complaint); *Levine v Smith* (2006) 145 CA4th 1131, 52 CR3d 197 (same);
- *Strathvale Holdings v E.B.H*. (2005) 126 CA4th 1241, 25 CR3d 372 (lack of personal jurisdiction rendered default judgment void; thus, it may be challenged at any time);
- *Falahati v Kondo* (2005) 127 CA4th 823, 26 CR3d 104 (default judgment was void and subject to set aside under CCP §473(d) because (1) it was based on complaint that did not apprise defendant of nature of plaintiff's demand against him or amount of damages sought, and (2) defendant was denied opportunity to respond to amendment purporting to add him as defendant); and
- *Wisdom v Ramirez* (1985) 177 CA3d Supp 1, 222 CR 923 (court may set aside any void judgment or order when summons was not properly served and defendant had no actual notice).

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§38.97 E. Relief if No Actual Notice to Defendant

When service of summons did not result in actual notice to a defendant in time to defend the action and a default or default judgment has been entered, the defendant may move to set aside the default or default judgment and for leave to defend the action. CCP §473.5(a). The lack of actual notice must not have been caused by the defendant's avoidance of service or inexcusable neglect. CCP §473.5(b).

Grounds for relief under CCP §473.5 usually result from service of process by means other than personal service, *e.g.,* substituted service or service by publication. See, *e.g., Tunis v Barrow* (1986) 184 CA3d 1069, 229 CR 389 (motion under §473.5 proper when service of process completed by publication that did not result in actual notice to defendant).

Relief has also been granted under this section when there was apparent personal service under circumstances creating doubt over whether the defendant received actual notice from the personal service. *Rosenthal v Garner* (1983) 142 CA3d 891, 191 CR 300; *Goya v P.E.R.U. Enters.* (1978) 87 CA3d 886, 151 CR 258.

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§38.98 1. Equitable Authority

When entry of default or default judgment has resulted from the defendant's not having had actual notice of the action in time to defend, the court may also grant relief under its inherent equitable power to set aside the default or default judgment. The grounds for an equitable motion are limited to extrinsic fraud or mistake. See §38.89. These terms are given a broad meaning and include all circumstances that deprive an adversary of fair notice of hearing regardless of whether the particular conduct would constitute fraud or mistake in the strict sense. *Munoz v Lopez* (1969) 275 CA2d 178, 79 CR 563 (decided under former CCP §473a). See *Bennett v Hibernia Bank* (1956) 47 C2d 540, 305 P2d 20.

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2. Timing: When to Request Relief if No Actual Notice to Defendant

§38.99 a. CCP §473.5

A motion for relief from default or default judgment made under CCP §473.5 must be filed "within a reasonable time," and no later than the earlier of (1) 2 years after entry of a default judgment against defendant or (2) 180 days after service on defendant of written notice that a default or default judgment has been entered. CCP §473.5(a). Thus, both CCP §473 and CCP §473.5 establish a jurisdictional outer time limit and a diligence requirement.

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§38.100 b. Equitable Powers

A motion addressed to the court's inherent equitable powers must be made within a reasonable time, but it is not subject to the §473.5 time limits. *Munoz v Lopez* (1969) 275 CA2d 178, 79 CR 563 (decided under former CCP §473a). Although there is no jurisdictional time limit, a motion for equitable relief is subject to the same requirement as for a CCP §473 motion—that it be made within a reasonable time, *i.e.,* the moving party must move diligently on learning of the entry of default or default judgment. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620; see §38.90.

The most important factors in determining whether the moving party has exercised due diligence are

- The length of time from discovery of the entry of default and the filing of the application;
- The reasons for any delay; and
- Anything that has occurred that would prejudice the plaintiff if the motion were granted.

McCreadie v Arques (1967) 248 CA2d 39, 56 CR 188; see, *e.g., Weitz v Yankosky, supra*.

NOTE: If the motion is made on the ground that the summons was not properly served, the judgment would be void, and the motion to set aside could be filed when the defendant learns of the default. *Sipe v McKenna* (1948) 88 CA2d 1001, 200 P2d 61. See §38.95.

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§38.101 F. Relief When Court Has Assumed Jurisdiction of Attorney's Practice

Under Bus & P C §§6180 and 6190, a court may assume jurisdiction over the practice of an attorney. If, after an application for the court to assume jurisdiction over the attorney's practice, a judgment is taken against a party represented by that attorney, relief from the judgment may be sought under CCP §473.1.

Like motions for relief under CCP §§473 and 473.5, a motion under CCP §473.1 has a jurisdictional time limit as well as a requirement that the motion be made within "a reasonable time." The jurisdictional time limit is usually 6 months after the court assumes jurisdiction over the attorney's practice. However, if the judgment for which relief is sought was entered in a proceeding that determines the ownership or right to possession of real or personal property, the jurisdictional time limit is different. In this event, it is the earlier of 6 months after the court takes jurisdiction over the attorney's practice or 90 days after service of a notice within the state on both the party and the attorney appointed under Bus & P C §6180.5. The notice must state that the judgment or order has been entered and advise them of their right to seek relief within 90 days.

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§38.102 G. Court May Condition Relief

Motion under CCP §473 or court's equitable powers. The court may grant relief subject to conditions, whether the motion is made under CCP §473 or under the court's equity powers. This rule is explicit under CCP §473(b) (court may grant relief on "any terms as may be just") and implicit under the court's equity powers. Moreover, whenever relief from a default judgment is granted under §473, the court in its discretion can (CCP §473(c)(1)):

- Impose a penalty of no more than $1000 on an offending attorney or defaulting party;
- Direct an offending attorney to pay no more than $1000 to the State Bar Client Security Fund; or
- Grant such other relief as is appropriate.

A penalty, when justified, can be assessed directly against both the party and the attorney.

Given the desire of courts to decide cases on the merits, counsel for plaintiff is likely to have more success in seeking to fashion appropriate conditions on the granting of relief than in opposing the motion. However, the conditions must be just, *i.e.,* "reasonably proportionate to the other party's prejudice or expense." *Shapiro v Clark* (2008) 164 CA4th 1128, 1148, 80 CR3d 398 (no justification for conditioning relief on security for prospective award of punitive damages); *Kirkwood v Superior Court* (1967) 253 CA2d 198, 201, 61 CR 316. Excessive conditions can be attacked by writ of mandamus. *Kirkwood v Superior Court, supra*.

Motion under CCP §473.5. Under CCP §473.5, the court may grant relief "on whatever terms as may be just." On CCP §473.5, see §38.99. Also, the court has the discretion *not* to impose any conditions in granting a motion under §473.5. *Goya v P.E.R.U. Enters.* (1978) 87 CA3d 886, 151 CR 258. For form of order, which may be modified, see §38.117.

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H. Procedure: How to Obtain Relief From Default or Default Judgment

§38.103 1. Motion Under CCP §473(b)

Frequently, a defendant first learns of the entry of a default judgment when a levy of execution is threatened or has occurred. To avoid the levy of a writ or to stop additional levies from being made, the defendant may need to obtain a stay of execution pending hearing and determination of the motion for relief from the default judgment. If timely requested, a stay may be obtained ex parte when the motion for relief from default judgment is filed. The request for the stay will require its own moving papers, including supporting declarations. The declarations in support of the motion to vacate are usually sufficient, with minor additions (*e.g.,* the fact that the levy is threatened), to support the request for the stay.

For most money judgments, the court's authority to grant a stay lapses 10 days after the final date on which an appeal could have been filed. See CCP §§917.1, 918(b). California Rules of Court 8.104(a) provides that for judgments entered in superior court the appeal period is the earliest of:

- 60 days after the clerk serves the party filing the notice of appeal with a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date that either was served;
- 60 days after the party filing the notice of appeal serves or is served by a party with a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
- 180 days after entry of judgment.

Service in the first two situations listed above may be by any method permitted by the Code of Civil Procedure, including electronic service when permitted under CCP §1010.6 and Cal Rules of Ct 2.250-2.261. Cal Rules of Ct 8.104(a)(4).

California Rules of Court 8.800 provides that the rules relating to the superior court appellate division apply to appeals in the appellate division of the superior court. California Rules of Court 8.822(a) provides that for judgments entered in a limited civil case the appeal period is the earliest of:

- 30 days after the date of mailing of notice of entry of judgment by the clerk;
- 30 days after service of written notice of entry of judgment by a party; or
- 90 days after entry of judgment.

If the time for granting a stay has passed before the defendant becomes aware of the default judgment, the defendant should make an ex parte application for an order shortening time for hearing of the motion for relief from default. On time for service of motions, see CCP §1005(b). On form of order, see §38.117. On ex parte motions, see chap 13.

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§38.104 b. Opposition

On a motion to set aside a default or default judgment, the plaintiff may controvert the defendant's moving papers with counterdeclarations. See, *e.g., Elms v Elms* (1946) 72 CA2d 508, 164 P2d 936. If the plaintiff was prejudiced by the delay, the counterdeclarations should set forth facts showing the prejudice. The burden of proof to show prejudice is on the opposing party. See, *e.g., Aldrich v San Fernando Valley Lumber Co.* (1985) 170 CA3d 725, 740, 216 CR 300. However, it is improper for the plaintiff to attempt to factually dispute the defendant's defense if the defendant has attached a copy of the proposed answer or other pleading as required by CCP §473. *First Small Bus. Inv. Co. v Sistim, Inc.* (1970) 12 CA3d 645, 90 CR 798. The motion is not a substitute for a trial on the merits. *Skolsky v Electronovision Prods., Inc.* (1967) 254 CA2d 246, 62 CR 91.

Given the court's inclination to hear matters on their merits and thus grant motions to set aside defaults or default judgments, plaintiff's counsel may have more success in endeavoring to convince the court to grant relief on the imposition of appropriate conditions. See §38.102.

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§38.105 c. Hearing and Evidence

Usually a motion to vacate default or default judgment is heard on declaration and counterdeclaration, but the court has the discretion to take oral evidence. See, *e.g., Reifler v Superior Court* (1974) 39 CA3d 479, 114 CR 356 (family law issues); Cal Rules of Ct 3.1306(a). Local practice varies. Some courts may permit oral testimony of the parties or witnesses, at least for cross-examination on specific matters in dispute. If oral testimony is permitted, parties or witnesses who will be testifying must be present in the courtroom at the time of the hearing. Some courts may also grant a continuance of the hearing to allow discovery to be taken of the parties or witnesses whose declarations have been filed.

After hearing the arguments and considering the evidence, the court may rule on the motion from the bench or take the matter under submission. On making its decision, the court enters an order granting or denying the motion. The court may deny the motion without prejudice if the showing in support of the motion is deficient but can be cured on a new motion. In some cases, a party can renew the motion even if the original motion was denied. See §38.107.

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§38.106 2. Motion Under CCP §473.5

A notice of motion under CCP §473.5 must designate a hearing date as prescribed by CCP §1005(b) (normally, at least 16 court days after date of service; longer if notice of motion is served by mail; subject to court order shortening time). CCP §473.5(b).

A motion under CCP §473.5 for relief from entry of default or default judgment must be accompanied by:

An affidavit or declaration under penalty of perjury (CCP §2015.5) showing that the defendant's lack of actual notice was not caused by the defendant's avoidance of service of process or inexcusable neglect.

PRACTICE TIP: It is advisable, whether required or not, to include such a declaration and copy when the motion is made under the court's equity powers independent of the statutory grounds of CCP §473.5.

For forms of motion and a declaration that can be adapted for use, see §§38.114-38.115.

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§38.107 3. Renewal if Motion Denied

Both as a statutory requirement and as a practical requirement to avoid being burdened by multiple applications for the same relief, courts require that any motion for renewal or reconsideration be based on facts different from those presented in the original motion. CCP §1008. Like the original motion, a renewed motion must be made within the same time, *i.e.,* 6 months after the entry of default or default judgment. *Northridge Fin. Corp. v Hamblin* (1975) 48 CA3d 819, 122 CR 109 (motion for renewal untimely when made 24 days after 6-month period expired).

A renewed motion should be noticed and supported by declarations in the same manner as the original motion, although the renewed motion can incorporate by reference applicable portions of the original motion, such as the proposed answer. It must also be shown by declaration that a prior motion was made, the date of the prior motion, the judge who heard the original motion, the disposition of that motion and what new facts are claimed. CCP §1008.

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§38.108 I. Appellate Review

An order granting or denying relief from a default judgment is appealable as an order after judgment. CCP §§904.1(a)(2) (unlimited civil cases), 904.2(b) (limited civil cases); *Tunis v Barrow* (1986) 184 CA3d 1069, 229 CR 389 (order denying motion to vacate appealable; order denying motion to reconsider not appealable). Because of the availability of a direct appeal, relief by mandamus will be granted only in unusual circumstances. A court's prejudgment denial of relief from default is interlocutory and not separately appealable. *Shapiro v Clark* (2008) 164 CA4th 1128, 1137, 80 CR3d 398.

Because judicial policy in favor of a trial on the merits takes precedence over the policy of upholding a trial court order denying relief unless abuse of discretion is shown, appellate courts are usually more willing to uphold an order granting relief than an order that denies relief. This result is not automatic, however, and appellate courts will uphold orders denying relief particularly when the defendant has not been diligent in seeking relief. A default judgment in excess of the prayer can be raised for the first time on appeal. Such a judgment is an act in excess of jurisdiction and is never waived. *Petty v Manpower, Inc.* (1979) 94 CA3d 794, 156 CR 622.

Timing. The notice of appeal must be filed on or before the earliest of:

- 60 days after the superior court clerk serves the party filing the notice of appeal with document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was served;
- 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by a proof of service; or
- 180 days after entry of judgment.

Cal Rules of Ct 8.104(a). On filing an appeal, see California Civil Appellate Practice, chap 7 (3d ed Cal CEB 1996).

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Source: Civil Litigation/California Civil Procedure Before Trial/38 Default/ V. CHECKLISTS/§38.109 A. Checklist: Procedure for Entry of Default and Default Judgment

V. CHECKLISTS

§38.109 A. Checklist: Procedure for Entry of Default and Default Judgment

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Entry of Default

- Give written notice to opposing counsel or to defendant in pro per that plaintiff intends to have default entered unless defendant responds within a certain reasonable time
- Within 10 days of defendant's default, prepare mandatory Judicial Council form, Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100) (see §38.111)
- Fill in request for entry of default
- Complete venue declaration (CCP §585.5) if plaintiff will be seeking clerk's judgment under CCP §585(a)
- Complete mailing declaration (CCP §587)
- Mail copy of application and any accompanying papers to defendant's attorney or, if none, to defendant at last known address (CCP §587)
- File original application and any supporting documentation

Default Judgment

- Prepare mandatory Judicial Council form, Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100) (see §38.111)
- Check box for type of default judgment requested
- Fill in section 2 amount of judgment requested
- Complete venue declaration (CCP §585.5(a)) if entry of default not previously sought and if clerk's judgment (CCP §585(a)) is sought
- Complete declaration of military status (50 USC App §§501-596); if defendant in military or status unknown,
- Obtain court appointment of attorney to represent defendant's interests; or
- Obtain court order directing entry of defendant's default judgment
- Prepare affidavit of completion of publication (CCP §585(c)) if defendant was served by publication
- Complete mailing declaration (CCP §587) if entry of default not previously sought; and
- Complete memorandum of costs (CCP §1033.5)
- Mail copy of application to defendant's attorney or, if none, to defendant at last known address (CCP §587), if entry of default not previously requested
- Prepare proposed judgment
- Obtain hearing date or calendar motion for default judgment on affidavits if required by particular court
- Consult clerk to see whether local procedures require additional documentation; check actions for which court requires prove up hearing or permits default application on affidavits or declarations (CCP §585(d))
- Prepare affidavits and declarations in lieu of personal testimony (CCP §585(d)) if permitted or required by court
- Set forth facts within personal knowledge of declarant with particularity; and
- Show affirmatively that declarant could competently testify to facts if sworn as witness (CCP §585(d))
- Prepare request for dismissal of all unserved defendants if required by particular court
- Prepare declaration justifying separate judgment under CCP §579 if required by particular court
- File original application and any supporting documentation

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§38.110 B. Checklist: Procedure for Relief From Default

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- Obtain stipulation to set aside default and default judgment
- If stipulation cannot be obtained, prepare notice of motion to set aside default and default judgment
- Prepare memorandum of points and authorities
- Prepare proposed responsive pleading
- Prepare affidavits or declarations in support of motion showing diligence in seeking relief
- If motion made under CCP §473 within 6 months after entry of default (see §§38.85-38.88)
- Facts showing mistake, inadvertence, or excusable neglect of defendant or defendant's attorney (see §§38.79-38.82)
- Facts showing inexcusable neglect of attorney
- Facts showing judgment void in fact though valid on its face
- If motion made under CCP §473.5 (see §38.99)
- Facts showing lack of actual notice not caused by defendant's inexcusable neglect or avoidance of service
- If motion not made within 6 months after entry of default
- Facts showing extrinsic fraud or mistake (see §§38.89-38.94)
- File and serve notice of motion and supporting papers
- If motion is granted, file responsive paper

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Source: Civil Litigation/California Civil Procedure Before Trial/38 Default/ VI. FORMS/§38.111 A. Form: Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100)

VI. FORMS

§38.111 A. Form: Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
REQUEST FOR (Application) ☐ **Entry of Default** ☐ **Clerk's Judgment** ☐ **Court Judgment**	CASE NUMBER:

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on *(date)*:
   b. by *(name)*:
   c. ☐ Enter default of defendant *(names)*:
   d. ☐ I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant *(names)*:

   (Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)
   e. ☐ Enter clerk's judgment
      (1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)
         ☐ Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The *Prejudgment Claim of Right to Possession* was served in compliance with Code of Civil Procedure section 415.46.
      (2) ☐ under Code of Civil Procedure section 585(a). *(Complete the declaration under Code Civ. Proc., § 585.5 on the reverse (item 5).)*
      (3) ☐ for default previously entered on *(date)*:

2. **Judgment to be entered.**

	Amount	Credits acknowledged	Balance
a. Demand of complaint	$	$	$
b. Statement of damages *			
(1) Special	$	$	$
(2) General	$	$	$
c. Interest	$	$	$
d. Costs *(see reverse)*	$	$	$
e. Attorney fees	$	$	$
f. **TOTALS**	$	$	$

   g. **Daily damages** were demanded in complaint at the rate of: $ per day beginning *(date)*:
   (Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.)*

3. ☐ *(Check if filed in an unlawful detainer case)* **Legal document assistant or unlawful detainer assistant** information is on the reverse *(complete item 4)*.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY

(1) ☐ Default entered as requested on *(date)*:
(2) ☐ Default NOT entered as requested *(state reason)*:

Clerk, by _____, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-100 [Rev. January 1, 2007]

REQUEST FOR ENTRY OF DEFAULT
(Application to Enter Default)

Code of Civil Procedure, §§ 585–587, 1169
www.courtinfo.ca.gov

Print

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

4. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☐ did **not** for compensation give advice or assistance with this form. *(If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state):*
   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

5. ☐ **Declaration under Code of Civil Procedure Section 585.5** *(required for entry of default under Code Civ. Proc., § 585(a)).* This action
   a. ☐ is ☐ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
   b. ☐ is ☐ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
   c. ☐ is ☐ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

6. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was
   a. ☐ **not mailed** to the following defendants, whose addresses are **unknown** to plaintiff or plaintiff's attorney *(names):*
   b. ☐ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:
      (1) Mailed on *(date):*
      (2) To *(specify names and addresses shown on the envelopes):*

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

7. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):
   a. Clerk's filing fees ..... $
   b. Process server's fees ..... $
   c. Other *(specify):* ..... $
   d. ..... $
   e. **TOTAL** ..... $ _____
   f. ☐ Costs and disbursements are waived.
   g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

8. ☐ **Declaration of nonmilitary status** *(required for a judgment).* No defendant named in item 1c of the application is in the military service so as to be entitled to the benefits of the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et seq.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

Copies: Original (file with court clerk); ___ copies for service (one for each attorney of record or unrepresented party); ___ office copies.

Comment: The following instructions are keyed to the multipurpose Judicial Council form. For further discussion, see §§38.52-38.58. The moving party must check the box for entry of default and/or clerk or court judgment.

Entry of Default

Item 1 (Request for Entry of Default): Section 1a of the form must be completed to obtain entry of default.

Item 5 (Declaration Under CCP §585.5): The plaintiff must complete the venue declaration when seeking entry of default, if a clerk's judgment under CCP §585(a) will be sought. See §§38.42-38.60 (clerk's judgment), §§38.61-38.73 (default judgment by court).

Item 6 (Declaration of Mailing): The mailing declaration must be completed, stating that a copy of the request has been mailed to the defendant's attorney of record or, if none, to the defendant at his or her last known address. If the defendant's address is unknown to the plaintiff or the plaintiff's attorney, *e.g.*, when service was by publication, the declaration must state that fact. CCP §587. See §38.37.

Clerk's Default Judgment

Item 1 (Request for Entry of Default Judgment): Sections a and b should be completed, even if they have been completed earlier in connection with a prior request for the entry of a default. Section e should be completed in all instances of a request for the entry of a clerk's default judgment. Under section e, the appropriate box or boxes should be checked. Box 1 pertains to a request for the entry of a clerk's default judgment in unlawful detainer proceedings that seek only the restitution of premises, but no monetary damages are sought, and the landlord has not elected to declare a forfeiture under the conditions set forth in CCP §1174(c). Box 2 of section e applies to all cases under CCP §585(a). Box 3 of section e should be completed in all instances in which a default of one or more defendants was entered before the request for the entry of a clerk's default judgment.

Item 2 (Judgment to Be Entered): Sections a and c through f should be completed as appropriate. The form requires the inclusion of information about the demand of the complaint, and the interest, costs, and attorney fees sought. The totals of these items as requested in the complaint, any credits to which the defendant is entitled on any item, and the balance due on each item must also be provided.

Some courts require that a partial satisfaction be filed with the clerk whenever credits are to be acknowledged. Other courts will accept the statement included in the column for "Credits Acknowledged" as sufficient. Consult the court clerk for information on local requirements.

The costs in section d are, as noted on the form, the totals from Item 6 on the reverse side of the form.

Item 5 (Declaration Under CCP §585.5): Section 585.5 requires this information at the time of a request for default when a clerk's judgment (CCP §585(a)) will be sought, not, as the caption of the document indicates, at the time of the request for judgment. If the judgment is not being sought at the same time as entry of default, however, prudent practice would dictate that the §585 declaration be included in both filings.

Item 6 (Declaration of Mailing): If default was previously entered, there is no need to complete this section at the time of the request for default judgment. Notice must be mailed to the defendant before entry of judgment. Once default is entered, nothing further need be mailed to the defendant. See §38.37.

Item 7 (Memorandum of Costs): The plaintiff is required to complete this section of the Request for Entry of Default form when judgment is sought, either to seek costs or to waive the right to seek costs. Cal Rules of Ct 3.1700(a)(2). See also CCP §1034. For items recoverable as costs, see CCP §1033.5; California Trial Practice: Civil Procedure During Trial §§27.67-27.68, 27.72 (3d ed Cal CEB 1995). See §38.53.

Item 8 (Declaration of Nonmilitary Status): No clerk's default judgment may be entered without a showing that the defendant is not in the military service. 50 USC App §§501-596. This item must be completed for every individual defendant at the time of the request for default judgment. The declaration must be completed by someone who has personal knowledge that the defendant is not in the armed services. Counsel should have the process server ascertain this information and complete the declaration if the defendant's status is not known to the plaintiff. If there is a delay from the date of the declaration until the request for entry of judgment, counsel should consult the local clerk to ascertain the length of delay that is acceptable. See §38.54.

Court Default Judgment

The Judicial Council form is completed in the same manner as noted in the comment as for a clerk's judgment with the following exceptions:

Item 1 (Request for Entry of Default Judgment): Section (c) is completed only if a default of one or more defendants is being requested along with the entry of a judgment. Section (d) should be checked.

Item 2 (Judgment To Be Entered): If the judgment is being sought in a personal injury or wrongful death action (other than limited civil case; see chap 6), section (b) (statement of damages) should be completed. If attorney fees are sought in a non-§585(a) action, section (e) should be completed. If judgment for unlawful detainer damages are sought, section (g) should be completed.

Item 6 (Declaration of Mailing): This declaration must be completed if the defendant's default has not been entered previously.

NOTE: Some courts may require a second declaration of mailing when a court judgment is sought, *e.g.,* when a money

judgment is sought after a judgment of restitution so the defendant will have notice of the specific amount sought.

Item 7 (Memorandum of Costs): Attorney fees recoverable by statute should be included in the memorandum of costs. See, *e.g., T.E.D. Bearing Co. v Walter E. Heller & Co.* (1974) 38 CA3d 59, 112 CR 910 (attorney fees recoverable by statute are element of costs; recoverable under cost bill procedure).

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§38.112 B. Form: Declaration on Open Book Account

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**DEFAULT JUDGMENT**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am employed by _ _[*e.g., plaintiff*]_ _**, and I have personal knowledge of the facts concerning the transactions with the** _ _[*e.g., defendants*]_ _ **in this action.**

2. There are no executed written agreements between the parties to this action.

3. Attached as Exhibits _ _[*specify*]_ _ **are the outstanding invoices with respect to the open book account of the** _ _[*e.g., defendants*]_ _ **with** _ _[*e.g., plaintiff*]_ _**.**

4. Attached as Exhibit _ _ **is a statement of the account between** _ _[*e.g., plaintiff*]_ _ **and** _ _[*e.g., defendants*]_ _ **setting forth the amount currently due** _ _[*e.g., plaintiff*]_ _ **from** _ _[*e.g., defendants*]_ _**.**

I have personal knowledge of all facts stated in this declaration and, if called to testify, I could and would competently do so.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (attach to and file with original of notice of motion); ___ copies for service (one for each other party); ___ office copies.

Comment: See §38.72 (motion for default judgment) and §§12.43-12.53 (formal requirements for declarations).

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§38.113 C. Form: Default Judgment by Court

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No. _ _ _ _ _ _**
vs	**DEFAULT JUDGMENT BY COURT (CCP §585(b)-(c))**
_ _[*Name(s)*]_ _, **Defendant(s)**	

The above matter came on regularly for hearing in Department No. _ _, the Honorable _ _[*name*]_ _ presiding on _ _[*date*]_ _, and _ _[*name*]_ _ appearing as attorney for plaintiff.

Defendant, _ _[*name*]_ _, having been regularly _ _[*served with process/served with summons by publication*]_ _, having failed to appear and answer plaintiff's complaint within the time allowed by law _ _[*and defendant's default having been entered*]_ _ on _ _[*date*]_ _, _ _[*and evidence having been introduced in open session of this Court by plaintiff or having been considered by the Court/and proof of publication and of the allegations of plaintiff's complaint having been made to the Court's satisfaction*]_ _,

[*Option 1*]

It is ordered that:

1. Plaintiff recover from defendant $_ _[*amount*]_ _ _ _[*as principal or damages*]_ _, $_ _[*amount*]_ _ as interest, $_ _[*amount*]_ _ as attorney fees, and $_ _[*amount*]_ _ as costs.

[*Add if appropriate*]

2. Plaintiff have sole possession of the real property at _ _[*address*]_ _, _ _[*city*]_ _, California.

[*Option 2*]

IT IS ORDERED that plaintiff have sole possession of the real property at _ _[*address*]_ _, _ _[*city*]_ _, California.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§38.61-38.74 (court default judgment). This form may be used for a default judgment by the court under CCP §585(b) or a default judgment under CCP §585(c) when the defendant was served by publication. It may also be adapted for use when the plaintiff requests that the court set attorney fees under CCP §585(a). See §38.65.

Many courts have their own printed forms for default judgment by court, and some have printed forms for default judgment following service by publication. These forms should be used whenever possible. If the attorney drafts a judgment similar to the form shown above, the format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/38 Default/§38.114 D. Form: Notice of Motion to Set Aside Default and Default Judgment

§38.114 D. Form: Notice of Motion to Set Aside Default and Default Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION TO SET ASIDE DEFAULT** _ _[*AND DEFAULT JUDGMENT*]_ _; _ _[*POINTS AND AUTHORITIES;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Please take notice that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §**_ _[*473/473.5*]_ _ **for an order vacating and setting aside the default** _ _[*and default judgment*]_ _ **entered in this action on** _ _[*date(s)*]_ _**, and for leave to file the attached proposed** _ _[*pleading, e.g., answer, demurrer*]_ _**. The grounds for issuance of this order are that** _ _[*name*]_ _**'s failure to respond to the complaint within the time allowed is because of the** _ ___ _[*mistake, inadvertence, surprise, or excusable neglect of* _ _[*defendant/defendant's attorney*]_ _*/mistake, inadvertence, surprise, or neglect of defendant's attorney*]_ _**, as is more fully set forth in the declaration(s) filed in support of this motion.**

This motion is based on this notice, the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the Declaration of* _ _[*name*]_ _*, dated* _ _[*date*]_ _ **, the proposed** _ _[*answer/demurrer*]_ _ **filed with the motion,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each attorney of record and unrepresented party); ___ office copies.

Comment: See §§38.75-38.108 (motion for relief from default and default judgment) and §§12.7-12.29 (formal requirements for notices of motion). Some attorneys routinely include in a notice of motion a request for "other just relief." This language is unnecessary with respect to a motion to set aside a default or default judgment because the court has the express authority by statute to base the granting of the motion on the defendant's satisfaction of conditions. See CCP §473; §38.102. This form, with minor adaptations, may also be used to seek to set aside defaults or default judgments entered as a result of extrinsic fraud. See §§38.89-38.94.

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/38 Default/§38.115 E. Form: Declaration Supporting Motion to Set Aside Entry of Default and Default Judgment

§38.115 E. Form: Declaration Supporting Motion to Set Aside Entry of Default and Default Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING MOTION OF** _ _[*NAME*]_ _ **TO SET ASIDE DEFAULT** _ _[*AND DEFAULT JUDGMENT*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

[*Option 1*]

1. I am the attorney for _ _[*name*]_ _, _ _[*e.g., defendant*]_ _ **in this action.**

[*Option 2*]

1. I am the _ _[*e.g., defendant*]_ _ **in this action.**

[*Option 3*]

1. I am the _ _[*state relationship, e.g., president*]_ _ **of the** _ _[*e.g., defendant*]_ _ **in this action, and I am authorized to make this declaration on** _ _[*his/her/its*]_ _ **behalf.**

[*Continue*]

2. I have personal knowledge of all facts stated in this declaration and, if called to testify, I could and would do so.

3. The entry of default _ _[*and default judgment*]_ _ **against** _ _[*e.g., defendant*]_ _ **in this action was because of** _ _[*my/*_ _[*name*]_ _*'s*]_ _ **mistake, inadvertence, surprise, or excusable neglect in that** _ _[*state facts, e.g., on November 22, 1992, I spoke by telephone with Mr. Smith, counsel for plaintiff. During that conversation I asked Mr. Smith for an extension of time to plead on behalf of my client until December 4, 1992. Mr. Smith agreed to the extension*]_ _**.**

[*Add if appropriate*]

4. The entry of default _ _[*and default judgment*]_ _ **was discovered by me on** _ _[*date*]_ _**. This motion was not filed earlier because** _ _[*state facts showing due diligence*]_ _**.**

[*Continue with any additional statements.*]

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (attach to and file with original of notice of motion); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§38.75-38.108 (motion for relief from default and default judgment) and §§12.43-12.53 (formal requirements for declarations). The supporting declaration for a motion to set aside a default or default judgment should be made by either the attorney or the defendant, depending on who has knowledge of the facts. It may occasionally be necessary to use the declaration of more than one person. A declaration framed only in terms of the conclusory language that there was excusable negligence is insufficient. *Kendall v Allied Investigations, Inc.* (1988) 197 CA3d 619, 243 CR 42. When the motion is addressed to the court's inherent equity power on the ground of extrinsic fraud or mistake, the declaration of a third person may be needed. See §§38.79-38.82 for discussion of mistake, inadvertence, surprise, or excusable neglect. If a significant delay occurred between the time the defendant or the defendant's attorney learned of the default or default judgment and the time the motion was filed, the declaration must state facts on which the court can conclude that the delay is excusable and that the defendant acted diligently in seeking to have the default or default judgment set aside. See §38.88.

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§38.116 F. Form: Order Staying Execution and Shortening Time

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER STAYING EXECUTION AND SHORTENING TIME FOR MOTION TO SET ASIDE DEFAULT** _ _[*AND DEFAULT JUDGMENT*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, for a stay of execution and an order shortening time was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

It is ordered that:

1. Execution on the judgment in this action be stayed until _ _[*date*]_ _**, at** _ _[*time*]_ _**, or until a decision is rendered on the motion to** _ _[*e.g., set aside entry of default judgment*]_ _**, whichever occurs first.**

2. The time for hearing the motion to _ _[*e.g., set aside entry of default judgment*]_ _ **be shortened so that the motion may be heard on** _ _[*date*]_ _**, if** _ _[*e.g., defendant*]_ _ **serves the moving papers on** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, by** _ _[*e.g., personal service*]_ _ **by** _ _[*date*]_ _**.**

3. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §38.103 (orders for stay of execution) and §§12.107-12.108 (use of proposed orders; attorney preparation of order).

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§38.117 G. Form: Order Setting Aside Entry of Default and Default Judgment

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER SETTING ASIDE**
vs	)	**ENTRY OF DEFAULT** _ _[*AND*
	)	*DEFAULT JUDGMENT*]_ _
_ _[*Name(s)*]_ _,	)	**Hearing:** _ _[*date; time*]_ _
Defendant(s)	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, for an order setting aside entry of default** _ _[*and default judgment*]_ _ **was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

It is ordered that:

1. The motion be granted _ _[*, subject to the conditions set forth below*]_ _**.**

2. The default _ _[*and default judgment*]_ _ **previously entered be set aside and vacated.**

3. _ _[*E.g., Defendant*]_ _ **have** _ _ **court days to respond to the complaint.**

[*Add if appropriate*]

4. The above order takes effect only after _ _[*e.g., defendant*]_ _ **has complied with the following conditions by** _ _[*date*]_ _**:** _ _[*State conditions in numbered paragraphs*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§12.107-12.108 (use of proposed orders; attorney preparation of order). Local practice varies on whether a formal order is required or whether the court simply issues a minute order. On the court's discretion and power to impose conditions on a motion to set aside entry of a default or default judgment under CCP §473, see §38.102.

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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39

Dismissal

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I. INTRODUCTION

§39.1 A. Scope of Chapter

This chapter discusses involuntary dismissal for the failure by the plaintiff's attorney to comply with California state statutory provisions requiring reasonable diligence in the prosecution of a civil action. CCP §§583.110-583.430. It describes the uses of involuntary dismissal (see §§39.3-39.7), failure to return summons within 3 years (see §§39.8-39.24), failure to bring an action to trial within 5 years (see §§39.25-39.62), failure to bring an action to new trial within 3 years (see §§39.63-39.64), other grounds (see §§39.65-39.70), and procedures (see §§39.71-39.80).

This chapter also discusses the procedures for voluntary dismissal requested by the plaintiff, with or without prejudice, as well as those entered into after the consent of all parties, which are governed by CCP §581. That section also permits the court to dismiss on its own motion (*e.g.,* for plaintiff's abandonment of case during trial; see CCP §581(d)). See §§39.95-39.125.

Dismissal after failure to post security for costs as ordered is covered in chap 29.

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§39.2 B. Governing Law

Involuntary dismissals are governed by CCP §§583.110-583.430, which set forth the grounds for dismissal and the applicable exceptions (see chart in §39.7). Mandatory dismissal for failure to serve a defendant with the summons and complaint within 3 years after commencement of an action is governed by CCP §583.210. Mandatory dismissal for failure to bring action to trial within 5 years is governed by CCP §§583.310 and 583.360. Mandatory dismissal for failure to bring action for a new trial within 3 years is governed by CCP §583.320. Discretionary dismissal for delay in prosecution is governed by CCP §§583.410-583.430.

Voluntary dismissals are governed by CCP §581. Dismissal under §581 may be with or without prejudice.

NOTE: As used in this chapter, as in the statute, the terms "complaint," "defendant," and "plaintiff" include "cross-complaint," "cross-defendant," and "cross-complainant," and "action" means any civil action or special proceeding. See CCP §581(a).

In addition to the statutory dismissal provisions applicable to civil actions generally (see chart in §39.7), there are other statutory provisions concerning dismissal of particular actions. For example, in the absence of a written stipulation between the parties, the court must dismiss an action for a tax refund, unless summons has been issued and served and the return made within 1 year after commencement (Rev & T C §5147); another example is that the trial court may dismiss an action to foreclose a mechanics lien if not brought to trial within 2 years after commencement. CC §3147. On the effect of the Trial Court Delay Reduction Act (Govt C §§68600-68620), see §39.5.

The general dismissal statutes contained in CCP §§583.110-583.430 do not affect the court's authority to dismiss an action or impose other sanctions under a local rule adopted by the court under CCP §575.1, by the Judicial Council according to statute, or otherwise under inherent judicial authority. CCP §583.150.

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II. DESCRIPTION AND USE OF INVOLUNTARY DISMISSAL

§39.3 A. Scope of Dismissal Statutes

The dismissal statutes apply to civil actions but not to special proceedings, except to the extent the statutes are incorporated by reference in the special proceeding and the courts choose to apply them to such special proceedings. CCP §583.120(a).

The dismissal statutes are designed to apply to complaints, cross-complaints, and any other initial pleadings (CCP §583.110(b)), and to governmental agencies as well as private parties (*Superior Oil Co. v Superior Court* (1936) 6 C2d 113, 56 P2d 950; *Bank of America v Superior Court* (1948) 84 CA2d 34, 189 P2d 799; *People v Kings County Dev. Co.* (1920) 48 CA 72, 191 P 1004).

The dismissal statutes do not apply to petitions filed under Fam C §2330 (dissolution or legal separation) if certain specified conditions exist. CCP §583.161. See *Marriage of Dunmore* (1996) 45 CA4th 1372, 53 CR2d 450.

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§39.4 B. Purpose of Dismissal Statutes

The purpose of the dismissal statutes, like statutes of limitation, is generally twofold (*Hocharian v Superior Court* (1981) 28 C3d 714, 724, 170 CR 790; *Holder v Sheet Metal Worker's Int'l Ass'n* (1981) 121 CA3d 321, 175 CR 313):

- To promote the trial of cases before evidence is lost or destroyed, or the memory of witnesses becomes dimmed, thus ensuring that defendants have a reasonable opportunity to prepare a defense; and
- To protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time.

The policies underlying the California dismissal statutes are declared in CCP §583.130, among them that the plaintiff must "proceed with reasonable diligence in the prosecution of an action" and that *all* parties must "cooperate in bringing the action to trial or other disposition." However, the policy that requires dismissal for failure to proceed with reasonable diligence is generally subordinated to policies favoring the right of parties to make stipulations in their own interests and to have a trial or other disposition of an action on the merits. CCP §583.130.

When policies conflict, the court must examine every case "on its own particular facts to assure a dismissal of an action is consistent 'with the spirit of the law and with a view of subserving, rather than defeating, the ends of substantial justice.'" 121 CA3d at 325 (decided under former law).

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§39.5 C. Effect of Trial Court Delay Reduction Act

The Trial Court Delay Reduction Act (Govt C §§68600-68620) has had an impact on involuntary dismissals. A court may not dismiss an action for noncompliance with local court rules implementing the Trial Court Delay Reduction Act if noncompliance is the fault of counsel, not the litigant. *Garcia v McCutchen* (1997) 16 C4th 469, 66 CR2d 319. Code of Civil Procedure §575.2(b) also prohibits dismissal as a sanction when noncompliance with local court rules is counsel's fault.

NOTE: Counsel should carefully review local court rules, particularly those implementing programs under the Trial Court Delay Reduction Act, that may affect the time periods specified in the California statutes.

For further discussion of trial delay reduction rules, see chap 40.

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§39.6 D. Involuntary Dismissal Is Not Res Judicata

A judgment of dismissal is not on the merits and thus is not res judicata. If a new lawsuit is not barred by the statute of limitations, it may be commenced after its predecessor has been dismissed. *Gonsalves v Bank of America Nat'l Trust Sav. Ass'n* (1940) 16 C2d 169, 172, 105 P2d 118; *Watson v Superior Court* (1972) 24 CA3d 53, 60, 100 CR 684.

Even though dismissals are not on the merits, one court has held that a dismissal under former CCP §583 is a favorable termination for purposes of a later malicious prosecution action because it "does reflect on the merits of the action." *Minasian v Sapse* (1978) 80 CA3d 823, 827, 145 CR 829. The court, however, left open the possibility of a later explanation of the failure to prosecute. 80 CA3d at 828. The question of whether such a dismissal is a "favorable termination" appears to be left as a factual issue in any later malicious prosecution action, with the presumption being that one does not abandon a meritorious action once instituted.

Even though a judgment of dismissal is not on the merits and is not a final judgment within the meaning of CC §1717, a defendant may be entitled to attorney fees, especially if the action is on a contract that provides for them. See CC §1717(b)(1); *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614 (CC §1717 requires that any contractual provision for attorney fees to "prevailing party" must be applied mutually, even if contract specifies that only one party may recover fees); *Nasser v Superior Court* (1984) 156 CA3d 52, 57, 202 CR 552; *Bank of Idaho v Pine Ave. Assoc.* (1982) 137 CA3d 5, 15, 186 CR 695. See also CCP §1032(a)(4).

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/§39.7 E. Chart: Comparison of General Involuntary Dismissal Statutes

§39.7 E. Chart: Comparison of General Involuntary Dismissal Statutes

This chart compares the statutes governing involuntary dismissal in California. CCP §§583.110-583.430. It does not include dismissals for plaintiff's failure to:

- Pay transfer fees after certain orders changing venue;
- Appear at trial; or
- Amend the complaint within the time allowed after a demurrer is sustained with leave to amend.

For discussion, see section on other grounds for involuntary dismissal in §§39.65-39.70.

General Dismissal Statutes

Code of Civil Procedure	When applicable	Dismissal mandatory or discretionary	Who may make motion	When time begins to run	Exceptions	Procedures governed by
§583.210	Failure to serve summons and complaint within 3 years after filing; failure to return summons or other proof of service within 60 days of date required for service	Mandatory	Any interested party (whether or not named as party) or court on own motion	Commencement of action (date complaint filed)	1. Written stipulation of parties extending time 2. Oral agreement in court 3. General appearance by defendant 4. Defendant not amenable to court's process 5. Period tolled when stay of action or proceedings affect service 6. Period tolled when validity of service was subject of litigation 7. Impossible, impracticable, or futile to comply 8. Waiver and estoppel	Ordinary motion procedure
§583.110 (a)-(b), (d)-(e); §583.210	(1) When summons on cross-complaint is required: failure to serve summons	Mandatory	Any interested party (whether or not named as party) or court on own motion	Filing of cross-complaint	1. Written stipulation of parties extending time 2. Oral agreement in court	Ordinary motion procedure

	within 3 years after filing; failure to return summons or other proof of service within 60 days of the date required for service (2) When summons on cross-complaint is not required: failure to serve cross-complaint within 3 years after filing. (See CCP §428.60 for procedure for service of cross-complaint)				3. When service of summons is required, general appearance by cross-defendant 4. Cross-defendant not amenable to court's process 5. Period tolled when stay of action or proceedings affect service 6. Period tolled when validity of service was subject of litigation 7. Impossible, impracticable, or futile to comply 8. Waiver and estoppel	
§583.420 (a)(2)(A)-(B)	Failure to bring action to trial within 3 years (or 2 years if Judicial Council so prescribes; see Cal Rules of Ct 3.1340)	Discretionary	Defendant or court on own motion	Commencement of action (date complaint filed)	(1) Waiver and estoppel (2) Criteria established by rules adopted by Judicial Council. See CCP §§583.410(b), 583.420(a)(2)(B); Cal Rules of Ct 3.1340-3.1342	Rules adopted by Judicial Council. See CCP §§583.410(b), 583.420(a)(2)(B); Cal Rules of Ct 3.1340-3.1343
§583.420 (a)(1)	Failure to serve within 2 years	Discretionary	Defendant or court on own motion	Commencement of action (date complaint filed)	Same as above	Same as above
§583.420 (a)(3)(A)	Failure to have retrial commenced within 2 years after mistrial is declared or jury has been unable to reach verdict	Discretionary	Defendant or court on own motion	Order declaring mistrial or disagreement of jury is entered	Same as above	Same as above
§583.420 (a)(3)(B)	When new trial is granted and no appeal:	Discretionary	Defendant or court on own motion	Order granting new trial is entered	Same as above	Same as above

	failure to have retrial within 2 years after entry of order granting new trial					
§583.420 (a)(3)(C)	When judgment is reversed, or order granting new trial affirmed, on appeal: failure to bring action to trial within 2 years after filing of remittitur	Discretionary	Defendant or court on own motion	Date remittitur filed by clerk of trial court	Same as above	Same as above
§583.310	Failure to bring action to trial within 5 years after filing	Mandatory	Defendant or court on own motion	Commencement of action (date complaint filed)	1. Written stipulation 2. Oral agreement 3. Period during which court's jurisdiction suspended 4. Period during which action was stayed or enjoined 5. Impossibility, impracticability, or futility 6. Tolling or extension by statute (including tolling because of arbitration; see CCP §1141.17) If less than 6 months remains within which action must be tried, action can still be tried within 6 months of end of tolling period (see CCP §583.350) 7. Waiver and estoppel	Ordinary motion procedure
§583.320	When new	Mandatory	Defendant	Order granting	Same as above	Ordinary motion

(a)(2)	trial granted and no appeal: failure to bring action to trial within 3 years after entry of order		or court on own motion	new trial is entered		procedure
§583.320 (a)(3)	When judgment reversed, or order granting new trial affirmed, on appeal: failure to bring action to trial within 3 years after filing of remittitur	Mandatory	Defendant or court on own motion	Date remittitur is filed by clerk of trial court	Same as above	Ordinary motion procedure
§583.320 (a)(1)	Failure to have retrial commenced within 3 years after mistrial declared or jury has been unable to reach verdict	Mandatory	Defendant or court on own motion	Order declaring mistrial or disagreement of jury is entered	Same as above	Ordinary motion procedure

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III. FAILURE TO SERVE SUMMONS WITHIN 3 YEARS: MANDATORY DISMISSAL

A. When Appropriate

§39.8 1. Three Years to Serve Summons

Failure to serve a defendant with the summons and complaint within 3 years after commencement of an action requires mandatory dismissal under CCP §583.210(a) unless the plaintiff can show that certain conditions tolled the period of service or that a certain statutory exception or estoppel applies. See discussion in §§39.16, 39.19-39.24.

An action "commences" when the complaint is filed. CCP §583.210(a). If service is not made on a defendant within the required time, that defendant is entitled to the protection of CCP §583.250(a)(1): "The action shall not be further prosecuted and no further proceedings shall be held in the action."

NOTE: In an action against more than one defendant this language is applicable only to a defendant who has not been served as required; a contrary interpretation would allow other defendants who had been served in a timely manner to avoid liability.

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§39.9 2. Additional 60 Days to File Proof of Service of the Summons

Filing proof of service of the summons must occur within 60 days after the time for service of summons and complaint on a defendant. CCP §583.210(b). The plaintiff thus has an additional 60 days beyond the 3-year period to file proof of service of the summons. On service of process generally, see chap 17.

Filing the proof of service of the summons with the court is sufficient; "returning" the summons is no longer applicable under CCP §583.210. The original summons is retained by the clerk in the court records and copies of the summons are issued to the plaintiff making the request. See CCP §412.10.

EXAMPLE: If a nonresident is served by certified mail requiring a return receipt (see CCP §415.40), or if service by publication is made on a defendant who cannot be served otherwise (see CCP §415.50), all that is required to prevent dismissal is that the plaintiff can show that the necessary acts (*i.e.,* mailing or publication) were completed within the 60-day period. It is irrelevant that service by mail on the nonresident is not deemed complete until the tenth day after the mailing, or if by publication, not until 30 days after the last publication—and that these events occurred after the 60-day period had expired. Note that the service sufficient to prevent dismissal would not be satisfactory for purposes of obtaining a default.

Failure to file proof of service of the summons within 60 days following the expiration of the 3-year period results in a mandatory dismissal, regardless of whether service was timely. For discussion of procedures for dismissing an action for failure to return summons, see §§39.71-39.80.

Both of the following actions must be performed to comply with the requirements of CCP §583.210:

- Service of summons within 3 years after date the complaint is filed; and
- Filing proof of service of the summons to the court within 60 days after the 3-year period has expired.

NOTE: The term "complaint" includes "cross-complaint" or "other initial pleading." CCP §583.110(b). Summons on a cross-complaint is required if the cross-defendant has not appeared in the action; when the cross-defendant has already appeared, it may be served in any manner prescribed in CCP §§1010-1020. CCP §428.60.

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§39.10 B. When 3-Year Period Begins

The 3-year period for service of summons and complaint begins with the filing of the complaint. CCP §583.210(a).

An amended complaint seeking recovery based on the same general set of facts as the complaint relates back to the date of the filing of the original complaint and thus does not extend the 3-year period for service. *Austin v Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 601, 15 CR 817. However, if an amended complaint alleges a new cause of action based on different operative facts, the action is considered commenced from the date the amended complaint is filed, even if the defendant under the new cause of action was an original defendant. *Barrington v A.H. Robins Co.* (1985) 39 C3d 146, 155, 216 CR 405.

PRACTICE TIP: Plaintiff's counsel can avoid disputes over whether an amended complaint alleges a new cause of action based on an entirely different set of operative facts by promptly serving the original complaint on all named defendants.

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§39.11 1. Fictitious Defendants Named in Complaint

The 3-year time limit for service of summons and complaint applies to defendants sued by fictitious names. CCP §583.210; Comment to CCP §583.210. Failure to identify and serve Doe defendants within 3 years of the filing of the complaint bars future action against those unidentified defendants. *Brennan v Lermer Corp.* (ND Cal 1986) 626 F Supp 926, 934.

NOTE: Aside from this 3-year time limit, it has been held that CCP §474 implicitly requires the plaintiff to amend the complaint to add the true names of Doe defendants within a reasonable period of time after learning of their identity. *A.N. v County of Los Angeles* (2009) 171 CA4th 1058, 1066, 90 CR3d 293, citing *Barrows v American Motors Corp.* (1983) 144 CA3d 1, 192 CR 380.

When a complaint is amended to identify a party previously named as a Doe defendant, the amendment relates back to the original complaint unless the cause of action is based on different operative facts and involves different "instrumentalities" and "accidents" from those in the original complaint. *Barrington v A.H. Robins Co.* (1985) 39 C3d 146, 216 CR 405. See §39.10. Thus, for the Doe defendant, the 3-year period begins when the original complaint is filed. See *Warren v Atchison, Topeka & Santa Fe Ry.* (1971) 19 CA3d 24, 96 CR 317.

If new defendants are added, however, the action commences from the date of the amended or supplemental complaint adding those defendants. 19 CA3d at 38. See discussion in §39.13.

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§39.12 2. Federal Removal After Period Expires for Serving Summons on Doe Defendants

After the period for service and return of summons expires, a defendant is deemed on notice that the Doe defendants are no longer part of the action. *Mike Silverman & Assocs. v Drai* (CD Cal 1987) 659 F Supp 741. Consequently, Doe defendants cannot destroy diversity for the purposes of removal to federal court after the period for service and return of summons expires.

Under 28 USC §1446, the petition for removal must be filed within 30 days of the expiration of the 3-year period for service and return of summons. For further discussion of federal removal, see chap 22.

NOTE: Before the period for service and return of summons expires, some "bright line notice" in the form of the plaintiff's affirmative action severing the Doe defendants is required before a cause of action becomes removable. *Preaseau v Prudential Ins. Co.* (9th Cir 1979) 591 F2d 74, 76.

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§39.13 3. When New Parties Added to Action

If new parties are added, the 3-year period for serving summons and complaint is commenced for those parties at the time the amended pleading is filed. *Warren v Atchison, Topeka & Santa Fe Ry.* (1971) 19 CA3d 24, 96 CR 317. This rule applies to both new plaintiffs and new defendants. *American W. Banker v Price Waterhouse* (1993) 12 CA4th 39, 14 CR2d 916, aff'd sub nom *Mariani v Price Waterhouse* (1999) 70 CA4th 685, 82 CR2d 671 (reversal of dismissal of new plaintiff who failed to serve summons and complaint within 2 years after original complaint filed).

When defendants are added to an action under CCP §389 (compulsory joinder of parties), the action is considered to have commenced with respect to them at the time they are joined, rather than when the action was originally filed. *Warren,* 19 CA3d at 39. This rule applies even though defendants were originally named as parties, then dismissed, and then ordered joined as parties under CCP §389. The original dismissal makes the parties strangers to the action; when they are later ordered joined and are named as defendants in the amended complaint, they come in as new parties, and the action commences anew with respect to them. See *Monrovia Hosp. Co. v Superior Court* (1967) 253 CA2d 607, 61 CR 737; *Taliaferro v Riddle* (1959) 167 CA2d 567, 334 P2d 950.

However, when defendants are *named* in the original complaint, the 3-year period for service of summons begins to run when the action is filed, *even though the complaint does not state a cause of action* with respect to those defendants, and is later amended to state a cause of action for them based on the same operative facts. *Elling Corp. v Superior Court* (1975) 48 CA3d 89, 123 CR 734.

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§39.14 4. Cases With Multiple Defendants

Plaintiff's counsel should be wary in actions against several defendants, particularly when some of those defendants are associated in some way.

EXAMPLE: *B* permits *A* (who is not an employee or agent) to borrow his car. *B* has an automobile liability insurance policy with $100,000 coverage for the injury or death of any person while his car is being driven by himself or another with his permission. *A* has no assets or liability insurance. While driving *B*'s car, *A* strikes *C*, inflicting injuries entitling *C* to $100,000 in damages. *C* sues and serves both *A* and *B*. *B*'s attorney answers solely on *B*'s behalf, but *C*'s attorney overlooks this fact and fails to return the summons served on *A* within 3 years. After the 3-year period expires, *B*'s attorney offers $15,000 in full settlement of *C*'s lawsuit. Under Veh C §17151(a), *B*, as owner of the car, is vicariously responsible for *A*'s conduct, but his liability is limited to $15,000. If *C*'s action against *A* were not barred, *C* would be able to recover the full $100,000 against *A*'s insurer, who under the policy had extended permissive user coverage to *A* and would have to pay the entire judgment.

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§39.15 5. Intervenor or Cross-Complainant

When 3 years have passed without the summons being served, the court has no power to permit intervention. *Chambers v Santa Cruz City Sch. Dist.* (1987) 193 CA3d 518, 523, 238 CR 356; *Floyd Neal & Assoc. v Superior Court* (1977) 72 CA3d 734, 140 CR 301. If service is not made within that time, "no further proceedings shall be held in the action." CCP §583.250. A complaint in intervention filed after the 3-year period had run on the initial complaint should be dismissed even though the action had not been dismissed under former CCP §581a before the filing of the complaint in intervention. *Floyd Neal & Assoc. v Superior Court*, *supra*. But an action by an intervenor or cross-complainant that is filed before the plaintiff's 3-year period has run is separate from plaintiff's action and is not put in jeopardy by plaintiff's failure to make service or return service. *Deutschmann v Sears, Roebuck & Co.* (1982) 132 CA3d 912, 183 CR 573.

For discussion of whether an injured employee who fails to timely return summons in a lawsuit against a tortfeasor may then intervene in an action in intervention filed by the employer who did effect a timely service and return, see California Workers' Damages Practice §§3.31, 3.32 (2d ed Cal CEB 2001).

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§39.16 6. Conditions That Toll Period for Service

In computing the 3-year period for service of summons, the time during which any of the following conditions existed must be excluded (CCP §583.240):

- The defendant was not amenable to service;
- Prosecution of the action was stayed, which affected service;
- Validity of service was the subject of litigation by the parties; or
- Service was impossible, impracticable, or futile owing to causes beyond plaintiff's control.

The requirements of CCP §§583.210-583.250 are mandatory and are not subject to extension, excuse, or exception, unless expressly provided for by statute. CCP §583.250(b). In addition to the conditions excusing the time for service listed above, see discussion of statutory exceptions in §§39.19-39.23. For circumstances in which defendant is estopped from moving for dismissal, see §39.24.

The finding required for service by publication under CCP §415.50, that a party cannot with reasonable diligence be served by another method, is not the same as a finding that the "defendant was not amenable to the process of the court" and does not toll the time to bring the case to trial under CCP §583.340. *Watts v Crawford* (1995) 10 C4th 743, 42 CR2d 81 (case dismissed for failure to serve within 3 years when order for publication issued 1 day before expiration of 3-year period).

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§39.17 a. Defendant Not Amenable to Service

- **Death of defendant tolls period for service.** The 3-year period for service of summons is tolled during the period between the death of the defendant and the appointment of a personal representative. Since there is no one to serve, effective service cannot be made until appointment of a personal representative. See, *e.g., Polony v White* (1974) 43 CA3d 44, 117 CR 341 (former CCP §581a tolled).
- **Defendant's absence from state usually does not toll service.** California has many procedures available for serving defendants. See, *e.g.,* CCP §415.20 (leaving copies at home or office and mailing duplicate copies effects service). Thus a defendant hiding from a lawsuit is unlikely to avoid being served with summons.

PRACTICE TIP: Because a defendant's absence from the state may toll the statute of limitations on filing a lawsuit (see CCP §351), it would not usually help a defendant who had been absent during the 3-year period to move for dismissal for failure to serve and return summons. The plaintiff could often merely dismiss the action and refile it.

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§39.18 b. Service Impossible, Impracticable, or Futile

If service is impossible, impracticable, or futile due to causes beyond the plaintiff's control, the time period during which summons must be served may be tolled. CCP §583.240. However, the statute specifically states that failure to discover relevant evidence or facts is *not* a cause beyond the plaintiff's control for this purpose. CCP §583.240(d).

This provision (CCP §583.240(d)) was enacted to repudiate the view developed in former case law (*e.g., Hocharian v Superior Court* (1981) 28 C3d 714, 170 CR 790) holding plaintiff's "reasonable diligence" to be sufficient to toll the period for service of summons. The Law Revision Commission made it clear that the excuse of impossibility, impracticability, or futility should be strictly construed against the plaintiff. See 6 Witkin, California Procedure, *Proceedings Without Trial* §§346-350 (5th ed 2008). See also *Williams v Los Angeles Unified Sch. Dist.* (1994) 23 CA4th 84, 28 CR2d 219 (CCP §583.240(d) exceptions construed strictly against plaintiff).

The 3-year period is not tolled by attorney misconduct. *Shipley v Sugita* (1996) 50 CA4th 320, 57 CR2d 750. In *Shipley*, the plaintiff incorrectly believed that the defendant had been properly served because of his own attorney's false statements. See also *Bishop v Silva* (1991) 234 CA3d 1317, 285 CR 910 (failure to serve summons within 3 years not excused by claim of impossibility on account of its loss by counsel who did not follow "lost summons" procedure).

The existence of nearly identical pending federal and state actions against the same defendant arising out of the same or similar facts does not fall under the impracticability or futility exception. *Valerio v Boise Cascade Corp.* (1986) 177 CA3d 1212, 1219, 223 CR 592 (bringing state action to trial when federal action pending may be difficult, but plaintiff's ability to serve summons not affected). Compare, however, *Deas v Knapp* (1982) 129 CA3d 443, 181 CR 76, which the *Valerio* court both distinguished and criticized.

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C. Statutory Exceptions to Three-Year Period

§39.19 1. Written Stipulation Extends Period

The parties may extend the time within which service must be made if the defendant enters into a written stipulation or does another act (see §39.21) that constitutes a general appearance. CCP §583.220.

The stipulation extending the time within which service must be made need not be filed with the court. CCP §583.230(a). However, a stipulation not filed must be brought to the attention of the court if relevant to a motion for dismissal. CCP §583.230(a).

A letter from the defendant's insurance carrier to the plaintiff's attorney, confirming an oral agreement giving defendant an open extension of time to plead, was a sufficient written stipulation to preclude dismissal under former CCP §581a. *Knapp v Superior Court* (1978) 79 CA3d 799, 145 CR 154. But see *Woodruff v McDonald's Restaurants* (1977) 75 CA3d 655, 142 CR 367, requiring the stipulation to be between attorneys. On oral stipulations, see §39.20.

PRACTICE TIP: It is good practice for counsel to draft the stipulation expressly either to extend the time for service and return of summons or to waive the defendant's right to dismiss.

A stipulation extending the time within which service must be made is not a general appearance; nor is it a motion to dismiss. CCP §583.220(b). See *Dresser v Superior Court* (1964) 231 CA2d 68, 78, 41 CR 473. For discussion of what constitutes a general appearance and what does not, see §§39.22-39.23.

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§39.20 2. Oral Stipulation in Court Extends Period

The parties may extend the period of service by oral agreement made in open court, if entered in the minutes of the court or a transcript is made. CCP §583.230(b).

PRACTICE TIP: Failure to comply with CCP §583.230 for an extension of time for service may not be fatal to the plaintiff's claim. Because CCP §583.140 provides that nothing within the involuntary dismissal statutes affects the principles of waiver and estoppel, if the requirements for an oral or written stipulation are not met but an agreement to extend the period of service existed, a plaintiff may be able to extend the period for service by arguing that the defendant is estopped from moving to dismiss the action under CCP §583.140.

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§39.21 3. Defendant's General Appearance

The appearance by the defendant is equivalent to a valid service and return of summons. CCP §583.220. Therefore, there are no grounds for dismissal if a defendant has made a general appearance within the 3-year period. See §§39.22-39.23 on what constitutes a general appearance and what does not. Further, if the defendant makes a general appearance by filing an answer within 3 years and 60 days after the complaint was filed, the plaintiff is relieved from the need to file return of service of summons within that period. *Wong v Armstrong World Indus.* (1991) 232 CA3d 1032, 1034, 283 CR 870 (definition of "service" in CCP §583.110 read into CCP §583.220 to block dismissal under CCP §583.250).

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§39.22 a. Matters Constituting General Appearance

The following actions constitute a general appearance:

- Motion to strike the pleadings (CCP §1014; but see CCP §418.10(e)(1) (no general appearance until after entry of order denying motion under §418.10));
- Demurrer (CCP §1014; but see CCP §418.10(e)(1));
- Answer (CCP §1014; but see CCP §418.10(e)(1));
- Acknowledgment of service (*General Ins. Co. v Superior Court* (1975) 15 C3d 449, 124 CR 745);
- Notice of a motion to transfer under CCP §396b (CCP §1014);
- Motion for reclassification under CCP §403.040 (CCP §1014);
- The defendant's written notice of appearance to the plaintiff (CCP §1014);
- The attorney's notice of appearance for the defendant (CCP §1014); and
- Written stipulation between attorneys acknowledging jurisdiction (*General Ins. Co. v Superior Court, supra* (stipulation entered into before expiration of 3-year period)).

A defendant also makes a general appearance by conduct indicating an intent to submit to the court's jurisdiction. *General Ins. Co. v Superior Court, supra.* See *Chitwood v Superior Court* (1971) 14 CA3d 522, 92 CR 441 (general appearance found when defendant answered interrogatories). But see *Semole v Sansoucie* (1972) 28 CA3d 714, 104 CR 897 (no general appearance even though plaintiff served interrogatories on both corporation and one of its employees).

NOTE: Answers to interrogatories filed by an employee do not constitute a general appearance by that employee in his or her individual capacity.

A signed, unfiled stipulation extending the time for the defendant "to appear" indefinitely, subject to termination on 10 days' written notice has been held to be an agreement to appear as well as a general appearance that prevents dismissal. *RCA Corp. v Superior Court* (1975) 47 CA3d 1007, 121 CR 441. A written stipulation merely extending the time for service, however, is not a general appearance. See §39.23.

PRACTICE TIP: An extension of time "to answer" is probably a general appearance in that it could be considered an agreement to answer within the meaning of *General Ins. Co. v Superior Court, supra,* because it evidences an intent to submit to the court's jurisdiction. However, an extension of time "to plead" or "to answer or otherwise plead" is not a general appearance. See discussion in §39.23.

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§39.23 b. Matters Not Constituting General Appearance

The following events do not constitute a general appearance:

- Stipulation extending the period of service (CCP §583.220(a));
- Motion to dismiss for delay in prosecution, whether or not joined with a motion to quash or a motion to set aside a default judgment (CCP §583.220(b));
- Motion to quash service (CCP §418.10; see also CCP §418.10(e)(1) (answer, demurrer, or motion to strike, when made simultaneously with §418.10 motion, does not constitute general appearance until entry of order denying §418.10 motion));
- Extension of time "to plead" (*Blank v Kirwan* (1985) 39 C3d 311, 333, 216 CR 718 (defendant's purpose may be to obtain adequate time to determine whether to submit or to object to court's jurisdiction; see also *Owen v Niagara Mach. & Tool Works* (1977) 68 CA3d 566, 137 CR 378));
- Extension of time to plead following a motion to dismiss for delay in prosecution (CCP §583.220(c); *Palmer v Superior Court* (1961) 192 CA2d 302, 13 CR 301);
- Extension of time to obtain representation (*Busching v Superior Court* (1974) 12 C3d 44, 115 CR 241);
- Appearance as a witness in a deposition or court proceeding (*Slaybaugh v Superior Court* (1977) 70 CA3d 216, 224, 138 CR 628);
- Answering in a representative capacity (*Semole v Sansoucie* (1972) 28 CA3d 714, 722, 104 CR 897); and
- Answering a complaint in intervention (*Duckett v Superior Court* (1989) 207 CA3d 1419, 255 CR 733 (complaint in intervention is action distinct from complaint; no general appearance by defendant's answer to complaint in intervention)).

Nor does a general appearance in response to a cross-complaint constitute a general appearance with respect to the complaint within the meaning of former CCP §581a. *Botsford v Pascoe* (1979) 94 CA3d 62, 156 CR 177 (35 months after complaint filed, plaintiff served additional defendants who, until then, had appeared only as cross-defendants; plaintiff failed to make timely return of summons; new defendants successfully moved to dismiss complaint in regard to them).

PRACTICE TIP: Counsel for a codefendant who has not yet appeared should be cautious about how he or she participates in the action. An attorney present solely as an observer in court *without participating in the proceedings* has not made a general appearance on behalf of a codefendant. Also, a codefendant who voluntarily executes a declaration in support of another defendant's motion to change venue *but does not join in the motion* has not made a general appearance. *Slaybaugh v Superior Court* (1977) 70 CA3d 216, 138 CR 628 (declaration simply testimony regarding knowledge of residence).

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§39.24 D. When Defendant Is Estopped From Dismissal

If the defendant induces the plaintiff to delay the return of summons, the period of the delay is not included in determining whether the 3-year requirement for service of summons has been met. *Tresway Aero, Inc. v Superior Court* (1971) 5 C3d 431, 96 CR 571.

The statute specifically provides that none of the statutes governing dismissal for delay in prosecution affects the principles of waiver and estoppel. CCP §583.140. A defendant may be estopped from seeking dismissal if the defendant:

- Makes a misrepresentation to a plaintiff unrepresented by counsel regarding the action, which causes plaintiff to delay (*Flamer v Superior Court* (1968) 266 CA2d 907, 72 CR 561);
- Stipulates in open court to extend the period in which to serve (*Woley v Turkus* (1958) 51 C2d 402, 334 P2d 12); or
- Induces the plaintiff to delay service, or to overlook errors in service, if plaintiff's reliance is reasonable (*Tresway Aero, Inc. v Superior Court* (1971) 5 C3d 431, 439, 96 CR 571; *Lesko v Superior Court* (1982) 127 CA3d 476, 179 CR 595; *Regus v Schartkoff* (1957) 156 CA2d 382, 386, 319 P2d 721).

PRACTICE TIP: A plaintiff's attorney engaged in settlement negotiations may protect the plaintiff by serving summons within the required period anyway, or by obtaining defendant's written stipulation to extend time to serve until after negotiations are terminated.

A person who does nothing to mislead a plaintiff (who is proceeding against a similarly named defendant) is not estopped from invoking CCP §583.210 when substituted for a "Doe" and served more than 3 years after suit was filed. *Brookview Condominium Owners' Ass'n v Heltzer Enters.* (1990) 218 CA3d 502, 510, 267 CR 76.

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IV. FAILURE TO BRING ACTION TO TRIAL WITHIN FIVE YEARS: MANDATORY DISMISSAL

§39.25 A. When Available

An action must be brought to trial within 5 years after it is commenced. CCP §583.310. Failure to proceed to trial requires dismissal by the court on its own motion or motion by any party. CCP §583.360. Dismissal is mandatory and is not subject to extension, excuse, or exception, except as expressly provided by statute. CCP §583.360.

If an answer admits all the allegations stated in the complaint, the defendant is not entitled to seek mandatory dismissal under the 5-year statute. *Smithers v Ederer* (1956) 146 CA2d 227, 303 P2d 771; *Martin v Gibson* (1941) 48 CA2d 449, 119 P2d 1012. By admitting all of a plaintiff's allegations, a defendant is agreeing there is no need for a trial. Consequently, the legislature did not intend to "compel a dismissal where there would be no trial, the object being to expedite the administration of justice in the matter of the trial of any issues of fact." 48 CA2d at 451.

Likewise, when the case is submitted on an agreed statement of facts, there is no mandatory dismissal under the statute. *Ryerson v Riverside Cement Co.* (1968) 266 CA2d 789, 72 CR 595. The statute is satisfied when issues of law leading to final determination of the action have been submitted before the 5-year period expires even though technically the action has not been brought to trial. *Berri v Superior Court* (1955) 43 C2d 856, 279 P2d 8.

In an action by property owners over construction of a subway, a private judge, appointed to try the matter under a stipulation of the parties, had jurisdiction to toll the 5-year statute of CCP §583.310, and a commissioner in the eminent domain department of superior court who retained jurisdiction over "discovery and other pretrial matters" was without jurisdiction to dismiss the action for failure to bring the case to trial within 5 years. *Health Indus. of Am., Inc. v Los Angeles County Metro. Transp. Auth.* (2002) 102 CA4th 1372, 1376, 126 CR2d 294.

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§39.26 1. When Action "Commenced"

The 5-year period for bringing an action to trial begins when plaintiff files the complaint. *Gray v Firthe* (1987) 194 CA3d 202, 239 CR 389. For a cross-complaint, the period begins when the cross-complaint is filed. See *Tomales Bay Oyster Corp. v Superior Court* (1950) 35 C2d 389, 217 P2d 968 (treated as independent action).

When a non-Doe defendant is added by amended complaint, the 5-year period commences on filing of the amendment, but for "Doe" defendants, the period begins with the original complaint. *Gray v Firthe, supra.*

The 5-year period is *not* extended for either an amended complaint or a complaint in intervention that asserts the same cause of action as the original complaint. *Bosworth v Superior Court* (1956) 143 CA2d 775, 300 P2d 155; *Douglas v Superior Court* (1949) 94 CA2d 395, 210 P2d 853. See *Bright v American Termite Control Co.* (1990) 220 CA3d 1464, 269 CR 793 (intervenor's complaint dismissed 5 years after original complaint filed; causes of action "essentially the same").

If an amended complaint alleges a new cause of action based on different operative facts, the action is considered commenced on the date the amended complaint was filed. *Brumley v FDCC Cal., Inc.* (2007) 156 CA4th 312, 67 CR3d 292.

Trial in an action has commenced within 5 years when trial on at least some of the claims begins before the 5-year period expires. See *Marriage of MacFarlane & Lane* (1992) 8 CA4th 247, 254, 10 CR2d 157 (trial in marital dissolution had commenced within 5-year period because court conducted partial trial on contested factual issues within 5-year period and reserved jurisdiction over related issues following judgment of dissolution); *Patapoff v City of Los Angeles* (1959) 171 CA2d 635, 644, 342 P2d 428 (statute satisfied when one of two consolidated actions began trial within 5-year period). However, when bifurcated matters do not involve interrelated claims, trial of one claim within the 5-year period is not "commencement of trial" within 5 years with respect to other, separate claims. *Sagi Plumbing v Chartered Constr. Corp.* (2004) 123 CA4th 443, 19 CR3d 835 (in consolidated action for breach of three separate contracts, bifurcated trial on one contract did not constitute commencement of trial within 5 years for remaining causes of action).

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§39.27 2. When Action "Brought to Trial"

An action must be "brought to trial" within 5 years after commencement of the suit against that defendant or it is subject to dismissal. CCP §583.310. Generally, any pretrial motion within the 5-year period resulting in a final judgment (*e.g.,* a motion for judgment on the pleadings disposing of all causes of action) is considered to have been a trial if that judgment is later reversed. See §§39.28-39.34 for case law on whether, and under what circumstances, an action has been "brought to trial." See §39.5 on local rules implementing the Trial Court Delay Reduction Act that may provide for earlier dismissal.

In determining whether an action has been brought to trial, "[t]he essential thing is that the action be brought to a stage where final disposition is to be made of it." *Berri v Superior Court* (1955) 43 C2d 856, 859, 279 P2d 8. The trial need not be completed, but it must have *begun* within the 5-year period, *e.g.,* by having one witness sworn and then continuing the case. *City of Los Angeles v Superior Court* (1940) 15 C2d 16, 98 P2d 207. Merely setting the action for trial is not sufficient. *Stuart v Hollywood Turf Club* (1956) 146 CA2d 261, 303 P2d 897.

For purposes of former CCP §583(b), taking testimony and entering judgment under CCP §594 (absence of adverse party) constitutes bringing the matter to trial. *Briley v Sukoff* (1979) 98 CA3d 405, 159 CR 452 (defendants answered but failed to appear for trial). This is so even if the judgment is later set aside because of accident or surprise under CCP §657.

NOTE: In an action against several defendants, the action must have been brought to trial against the defendant moving for dismissal. *Fanain Corp. v Superior Court* (1974) 36 CA3d 745, 751, 111 CR 920.

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§39.28 a. When Jury Impaneled

An action is brought to trial when the jury is impaneled. *Hartman v Santamarina* (1982) 30 C3d 762, 180 CR 337; *Kadota v City & County of San Francisco* (1958) 166 CA2d 194, 333 P2d 75. An action is also brought to trial in a jury case "when the parties commence the examination of prospective jurors." 166 CA2d at 195. It is not necessary that the jury have been selected and sworn. Thus, the 5-year requirement is satisfied as soon as voir dire examination begins. *Hilliard v A.H. Robins Co.* (1983) 148 CA3d 374, 390, 196 CR 117.

In a nonjury trial, the action is brought to trial when the first witness is sworn. *Hartman v Santamarina* (1982) 30 C3d 762, 180 CR 337. However, if defendant does something to prevent plaintiff from calling the first witness, the trial is still considered commenced. *Clements v Ragghianti* (1957) 155 CA2d 188, 317 P2d 706 (defendant moved for nonsuit and while court had motion under submission, the 5-year period expired; dismissal was reversible error). It is common for the parties to call the court's attention to the approaching deadline, have one witness sworn, and then continue the hearing to a mutually convenient time for the court and parties. *Hartman,* 30 C3d at 765.

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§39.29 b. Motions in Limine

A motion in limine does not qualify as having brought an action to trial within the meaning of CCP §583.310 unless the judge's ruling on that motion constitutes a final determination of the case. *Hendrix v Hendrix* (1985) 171 CA3d 859, 217 CR 609 (motion in limine involved question of law or fact not raised by pleadings; plaintiff removed case from civil active list to amend complaint rather than proceed to trial on existing complaint).

The *Hendrix* court, quoting *Nelson v Specialty Records, Inc.* (1970) 11 CA3d 126, 140, 89 CR 540, stated (171 CA3d at 863):

> An issue of law as to pleadings raised on the date of trial before a court sitting without a jury may be construed as having brought the case to trial if the ruling constitutes a final determination of a case, *but otherwise …* the action of [the] court does not constitute a final disposition [emphasis added].

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§39.30 c. Summary Judgment Motions

The granting of a motion for summary judgment is considered a trial when there is a determination of an issue of law or fact that results in a final disposition of the entire case. *King v State* (1970) 11 CA3d 307, 310, 89 CR 715. See also *Lemaire, Faunce & Katznelson v Cox* (1985) 171 CA3d 297, 217 CR 281; *Southern Pac. Co. v Seabound Mills* (1962) 207 CA2d 97, 24 CR 236.

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§39.31 d. Binding Arbitrations

When parties submit to binding judicial arbitration and waive their right to a trial de novo, a trial occurs within the meaning of former CCP §583(b). *Dodd v Ford* (1984) 153 CA3d 426, 200 CR 256 (written stipulation of parties to submit to binding arbitration). Nonbinding arbitration does, however, toll the 5-year statutory period if the action is still submitted to arbitration more than 4 years and 6 months after the complaint was filed. CCP §1141.17(b). See §39.57.

In an action that has been stayed pending contractual arbitration proceedings, the 5-year period is tolled under CCP §583.340(b). See §39.40.

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§39.32 e. Demurrers

A judgment of dismissal following the granting of a demurrer without leave to amend is a determination of the issues of law raised by the demurrer and constitutes a trial within the meaning of CCP §583.310. A demurrer also results in final disposition of the case for purposes of the dismissal statutes when the demurrer is granted with leave to amend and plaintiff fails to amend within the allotted time. See *McDonough Power Equip. Co. v Superior Court* (1972) 8 C3d 527, 105 CR 330 (not mere sustaining of demurrer, but entry of judgment acts as final disposition, disposing of case). See also *Berri v Superior Court* (1955) 43 C2d 856, 858, 279 P2d 8.

A hearing on a demurrer to a complaint does not constitute a trial when there is no final disposition of the entire case. See *California Ammonia Co. v Macco Corp.* (1969) 270 CA2d 429, 432, 75 CR 753. Because no trial has occurred, the action is subject to dismissal under CCP §583.310.

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§39.33 f. Hearings to Enter Default Judgments

A hearing to enter a default judgment is not considered a trial for purposes of satisfying the 5-year statute for bringing an action to trial under CCP §583.310. *Misic v Segars* (1995) 37 CA4th 1149, 44 CR2d 100. Nor does a hearing on a motion to set aside a default judgment constitute a trial under former CCP 583(b). *Meier v Superior Court* (1942) 55 CA2d 675, 131 P2d 554. See §39.44 on tolling of 5-year statute during period when defendant is in default.

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§39.34 g. Preliminary Injunctions

An application for a preliminary injunction is not considered a trial for purposes of satisfying the statute that an action be brought to trial within 5 years (CCP §583.310). *Superior Oil Co. v Superior Court* (1936) 6 C2d 113, 56 P2d 950.

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/§39.35 B. Statutory Extensions, Excuses, and Exceptions

§39.35 B. Statutory Extensions, Excuses, and Exceptions

Dismissal under CCP §583.360 is mandatory and not subject to extension, excuse, or exception unless expressly provided by statute.

The exceptions that do allow extensions, excuses, and exceptions are listed below:

- Written stipulation to extend the time in which an action must be brought to trial (CCP §583.330(a); see §39.36);
- Oral agreement made in open court to extend time of trial, if entered in the minutes of the court or a transcript is made (CCP §583.330(b); see §39.39);
- Court's jurisdiction to try action is suspended, or prosecution or trial of the action is stayed or enjoined, *e.g.,* because of appeal, writ, arbitration (CCP §583.340(a)-(b); see §§39.40-39.45);
- Bringing action to trial is impossible, impracticable, or futile (CCP §583.340(c); see §§39.46-39.57).

If fewer than 6 months remain to bring the action to trial at the end of a statutory period of tolling or extension, the action may not be dismissed if it is brought to trial within 6 months after that period has ended. CCP §583.350; *Him v Superior Court* (1986) 184 CA3d 35, 228 CR 839. But see *Waxman v Boren, Elperin, Howard & Sloan* (1990) 221 CA3d 519, 270 CR 540 (cross-complainants who have given, then rescinded, an open-ended extension of time to answer and had not acted diligently to bring case to trial not entitled to 6-month grace period).

On tolling the period for bringing an action to trial when the plaintiff or defendant is on active duty in the military service, see 50 USC App §525 (Servicemembers Civil Relief Act of 2005); *Buttler v City of Los Angeles* (1984) 153 CA3d 520, 200 CR 372 (service member, or any plaintiff, may apply under 50 USC App §521 for stay of entire action if going forward without service member would adversely affect that party's rights). On tolling for judicial arbitration, see §§39.58-39.59. On waiver and estoppel, see §§39.60-39.62.

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§39.36 1. Written Stipulation

The 5-year period within which an action must be brought to trial may be extended by parties' written stipulation. CCP §583.330(a). The stipulation need not be filed with the court but must be brought to the court's attention if relevant to a motion for dismissal. Counsel should check for local rules (particularly those to reduce trial delay) affecting the parties' right to stipulate to a later trial date.

A defense attorney's presence at a pretrial or trial-setting conference at which a trial date is set beyond the 5-year period is not a waiver of or substitution for the written stipulation requirement under former CCP §583(b). See *Taylor v Shultz* (1978) 78 CA3d 192, 144 CR 114.

A stipulation entered into after the 5-year period, *e.g.,* extending the time for trial to a certain date, is enforceable. *Estate of Thatcher* (1953) 120 CA2d 811, 262 P2d 337. However, such a stipulation does not constitute a permanent waiver of the right to dismiss, and the action is subject to dismissal if not brought to trial on the date originally set. *Fisher v Superior Court* (1958) 157 CA2d 126, 131, 320 P2d 894.

Extending the time of trial to a date within the 5 years does not toll the 5-year period, absent a contrary intent. *J.C. Penney Co. v Superior Court* (1959) 52 C2d 666, 669, 343 P2d 919.

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§39.37 a. Drafting Stipulation

A written stipulation is effective if it expressly extends the date of trial to a date beyond the 5-year period (*General Ins. Co. v Superior Court* (1975) 15 C3d 449, 124 CR 745; *Anderson v Erwyn* (1966) 247 CA2d 503, 507, 55 CR 634) or expressly waives the right to dismiss (*Bank of America v Superior Court* (1937) 22 CA2d 450, 71 P2d 296).

PRACTICE TIP: Counsel should draft the stipulation carefully. A stipulation that the trial date "be reset for some convenient date" is not sufficient to extend the 5-year period. *Hastings v Superior Court* (1955) 131 CA2d 255, 258, 280 P2d 74.

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§39.38 b. Effect of Agreement Extending Time to Answer

Courts have held that a written agreement to an open extension of the time to answer evidences a mutual intent to defer the action and must be enforced. The agreement is the equivalent of a stipulation extending the 5-year period indefinitely. *Wheeler v Payless Super Drug Stores, Inc.* (1987) 193 CA3d 1292, 238 CR 885. The *Wheeler* court stated (193 CA3d at 1302):

> When the written agreement precludes plaintiff from taking a default judgment prior to expiration of the five-year period, the defendant may not rely on plaintiff's failure to take default to obtain dismissal of the action.

In one case, the parties had stipulated to an open-ended extension of the time to plead subject to termination on notice. Before the 5-year period had expired, the plaintiff gave the defendant notice to answer the complaint. No answer was filed, and after expiration of the statutory period, a motion to dismiss was made. The court held that both the parties' written stipulation and the defendant's conduct waived the diligence normally required of plaintiffs under former CCP §583(b), thus tolling the statutory period and barring dismissal. *Farrar, Herrick & Assoc. v Safecare Co.* (1981) 115 CA3d 123, 171 CR 191. See also *Meraia v McCann* (1978) 83 CA3d 239, 147 CR 756.

No tolling occurs, however, when an open extension of time to answer is terminated by the defendant's answer before the expiration of the statutory period under circumstances that do not preclude the plaintiff from bringing the case to trial within the statutory period. See *Gentry v Nielsen* (1981) 123 CA3d 27, 31, 176 CR 385.

Failure to bring the action to trial within a reasonable time after an open-ended stipulation to answer has extended the statutory period can result in a dismissal notwithstanding a defendant's waiver. *Chapin v Superior Court* (1965) 234 CA2d 571, 44 CR 496 (trial date to be set for a time convenient to all parties subject to implied condition of reasonableness). On the plaintiff's diligence requirement, see §39.48.

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§39.39 2. Oral Agreement in Court

If the stipulation is oral, it must be made in open court and either entered in the minutes or taken down by the court reporter. CCP §583.330(b). See *Wright v Groom Trucking Co.* (1962) 206 CA2d 485, 24 CR 80; *Govea v Superior Court* (1938) 26 CA2d 27, 78 P2d 433.

PRACTICE TIP: An informal oral agreement not meeting the requirements of CCP §583.330(b) might still provide a basis for the plaintiff to argue that the defendant waived the statutory requirement and is thus estopped from moving for dismissal. See discussion in §§39.60-39.62.

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§39.40 3. Court's Jurisdiction Suspended

The time during which the court's jurisdiction is suspended, or when the prosecution or trial of the action is stayed or enjoined, is not included in computing the 5-year period for bringing the action to trial. CCP §583.340. The statutory period is extended for the length of time the court was divested of jurisdiction. CCP §583.340. See *Spanair S.A. v McDonnell Douglas Corp.* (2009) 172 CA4th 348, 90 CR3d 864 (jurisdiction suspended from removal to district court until district court mailed certified copy of remand order to superior court); *Brock v Kaiser Found. Hosp.* (1992) 10 CA4th 1790, 13 CR2d 678 (petition to compel arbitration and stay action; time when action is stayed is excluded under CCP §583.340(b)). But see *Wheeler v City of Santa Monica* (1990) 219 CA3d 1554, 269 CR 175 (court's jurisdiction not suspended when superior court's failure to assume jurisdiction resulted from plaintiff's failure to pay fee required to transfer case). Examples of situations in which the trial court's jurisdiction is suspended follow in §§39.41-39.45.

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§39.41 a. Appeal Pending

The 5-year period is tolled during the time in which the matter is on appeal, commencing with the filing of the appeal. *Bergin v Portman* (1983) 141 CA3d 23, 25, 190 CR 81.

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§39.42 b. Writ Pending

The 5-year period is tolled during the period a writ is pending for an appellate court to review whether a settlement is in "good faith" under CCP §877.6(c). CCP §877.6(e). For discussion of procedures required under CCP §877.6, see chap 50.

The 5-year period is also tolled during the period a writ is pending for an appellate court to review a denial of a motion for summary judgment. See *Perez v Grajales* (2008) 169 CA4th 580, 593, 86 CR3d 784. See also, *e.g., Christin v Superior Court* (1937) 9 C2d 526, 71 P2d 205 (writ of prohibition staying proceedings during review of pretrial matters).

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§39.43 c. Automatic Stay in Bankruptcy Proceedings

As long as an automatic stay of all actions by creditors is in effect, the time in which a defendant is in bankruptcy proceedings under Chapter 11 (11 USC §§1101-1174) suspends the court's jurisdiction and tolls the statutory 5-year period for bringing the action to trial. *Hughes v Portsmouth Square, Inc.* (1982) 135 CA3d 170, 184 CR 926. See also *Lane v Newport Bldg. Corp.* (1986) 176 CA3d 870, 222 CR 443 (court's jurisdiction not suspended in respect to other defendants who are not in bankruptcy). See also form in §5.58 (Notice of Stay of Proceedings (Judicial Council Form CM-180)).

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§39.44 d. Defendant in Default

The period during which a defendant is in default, including the period during which the default judgment is in effect, is excluded from the 5-year period. *Ford v Superior Court* (1973) 34 CA3d 338, 343, 109 CR 844 (period between entry of default judgment and issuance of remittitur not included in applying 2-year and 5-year diligent prosecution provisions of former statute). For discussion of default generally, see chap 38.

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§39.45 e. Period Between Party's Death and Appointment of Personal Representative

The time period between the date of either plaintiff's or defendant's death and the subsequent appointment of a personal representative is excluded from the calculation of the 5-year period. *Pham v Wagner Litho Mach. Co.* (1985) 172 CA3d 966, 972, 218 CR 476 (tolling provision applies whenever a trial court lacks jurisdiction to proceed).

The *Pham* court noted that the impossibility excuse (see §39.46) was also applicable because after plaintiff's death any proceedings taken in the absence of her personal representative would have been void. 172 CA3d at 973 n11. See also *Herring v Peterson* (1981) 116 CA3d 608, 172 CR 240 (counsel's authority expired with defendant's death; personal representative of estate can hire other counsel).

NOTE: There appears to be no time limitation on how long the 5-year statute will be tolled. 116 CA3d at 615. The *Herring* court found that the statutory period was extended indefinitely as long as the court lacked jurisdiction; in that case, jurisdiction was not restored for 7 years, and while that 7-year delay violated the former CCP §583, the court observed that statute itself did not set a time limitation on the tolling period. But see *Pham v Wagner Litho Mach. Co., supra,* suggesting that the statute was tolled only for the period of "temporary impracticability" during the time reasonably consumed in search of decedent's heirs.

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§39.46 4. Impossibility, Impracticability, or Futility

The 5-year statutory period is tolled whenever it is impossible, impracticable, or futile to bring the action to trial. CCP §583.340(c). The impossible, impracticable, or futile exception to the 5-year period, developed by case law, was codified in 1984 in CCP §583.340(c) (Comment to CCP §583.340); thus, older decisions are often still viable under the present statute.

Plaintiff must show a causal connection between the circumstances of impossibility, impracticability or futility and bringing the case to trial. *Sierra-Nevada Mem.-Miners Hosp., Inc. v Superior Court* (1990) 217 CA3d 464, 473, 266 CR 50. See *Tamburina v Combined Ins. Co. of Am.* (2007) 147 CA4th 323, 333, 54 CR3d 175 (unusually long illness deprived plaintiff and counsel of substantial portion of 5-year period). Plaintiff must also show reasonable diligence in bringing the case to trial. *De Santiago v D & G Plumbing, Inc.* (2007) 155 CA4th 365, 372, 65 CR3d 882.

Courts are to interpret CCP §583.340(c) liberally to promote the policy that favors trial on the merits. Comment to CCP §583.340. The period is tolled for the duration of the excuse without regard to the remaining time following the removal of the disability. Comment to CCP §583.340. For example, the tolling of the 5-year period includes court-ordered trial continuances because of courtroom unavailability. *Chin v Meier* (1991) 235 CA3d 1473, 1 CR2d 499; *Rose v Scott* (1991) 233 CA3d 537, 284 CR 487 (time also tolled during periods case was continued on defendant's motions).

In *De Santiago,* 155 CA4th at 375, the Fourth District Court of Appeal rejected the holding of *Chin* that court-ordered continuances automatically toll the 5-year period, and held that a court must consider reasonable diligence in determining impracticability.

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/§39.47 a. Burden on Plaintiff to Prove Excuse

§39.47 a. Burden on Plaintiff to Prove Excuse

The plaintiff has the burden of demonstrating by clear and convincing evidence that (*Lane v Newport Bldg. Corp.* (1986) 176 CA3d 870, 873, 222 CR 443):

> the existence of either impossibility, impracticability or futility of bringing the matter to trial within five years. Absent such a showing, the five-year statute applies without any further consideration or determination of prejudice.

See also *Hoffman v State* (1985) 171 CA3d 1100, 1108, 217 CR 867; *Central Mut. Ins. Co. v Executive Motor Home Sales, Inc.* (1983) 143 CA3d 791, 796, 192 CR 169.

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§39.48 (1) Excuse Conditional on Plaintiff's Diligence

As a condition to being excused from the 5-year requirement, the plaintiff must have exercised reasonable diligence in prosecuting the action. *Moran v Superior Court* (1983) 35 C3d 229, 197 CR 546. An assessment of the plaintiff's diligence requires an examination of all the circumstances present throughout the 5-year period. *Cannon v City of Novato* (1985) 167 CA3d 216, 223, 213 CR 132; *Bennett v Bennett Cement Contractors, Inc.* (1981) 125 CA3d 673, 178 CR 633.

The existence of impracticability is determined in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. The critical factor in applying the exception to a given factual situation is whether the plaintiff exercises reasonable diligence in prosecuting his or her case. *Him v Superior Court* (1986) 184 CA3d 35, 39, 228 CR 839, citing from *Moran v Superior Court* (1983) 35 C3d 229, 238, 197 CR 546. But see *Lazelle v Lovelady* (1985) 171 CA3d 34, 40, 217 CR 145 (5-year statute tolled for 69 days while courtroom unavailable in spite of plaintiff's "questionable diligence" earlier in case).

NOTE: An attorney's inexcusable neglect is generally chargeable to the client, except in those extreme instances in which the neglect amounts to positive misconduct that effectively obliterates the existence of the attorney-client relationship. *Baccus v Superior Court* (1989) 207 CA3d 1526, 255 CR 781 (delay in prosecution alone does not constitute abandonment or positive misconduct sufficient to excuse compliance with 5-year statute (CCP §583.310)).

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§39.49 (2) Plaintiff's Duty to Inform Court of Statutory Deadline; Motion for Trial Preference

As expiration of the 5-year period approaches, the plaintiff must be especially diligent in informing the court of when trial should be set. *Hoffman v State* (1985) 171 CA3d 1100, 1107, 217 CR 867 (proximity of end of 5-year period charges plaintiff with constant vigilance).

Many cases support the rule that plaintiff has the burden of calling the court's attention to the necessity of setting the trial date within the period fixed by CCP §583.310. See, *e.g., Baccus v Superior Court* (1989) 207 CA3d 1526, 1535, 255 CR 781; *Hill v Bingham* (1986) 181 CA3d 1, 225 CR 905; *Cannon v City of Novato* (1985) 167 CA3d 216, 213 CR 132.

A plaintiff cannot avoid dismissal by acquiescing to a trial date beyond the 5-year period. Reliance on an improper date set by the court clerk or miscalculation of the time, or inadvertence in selecting a trial date, are not considered excusable. *Sizemore v Tri-City Lincoln Mercury, Inc.* (1987) 190 CA3d 84, 89, 235 CR 243. See *Wilcox v Ford* (1988) 206 CA3d 1170, 1175, 254 CR 138 (plaintiff not permitted to shift blame to defendant for lack of diligence); *Taylor v Hayes* (1987) 199 CA3d 1407, 1410, 245 CR 613 (duty to keep track of pertinent dates crucial to maintenance of lawsuit).

PRACTICE TIP: The best way a plaintiff can satisfy the duty to inform the court that the 5-year statute is nearing expiration is by making a motion for preference under CCP §36(e). See chap 42. Some courts have stated that under most circumstances it would be an abuse of discretion to deny a defendant's motion to dismiss if the plaintiff had not made a motion under former Cal Rules of Ct 225 (now see Cal Rules of Ct 3.1335) (motion to advance or specially set case for trial). See, *e.g., Westinghouse Elec. Corp. v Superior Court* (1983) 143 CA3d 95, 191 CR 549; *State v Superior Court (Garner)* (1979) 98 CA3d 643, 159 CR 650.

Alternatively, the plaintiff may use the technicality of having the action "brought to trial" approved in *Hartman v Santamarina* (1982) 30 C3d 762, 180 CR 337 (see §39.27); that is, call the court's attention to the situation, request that one witness be sworn, and then move for a continuance to a later date. See also *Central Mut. Ins. Co. v Executive Motor Home Sales, Inc.* (1983) 143 CA3d 791, 795, 192 CR 169. For discussion of when an action is "brought to trial" for purposes of the 5-year statute (CCP §583.310), see §§39.27-39.34.

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§39.50 b. Court Not Under Mandatory Duty to Set Case Within Five-Year Period

A trial court is not under a mandatory duty to specially set a preferential trial date, even if the 5-year deadline is approaching. *Salas v Sears, Roebuck & Co.* (1986) 42 C3d 342, 228 CR 504. The considerations involved in ruling on a plaintiff's motion for trial preference under CCP §36(e) (see chap 42) are the same as those on a defendant's motion for discretionary dismissal under CCP §583.410-583.430. 42 C3d at 347. See *Biondi, Flemming & Gonzales v Braham* (1990) 218 CA3d 842, 847, 267 CR 365 (cross-complainant's motion for preferential setting should not have been denied when cross-complainant diligently filed at-issue memorandums; court should consider criteria listed in Cal Rules of Ct 3.1342(e) in deciding motion under CCP §36(e)). The trial court must look at the total picture, the 5-year limitation being an important, but not the sole, consideration; rather, all factors must be weighed, including:

- Plaintiff's diligence or dilatory action;
- Prejudice to defendant from delay;
- Condition of the court calendar;
- Rights of other litigants; and
- Likelihood of mandatory dismissal if an early trial date is not set.

See also *Wilson v Sunshine Meat & Liquor Co.* (1983) 34 C3d 554, 194 CR 773; *Nye v 20th Century Ins. Co.* (1990) 225 CA3d 1041, 275 CR 319 (no special setting for plaintiff whose counsel let two and a half years pass without acting and asked for special setting only 41 days before 5-year period expired; no need to show that defendant was prejudiced); *Parlen v Golden State Sanwa Bank* (1987) 194 CA3d 906, 240 CR 73.

NOTE: A trial court may not cite "court congestion" as the sole ground for refusing to specially set a case for trial. *Dick v Superior Court* (1986) 185 CA3d 1159, 230 CR 297 (trial court abused discretion, plaintiff diligent in prosecuting case; ample days remained in 5-year period to try case); *Goers v Superior Court* (1976) 57 CA3d 72, 74, 129 CR 29.

On duty to reset after timely request for trial de novo following mandatory arbitration, see *Moran v Superior Court* (1983) 35 C3d 229, 197 CR 546; §39.58.

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c. Examples of Impossibility, Impracticability, or Futility

§39.51 (1) Motion to Disqualify Judge (CCP §170.6)

The time that elapses while a party disqualifies a trial judge under CCP §170.6 is not included when calculating the 5-year period for bringing an action to trial. *Nail v Osterholm* (1970) 13 CA3d 682, 686, 91 CR 908 (trial awaiting assignment of another judge). In one case, however, a cause was assigned to a trial judge whom defendants disqualified under CCP §170.6, then assigned to another judge whom the plaintiff disqualified. The court held that the period a trial is in abeyance pending the assignment of another judge is to be disregarded when considering a motion to dismiss under former CCP §583(b). *Breacher v Breacher* (1983) 141 CA3d 89, 91, 190 CR 112.

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§39.52 (2) Counsel's Illness or Death

The 5-year statutory period for bringing the action to trial may be tolled on account of an attorney's illness or death if coupled with an otherwise diligent effort by the plaintiff to bring the case to trial. *Him v Superior Court* (1986) 184 CA3d 35, 228 CR 839 (applying reasonable diligence standard delineated in *Moran v Superior Court* (1983) 35 C3d 229, 238, 197 CR 546). However, the delay "attributable to sickness or death of counsel is not *necessarily* excusable. Each case must be decided on its own particular features and facts." *Him,* 184 CA3d at 39. The death of defense counsel does not support plaintiffs' claim of impracticability. *Sanchez v City of Los Angeles* (2003) 109 CA4th 1262, 135 CR2d 869.

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§39.53 (3) Related Action Pending; Criteria

The 5-year statute may be tolled when a pending related action is being pursued on which the success of the present action depends. *Rose v Knapp* (1951) 38 C2d 114, 237 P2d 981; *Bosworth v Superior Court* (1956) 143 CA2d 775, 300 P2d 155.

The California Supreme Court has enumerated the criteria that a trial court should use to rule on a motion to dismiss under the 5-year statute when another action is pending between some of the same parties as a result of the same incident or transaction (*Brunzell Constr. Co. v Wagner* (1970) 2 C3d 545, 550, 86 CR 297):

- The relationship between the causes of action;
- The expense and difficulty likely to be created by separate trials;
- Plaintiff's diligence and good faith efforts;
- Prejudice or hardship to the defendant; and
- Any other relevant facts the court deems important for the purpose of determining whether it would have been impracticable and futile to bring the instant action to trial within the statutory period.

The statutory period under former CCP §583 is tolled regarding the pending state claim until the completion of the federal action arising out of the same event. *McRoberts v Gorham* (1971) 18 CA3d 1040, 96 CR 427.

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§39.54 (4) Multiple Defendants; Severable Actions

Actions involving multiple defendants present unique concerns, particularly when each defendant has a legally severable action, because the complexity and expense to litigate each action individually may render trial within the 5-year period impracticable and futile. In reversing a trial court's order granting dismissal, one court held that the ability to sever an action does not preclude application of the impossibility, practicability or futility exception. *Brunzell Constr. Co. v Wagner* (1970) 2 C3d 545, 553, 86 CR 297. In that case, the plaintiff brought an action against several defendants in a construction contract. More than 5 years later, some defendants moved to dismiss the action with respect to themselves under former CCP §583(b) on the ground that the cause of action stated against them was severable from those stated against the defendants involved in a related pending matter. Owing to the various pretrial proceedings (*e.g.,* injunction and order to quash service of summons), the plaintiff was unable to proceed to trial within 5 years against the defendants moving for dismissal. In applying its criteria, the court observed (2 C3d at 553):

> In instances in which proceeding to trial against one defendant becomes impossible or impracticable, the fact that a plaintiff could have severed his causes of action and proceeded separately against a codefendant is of course one important—indeed, the threshold—factor to be considered in determining whether it was impossible or impracticable for him to proceed to trial against that codefendant within the statutory period. *Pacific Greyhound* [*Lines v Superior Court* (1946) 28 C2d 61, 168 P2d 665] and *Westphal* [*v Westphal* (1943) 61 CA2d 544, 143 P2d 405] illustrate, however, that the availability of severance is not solely determinative in every instance.

An automatic stay order issued by the bankruptcy court as a result of a bankruptcy filed by one defendant does not excuse dilatory prosecution against codefendants. *Lane v Newport Bldg. Corp.* (1986) 176 CA3d 870, 222 CR 443. In that case, plaintiffs failed to take a number of steps that might avoid possible prejudice caused by the defendant's bankruptcy. These steps included a proposal to stay the entire action pending bankruptcy proceedings, stipulations extending the 5-year period, serving the claims against the bankrupt defendant, and seeking relief from the stay in bankruptcy court. *Lane v Newport Bldg. Corp., supra.*

Distinguishing *Lane,* the court in *Rim Forest Lumber Co. v Woodside Constr. Co.* (1987) 190 CA3d 454, 235 CR 443 (discretionary dismissal for failure to bring action to trial when plaintiff was otherwise diligent and defendant not prejudiced), ruled that plaintiff's delay in severing some, but not all, defendants in a bankruptcy proceeding does not justify dismissal under former CCP §583(a). The court speculated that the pending bankruptcy proceedings would have tolled the mandatory 5-year period for lack of jurisdiction under former CCP §583(b) and CCP §§583.310-583.360. See also *Tannatt v Joblin* (1982) 130 CA3d 1063, 1066, 182 CR 112 (dismissal of multiparty debt collection action reversed; court concluded plaintiff's forbearance from prosecuting secondarily liable defendants was neither "capricious nor unreasonable").

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§39.55 (5) Settlement Agreement

Most courts that have considered the matter have concluded that settlement of an action before trial tolls the 5-year dismissal period under CCP §583.310. Thus, for example, when a case was taken off calendar because the parties had orally agreed to settle, and the parties had been active, albeit unsuccessful, in trying to reduce the oral agreement to writing, the court of appeal ruled that defendants were not entitled to dismissal under CCP §583.310. *Canal Street, Ltd. v Sorich* (2000) 77 CA4th 602, 608, 91 CR2d 811 (no compelling reason settlement agreement must be reduced to judgment within 5 years). See also *Gorman v Holte* (1985) 164 CA3d 984, 988, 211 CR 34 (CCP §583.310 requires merely that trial begin within 5 years, not that judgment be entered within that time).

One court has, however, ruled that dismissal is mandatory in this situation. See *Varwig v Leider* (1985) 171 CA3d 312, 217 CR 208 (when settlement not reduced to judgment within 5 years of commencement of action, dismissal required; to enforce settlement, plaintiff required to bring second action based on original settlement agreement). The result can probably be avoided if plaintiff's counsel obtains a written stipulation from defendants expressly waiving the 5-year statute as a condition of the settlement.

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§39.56 (6) Other Examples

Other circumstances in which the impossibility, impracticability, and futility exception has been applied to toll the 5-year period include:

- Trial court refused to set for trial in mistaken belief that 5-year period was tolled by appointment of special referee (*Pat Rose Assocs. v Coombe* (1990) 225 CA3d 9, 17, 275 CR 1, disapproved on other grounds in *Adams v Murakami* (1991) 54 C3d 105, 284 CR 318 (CCP §583.340 exception should be liberally construed));
- Impracticability of completing a substantial amount of discovery in the time left (*Westinghouse Elec. Corp. v Superior Court* (1983) 143 CA3d 95, 191 CR 549 (court of appeal found that no prejudice resulted from the delay));
- Consolidation of a personal injury action with a later accruing wrongful death action (*General Motors Corp. v Superior Court* (1966) 65 C2d 88, 52 CR 460);
- Necessary codefendant was armed forces member (*Pacific Greyhound Lines v Superior Court* (1946) 28 C2d 61, 168 P2d 665);
- Pending appeal from an order changing venue (*Christin v Superior Court* (1937) 9 C2d 526, 71 P2d 205); note, however, that time period in which change of venue was sought is *not* excluded (*Moore v Powell* (1977) 70 CA3d 583, 138 CR 914);
- Removal of case from civil active list to judicial arbitration (*Brown v Engstrom* (1979) 89 CA3d 513, 152 CR 628); and
- Default was entered against defendant (*Maguire v Collier* (1975) 49 CA3d 309, 122 CR 510).

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§39.57 d. Examples of Nonexcuse

The 5-year period within which an action must be brought to trial is not excused by delay caused by:

- The plaintiff's illness. *Singelyn v Superior Court* (1976) 62 CA3d 972, 133 CR 486.
- Ordinary pretrial proceedings, *e.g.,* demurrers and amendment of pleadings, time normally spent waiting for a place on the court's calendar, or securing a jury trial. *Perez v Grajales* (2008) 169 CA4th 580, 593, 86 CR3d 784; *Wright v Groom Trucking Co.* (1962) 206 CA2d 485, 497, 24 CR 80.
- Service of process on a foreign corporation by delivery of a summons and complaint to the secretary of state. *Hughes & Ladd, Inc. v Rogue River Paving Co.* (1975) 46 CA3d 311, 119 CR 925.
- Plaintiff's inadvertence in choosing trial date. *Cannon v City of Novato* (1985) 167 CA3d 216, 222, 213 CR 132 (court has no duty to verify plaintiff's calculation of 5-year date).
- Plaintiff's reliance on a clerk's statement that the case would trail for several months. *Hoffman v State* (1985) 171 CA3d 1100, 217 CR 867 (such reliance unreasonable; action not excepted from 5-year requirement).
- Trial court's mistake in setting the case for trial 1 day after expiration of the 5-year period. *Singelyn v Superior Court* (1976) 62 CA3d 972, 133 CR 486. For discussion of plaintiff's duty to inform court of 5-year statutory deadline, see §39.49.
- The time between a tentative court order and a final court order regarding the manner in which members of a class are to be notified of a class action. *Standard Oil Co. v Superior Court* (1976) 61 CA3d 852, 132 CR 761.
- Plaintiff's failure to request an early setting of a trial date. *Westinghouse Elec. Corp. v Superior Court* (1983) 143 CA3d 95, 191 CR 549.
- Court clerk's setting of case for trial on a date beyond the 5-year period. *Central Mut. Ins. Co. v Executive Motor Home Sales, Inc.* (1983) 143 CA3d 791, 192 CR 169.

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5. Judicial Arbitration

§39.58 a. When Tolling Occurs

Judicial arbitration within the last 6 months of the 5-year period extends the statutory period for the time the matter remains submitted to arbitration. CCP §1141.17(b); *Gonzalez v County of Los Angeles* (2004) 122 CA4th 1124, 1129, 19 CR3d 381 (5-year deadline in which case must be brought to trial tolled because case was sent to mediation during last 6 months of 5-year period). However, a plaintiff's failure to request judicial arbitration until shortly before the 5-year period would expire provides a basis for dismissal for want of prosecution. See *Nanfito v Superior Court* (1991) 2 CA4th 315, 2 CR2d 876 (plaintiff waited until 2 months before end of 5 years). Thus, if the case is submitted to or remains in arbitration (having been submitted earlier than the last 6 months of the 5-year period), the period from the date that is 4 years and 6 months after the action was filed to the date on which a request for trial de novo is filed is not included in computing the 5-year period. CCP §1141.17(b).

The trial court has a duty under CCP §1141.20 to restore a case to the same position on the trial calendar as it had before arbitration. *Moran v Superior Court* (1983) 35 C3d 229, 234, 197 CR 546. However, the plaintiff is responsible for informing the court of the date when the 5-year period will expire and requesting an earlier trial date. *Howard v Thrifty Drug & Discount Stores* (1995) 10 C4th 424, 41 CR2d 362. If the court fails to calendar correctly a trial date after having been properly informed, the action is tolled under CCP §1141.20, from the request for trial de novo until the date of the trial. *Howard v Thrifty Drug & Discount Stores*, *supra*.

In another action, the plaintiff's lawsuit was not tolled while in arbitration because arbitration did not occur during the statutory period of excuse. There was more than 6 months between the filing of request for trial de novo and expiration of the 5-year period. *Taylor v Hayes* (1987) 199 CA3d 1407, 1411, 245 CR 613. See also *State v Superior Court (Garner)* (1979) 98 CA3d 643, 159 CR 650 (6½ month period after termination of arbitration was sufficient to advance trial to date within 5 years; plaintiff's failure to obtain trial de novo within remaining 6½ months was inexcusable).

The tolling of the 5-year period under CCP §1141.17(a) applies only to judicial arbitration under CCP §1141.10-1141.31. CCP §1141.17(a). It does not apply to contracts for arbitration under CCP §§1280-1288.8. *Nanfito v Superior Court* (1991) 2 CA4th 315, 2 CR2d 876. However, if the court grants a petition to compel contractual arbitration and stays the action, the time when the action is stayed is excluded under CCP §583.340(b). *Brock v Kaiser Found. Hosp.* (1992) 10 CA4th 1790, 13 CR2d 678 (criticizing *Boutwell v Kaiser Found. Health Plan* (1988) 206 CA3d 1371, 254 CR 173, which ignored stay under §583.340(b) and dismissed action for lack of reasonable diligence in arbitration hearing).

NOTE: Judicial arbitration includes arbitrations by stipulation of the parties or at plaintiff's election regardless of the amount in controversy (see CCP §1141.12), not just arbitrations ordered by the court under CCP §1141.11 because the amount in controversy will not exceed $50,000. For discussion of the effect of stipulating to "binding" arbitration on the 5-year statute, see §39.31. On applicability of CCP §1141.17 to intervenor's cause of action, see *Johnson v Santos* (1983) 148 CA3d 566, 196 CR 145 (claim of workers' compensation carrier also tolled for period plaintiff in arbitration).

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§39.59 b. Plaintiff's Diligence Required

When a trial de novo is requested by either the plaintiff or the defendant after a judicial arbitration award, the plaintiff must act diligently to see that the case actually is set for trial before expiration of the dismissal period. *Howard v Thrifty Drug & Discount Stores* (1995) 10 C4th 424, 41 CR2d 362 (plaintiff failed to inform court of impending 5-year statute and waited 6 months to file motion to specially set after defendant's request for trial de novo). See *Serrano v FMC Corp.* (1990) 221 CA3d 1027, 271 CR 41 (plaintiff did nothing for 2 years after requesting trial de novo); *Wheeler v City of Santa Monica* (1990) 219 CA3d 1554, 1562, 269 CR 175 (3-month period between arbitrator's award and date set for trial de novo need not be excluded in calculating 5-year period when plaintiff's own lack of diligence caused 10-month delay); *Baccus v Superior Court* (1989) 207 CA3d 1526, 1536, 255 CR 781 (plaintiff failed to call court's attention to imminence of 5-year deadline when requesting trial de novo). The plaintiff must also act diligently when a trial de novo is requested after an award under the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206). *Perez v Grajales* (2008) 169 CA4th 580, 601, 86 CR3d 784 (attorney's failure to prosecute complaint after he rejected MFAA arbitration award repudiated his request for trial de novo).

The court has discretion to deny a plaintiff's request to specially set that is not promptly made after a request for trial de novo. *Howard v Thrifty Drug & Discount Stores*, *supra*. The plaintiffs' conduct before arbitration and after a request for trial de novo also may be considered by the court in determining whether discretionary dismissal is appropriate under CCP §§583.410-583.430. *Howard v Thrifty Drug & Discount Stores*, *supra*; *Baccus v Superior Court, supra.*

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§39.60 6. Waiver and Estoppel

Under the statute, the principles of waiver and estoppel as developed by case law are preserved. CCP §583.140 ("Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel"). A defendant waives the right to seek mandatory dismissal by going to trial without objecting. *Butler v Hathcoat* (1983) 146 CA3d 834, 194 CR 352. In *Butler*, the action proceeded to trial more than 8 and one-half years after the complaint was filed. Following trial, and the announcement of the tentative ruling, defendant moved to dismiss under the 5-year statute. The court held that "the defendant may waive, or be estopped to assert, the right to a dismissal and it is waived by proceeding to trial without moving to dismiss." 146 C3d at 837.

A defendant who induces a plaintiff to refrain from diligently pursuing the action also may be estopped from seeking dismissal under CCP §583.360 and may be held to have waived the right to seek dismissal. Conduct that will estop defendant from seeking a dismissal can be anything that lulls plaintiff into a false sense of security. *Borglund v Bombardier, Ltd.* (1981) 121 CA3d 276, 281, 175 CR 150 ("If … defendant … lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his deception"). See also *Tresway Aero, Inc. v Superior Court* (1971) 5 C3d 431, 437, 96 CR 571 (defendant estopped from quashing service of summons after having obtained extension of time to answer complaint that went beyond 3-year period).

The following four elements must be present to invoke the doctrine of equitable estoppel (*Driscoll v City of Los Angeles* (1967) 67 C2d 297, 305, 61 CR 661):

- The party to be estopped must be apprised of the facts.
- The party to be estopped must intend that his or her conduct would be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended.
- The other party must be ignorant of the true state of facts.
- The other party must rely on the conduct to his or her injury.

The existence of estoppel raises a question of fact for the trier of fact, whose determination is conclusive and binding on appeal unless the opposite conclusion is the only one to be reasonably drawn from the facts. *Albers v County of Los Angeles* (1965) 62 C2d 250, 266, 42 CR 89. However, when the evidence is not in conflict and is capable of only one reasonable interpretation, the existence of estoppel is a question of law. *California Cigarette Concessions, Inc. v City of Los Angeles* (1960) 53 C2d 865, 869, 3 CR 675.

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§39.61 a. Conduct Resulting in Estoppel

- **Defendant's misrepresentations.** A defendant may be estopped from dismissing a case by having made misrepresentations to the plaintiff. *Griffis v S.S. Kresge Co.* (1984) 150 CA3d 491, 197 CR 771 (defendant estopped from seeking dismissal for failure to prosecute after plaintiff's attorney relied on defense counsel's misrepresentation to the court regarding expiration of the 5-year period).
- **Defendant's request for continuance.** A defendant may be estopped from dismissing a case by having requested a continuance beyond the 5-year period. *Breacher v Breacher* (1983) 141 CA3d 89, 190 CR 112 (defendant estopped from seeking dismissal under former CCP §583 after defendant's attorney, to avoid being on beeper call during the Christmas holidays, sought and received a continuance beyond the 5-year period). See also *Holder v Sheet Metal Worker's Int'l Ass'n* (1981) 121 CA3d 321, 327, 175 CR 313.
- **Plaintiff's reliance on defendant's representations.** A defendant may be estopped from dismissing a case by plaintiff's reliance on defendant's representations. *Borglund v Bombardier, Ltd.* (1981) 121 CA3d 276, 175 CR 150 (defendant's oral assertion to plaintiff that he would not seek dismissal should the 5-year statute expire, and plaintiff's reliance on that justified invoking doctrine of estoppel). In *Borglund*, defense counsel orally represented to plaintiff that former CCP §583 did not apply to an out-of-state plaintiff and, in any event, he would not seek dismissal on running of the 5-year statute. However, more than 7 years after the filing of the complaint, the defendant moved to dismiss. The court, in remanding the case, held that the trial court must consider equitable estoppel in ruling on the defendant's motion to dismiss.

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§39.62 b. Conduct Insufficient for Finding of Estoppel

- **Plaintiff's failure to track trial date.** Plaintiff cannot shift the blame for delay to defendant for plaintiff's own lack of diligence in keeping track of pertinent dates and in failing to make an independent effort to confirm whether a trial continuance had been obtained. *Wilcox v Ford* (1988) 206 CA3d 1170, 1180, 254 CR 138.
- **Defendant's written refusal to stipulate to extension.** A defendant's written refusal to stipulate to an extension precludes any misunderstanding by plaintiff that might give rise to an estoppel defense to a motion to dismiss. *Boutwell v Kaiser Found. Health Plan* (1988) 206 CA3d 1371, 254 CR 173 (defendants agreed not to move for immediate dismissal if plaintiff promptly pursued arbitration, but defendants expressly stated in correspondence that they would not stipulate to extend mandatory dismissal period and advised plaintiff's attorney to take whatever steps necessary to protect his client's rights; after 1 year, the arbitration had still not taken place, and court held that defendants were not equitably estopped from seeking dismissal).

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V. FAILURE TO BRING ACTION TO NEW TRIAL WITHIN THREE YEARS: MANDATORY DISMISSAL

§39.63 A. When Applicable; Statutory Measurement

A plaintiff must bring an action to trial within 3 years after a mistrial or jury disagreement, a decision on appeal, or the granting of a new trial. CCP §583.320. For discussion of whether an action has been "brought to trial" under CCP §583.320, see §39.27. When §583.320 applies, it is mandatory.

Section 583.320 does not apply if the initial 5-year period in which to bring the action to trial has not yet expired. CCP §583.320(b). For example, if the 5-year period were tolled because of an appeal pending after judgment on a demurrer, the plaintiff would now have the benefit of the full 5-year period from the filing of the complaint for bringing the action to trial, rather than the shorter 3-year period after remittitur was filed. These were the facts in *McDonough Power Equip. Co. v Superior Court* (1972) 8 C3d 527, 105 CR 330 (holding applying 3-year dismissal statute decided under former statute nullified by enactment of CCP §583.320(b)).

A petition for writ of mandate is not an appeal but an original proceeding that may result in issuance of a peremptory writ of mandate, but not a remittitur. Therefore, CCP §583.320 is not applicable, and dismissal of an action not brought to trial within 3 years of issuance of the writ is not required. *Daum Dev. Corp. v Yuba Plaza, Inc.* (1970) 11 CA3d 65, 89 CR 458. For further discussion, see California Civil Writ Practice (4th ed Cal CEB 2008).

The statutory period for CCP §583.320 is measured as follows:

- If there is no judgment because of a mistrial or the jury is unable to reach a decision, retrial must commence within 3 years after the order declaring the mistrial or the disagreement of the jury is entered (CCP §583.320(a)(1)).
- If after judgment a new trial is granted and no appeal is taken, retrial must commence within 3 years after entry of the order granting the new trial (CCP §583.320(a)(2)).
- If on appeal the appellate court either affirms the granting of a new trial or reverses the judgment and remands the action for a new trial, retrial must be commenced within 3 years after the remittitur is filed by the clerk of the trial court (CCP §583.320(a)(3)).

An action will be dismissed on a noticed motion of defendant or by the court on its own motion. CCP §583.360. For discussion of procedures used in motions for dismissal, see §§39.71-39.75.

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§39.64 B. Exceptions and Tolling of Statutory Period

Except as provided for by statute, CCP §583.320 is not subject to extension, excuse, or exception. CCP §583.360(b). The provisions governing permissible extensions, excuses, and exceptions and the tolling of CCP §583.320 are identical to the 5-year mandatory dismissal statute for failure to bring an action to trial. See, *e.g., Good v State* (1969) 273 CA2d 587, 592, 78 CR 316 (appeal reversed judgment on demurrer; plaintiff who failed to bring action to retrial within 3 years with respect to individual city employee defendants was excused regarding city defendant because of legislative moratorium then in effect that made retrial impossible).

These excuses and exceptions include impossibility, impracticability, futility, estoppel and waiver, and extension by written stipulation or oral agreement in court. For applicable discussion, see §§39.46-39.56.

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VI. OTHER GROUNDS FOR INVOLUNTARY DISMISSAL

§39.65 A. Inherent Authority of Court

Independent of other statutory grounds, the court may dismiss an action with prejudice or impose other sanctions under court rules granting it inherent authority to do so. CCP §583.150. *Lyons v Wickhorst* (1986) 42 C3d 911, 231 CR 738. The court has the inherent power to dismiss an action based on a plaintiff's deliberate and egregious misconduct. *Stephen Slesinger, Inc. v Walt Disney Co.* (2007) 155 CA4th 736, 764, 66 CR3d 268. The court must set a hearing on the dismissal and mail notice to the parties at least 20 days before the hearing date. CCP §583.410(b); Cal Rules of Ct 3.1340; *Sakhai v Zipora* (2009) 180 CA4th 593, 598, 102 CR3d 691.

The *Lyons* court considered two factors to be important when the court exercises the discretionary power to dismiss:

- Whether the plaintiff's pattern of conduct was so severe and deliberate as to constitute extreme circumstances; and
- Whether alternatives less severe than dismissal are available.

"The 'sound exercise of discretion' requires that the judge consider and use lesser sanctions unless the court's authority cannot possibly be otherwise vindicated." *Lyons v Wickhorst* (1986) 42 C3d 911, 917, 231 CR 738 (discretionary dismissal not proper for plaintiff's failure to take part in mandatory judicial arbitration because lesser sanctions, *e.g.,* costs and fees under CCP §128.5, were available). For currently operative sanctions statutes, see CCP §§128.6-128.7.

The court on occasion exercises its power to dismiss an action under a mandatory dismissal provision, even though the statutory time period for mandatory dismissal has not elapsed. See, *e.g., Massey v Bank of America* (1976) 56 CA3d 29, 33, 128 CR 144, 146 (class action cause of action dismissed because less than 2 months left in 5-year period was "grossly inadequate" for bringing to trial; court asked to determine only existence of class and form of notice to be given to members of class). See also *Rice v Arden Farms Co.* (1962) 199 CA2d 349, 18 CR 863.

Plaintiffs should take particular note of CCP §583.420, which limits the court's inherent power to dismiss an action at its discretion for delay in prosecution under CCP §§583.410-583.430. See *Roman v Usary Tire & Serv. Ctr.* (1994) 29 CA4th 1422, 35 CR2d 329 (trial court abused its discretion by dismissing case that was less than two years old). Thus, CCP §583.150 arguably limits dismissal to the statute's mandatory provisions and to situations other than those concerning a discretionary dismissal for delay in prosecution. An example of such a situation is an action based on a claim that can be shown to be a pretense or otherwise invalid. See *Lyons v Wickhorst, supra*.

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§39.66 B. Failure to Pay Transfer Fees and Costs

An action transferred for improper venue cannot be further prosecuted until transfer costs and fees are paid. CCP §399(a). If transfer costs and fees are not paid within 30 days after service of notice of the transfer order, the court may dismiss the action on the noticed motion of any party. CCP §399(a). The dismissal by the court is without prejudice on condition that the same action may not be brought in another court until payment under the order is made. CCP §399(a).

The plaintiff can avoid dismissal following a payment made after the 30-day period, provided the papers are forwarded to the transferee court before the defendant's motion to dismiss is filed. See *Moore v Superior Court* (1970) 13 CA3d 869, 92 CR 23.

An order transferring venue is reviewable by petition for writ of mandate in a superior court action (CCP §400) other than a limited civil case (see chap 6), and by appeal in a limited civil case (CCP §904.2). If a writ of mandate under CCP §400 is filed in a trial court or if an appeal is taken under CCP §904.2, payment of transfer fees and costs is due within 30 days after notice of the finality of the order of transfer. CCP §399(a).

If a petition for writ of mandate or appeal is unsuccessful, the time for payment of transfer fees and costs is 60 days following service of the notice of the order. CCP §399(a).

When the order to transfer is based on the parties' stipulation expressly stating that the action was brought in the wrong court, a motion for dismissal for failure to pay transfer fees and costs under CCP §399 is permissible. *Bechtel Corp. v Superior Court* (1973) 33 CA3d 405, 410, 109 CR 138. See *La Mirada Community Hosp. v Superior Court* (1967) 249 CA2d 39, 57 CR 42 (motion to dismiss not permissible, because order for transfer based on general stipulation; no finding that action was brought in wrong court).

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§39.67 C. Failure to Appear for Trial

The court may dismiss an action without prejudice on its own motion when no party appears for trial following proper notice. CCP §581(b)(3) (30-day notice of the time and place of trial). The court may also dismiss the action without prejudice when one party fails to appear and the appearing party seeks dismissal. CCP §581(b)(5).

A court has the authority to dismiss without prejudice either the entire complaint or only the part of the complaint relating to the particular defendant who appears and asks for the dismissal. CCP §581(*l*). But see *Link v Carter* (1998) 60 CA4th 1315, 71 CR2d 130, in which the sanction of dismissal for plaintiff's failure to appear at trial was reversed. The trial court in *Link* had set a continuance date without prior notice to plaintiff, who had already made plans to leave the country for medical treatment, and plaintiff had no history of noncompliance and had diligently prosecuted his case.

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§39.68 D. Failure to Amend After Demurrer Sustained or Motion to Strike Granted

A court may dismiss a complaint with respect to a defendant after a demurrer has been sustained to the complaint without leave to amend and either party moves for dismissal. CCP §581(f)(1). The court may also dismiss an action after defendant's motion to strike the whole of a complaint is granted without leave to amend and either party moves for dismissal. CCP §581(f)(3).

The court may dismiss an action following the sustaining of a demurrer with leave to amend if plaintiff fails to amend within the time allowed by the court and either party moves for dismissal. CCP §581(f)(2); *Harding v Collazo* (1986) 177 CA3d 1044, 223 CR 329. Note, however, that dismissal after the sustaining of the demurrer is conditioned on the case's not being subject to CCP §597, which applies when demurrers entail special defenses or issues. CCP §581(f).

Similarly, the court is empowered to dismiss an action when a motion to strike is granted with leave to amend and the plaintiff fails to amend the complaint within the time allowed by the court. CCP §581(f)(4).

PRACTICE TIP: Either party may make an ex parte motion for dismissal under CCP §581(f). Cal Rules of Ct 3.1320(h). Note, however, that ex parte motions require informal notice to be given beforehand. See chap 13.

Counsel should also check local court rules, although many are now preempted by Cal Rules of Ct 3.20 and 2.100(a).

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§39.69 E. Failure to Comply With Discovery

A court may dismiss an action against any party for misuse of the discovery process. CCP §2023.030(d)(3). See *Deyo v Kilbourne* (1978) 84 CA3d 771, 796, 149 CR 499 (discussing factors relevant in considering discovery sanctions). See also *Williams v Russ* (2008) 167 CA4th 1215, 1223, 84 CR3d 813 (spoliation of evidence supported terminating sanction); *Liberty Mut. Fire Ins. Co. v L**c**L Adm'rs, Inc*. (2008) 163 CA4th 1093, 78 CR3d 200 (evasive responses and history of discovery misconduct supported terminating sanction); *Miranda v 21st Century Ins. Co.* (2004) 117 CA4th 913, 926, 12 CR3d 159 (court had power to dismiss uninsured motorist arbitration as terminating sanction under Civil Discovery Act); *Baraz v U.S.* (CD Cal 1998) 181 FRD 449 (in federal court, dismissal of action as sanction for discovery violation is permissible only on showing of willfulness, bad faith, or fault).

On failure to pay monetary sanctions, see, *e.g., Williams v Travelers Ins. Co.* (1975) 49 CA3d 805, 123 CR 83. The court may not impose terminating sanctions based on a motion to compel brought after the close of discovery, unless it reopens discovery. *Pelton-Shepherd Indus. v Delta Packaging Prods., Inc.* (2008) 165 CA4th 1568, 1589, 82 CR3d 64.

For further discussion of dismissal as a sanction for failure to comply with discovery, see California Civil Discovery Practice (4th ed Cal CEB 2006).

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§39.70 F. Failure to Comply With Trial Court Delay Reduction Act

Under the Trial Court Delay Reduction Act, rules in certain counties provide for dismissal of an action for refusal to comply with the rules of the act, comply with the judge's orders, or meet the required time deadlines. See, *e.g.,* Los Angeles Ct R 7.13. The court may not dismiss an action for noncompliance with local court rules implementing the Trial Court Delay Reduction Act (Govt C §§68600-68620) if noncompliance is the fault of counsel, not the litigant. *Garcia v McCutchen* (1997) 16 C4th 469, 66 CR2d 319. See further discussion in §39.5.

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VII. PROCEDURES FOR DISMISSAL UNDER MANDATORY STATUTES

§39.71 A. Motion to Dismiss

A motion to dismiss an action for lack of prosecution—based either on a failure to serve and return summons, or a failure to bring the action to trial within the requisite period—is made in the same manner as other pretrial motions, *i.e.,* by filing and serving a notice of motion, a memorandum, and a declaration in support of the motion if appropriate.

If the plaintiff fails to serve summons within 3 years after commencing the action and to return it to the court within 60 days thereafter, a motion to dismiss under the 3-year statute is proper. CCP §583.250(a)(2). Similarly, if the plaintiff fails to bring the action to trial within 5 years, a motion to dismiss is appropriate. CCP §583.360(a).

NOTE: A motion to quash is a procedural device ordinarily used in the trial court to test the validity of service and has been used when plaintiff failed to serve summons within the 3-year time period. *Mannesmann DeMag, Ltd. v Superior Court* (1985) 172 CA3d 1118, 1124, 218 CR 632; *Deas v Knapp* (1982) 129 CA3d 443, 181 CR 76. On making and opposing motions to quash, see chap 19. But see *Tandy Corp. v Superior Court* (1982) 129 CA3d 734, 741 n5, 181 CR 319 (motion to dismiss express remedy for violation of former CCP §581a).

For discussion of ex parte motion to dismiss for failure to amend the complaint within the period granted by court after a demurrer is sustained or a motion to strike is granted, see §39.68.

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§39.72 1. Who May Make Motion

Failure to serve and return summons. A motion to dismiss for failure to serve summons does not necessarily need to be made by a party to the action. *Any person* interested in the action (*e.g.,* a potential Doe defendant), whether a party or not, may on noticed motion move for a mandatory dismissal for failure to serve a summons in a timely manner. CCP §583.250(a)(2). The action may also be dismissed by the court on its own motion. CCP §583.250(a)(2).

Failure to bring action to trial. Only a defendant or cross-defendant (see CCP §583.110(d)), or the court on its own motion (CCP §583.360(a)), may move for mandatory dismissal for failure to bring an action to trial after notice to the parties. CCP §583.360.

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§39.73 2. Notice; Grounds

The notice of motion together with all supporting papers must be filed and served 16 court days before the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). When service is by mail, the notice period is increased by 5 calendar days if the party resides within California, 10 calendar days if mailed to another state, and 20 calendar days' notice if mailed outside the country. CCP §1005(b). Personal service requires only the 16 court days' notice. CCP §1005(b). See chap 18 on service by Express Mail and facsimile transmission.

Like all motions, a motion for dismissal for lack of prosecution must state the grounds on which it is based. CCP §1010. A court can consider only the grounds stated in the notice of motion. *Maguire v Collier* (1975) 49 CA3d 309, 122 CR 510.

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§39.74 3. Supporting Papers

A memorandum in support of the motion must be filed with the motion to dismiss. Cal Rules of Ct 3.1112(a), 3.1113(a). The court may treat absence of supporting memorandum as an admission that the motion is not meritorious and cause for its denial. See Cal Rules of Ct 3.1113(a).

PRACTICE TIP: The declaration accompanying the motion should state facts showing why a dismissal is required and should also demonstrate the nonexistence of any statutory exceptions or periods during which the statute would be tolled. Counsel should list exact dates (*e.g.,* when the complaint was filed commencing the action, and the duration of any period of excuse).

For discussion of procedures for noticed motions generally, see chap 12.

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§39.75 4. Opposing Papers; Reply

Opposition to a motion to dismiss must be filed and served 9 court days before the hearing; any reply papers must be filed and served at least 5 court days before the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). Opposition and reply papers must be served by personal delivery, fax, express mail, or other method reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c).

NOTE: If dismissal is sought under the discretionary dismissal statute, opposition papers are due 15 days after service of the moving papers. Cal Rules of Ct 3.1342(b). See discussion in §39.89.

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§39.76 B. Order of Dismissal; Notice of Entry

All dismissals ordered by the court must be in the form of a written order, signed by the court and filed in the action. See CCP §1003. For form of order of dismissal, see §39.128. The party who successfully requests a dismissal of an action must serve a notice of entry of the dismissal on all parties. Cal Rules of Ct 3.1390. See form in §39.131.

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§39.77 C. Attorney Fees

Counsel should consider requesting an award of fees after obtaining a dismissal if authorized by statute or contract between the parties. A defendant was entitled, for example, to recover attorney fees after obtaining a dismissal in an action on a payment bond (CC §3250) for the plaintiff's failure to timely serve the summons. *Winick Corp. v Safeco Ins. Co.* (1986) 187 CA3d 1502, 232 CR 479 (court construed dismissal as a favorable termination of the action for purposes of the statute).

For further discussion of attorney fees, see California Attorney Fee Awards (2d ed Cal CEB 1994); Fee Agreement Forms Manual (2d ed Cal CEB 2007).

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D. Procedures After Court Ruling

§39.78 1. Defendant's Remedies When Dismissal Denied

When the court denies a motion to dismiss, the defendant may make a motion to reconsider under CCP §1008. See chap 12. Alternatively, defendant can consider seeking appellate review by petition for writ of mandate or prohibition. See *Bernstein v Superior Court* (1969) 2 CA3d 700, 701, 82 CR 775. Mandate may issue to compel dismissal and prohibition may issue to restrain the trial. See *McDonough Power Equip. Co. v Superior Court* (1972) 8 C3d 527, 105 CR 330; *Coates Capitol Corp. v Superior Court* (1967) 251 CA2d 125, 59 CR 231. See generally California Civil Writ Practice §§8.40-8.44, 8.50-8.56 (4th ed Cal CEB 2008).

Defendant cannot directly appeal from an order denying a motion to dismiss, but may proceed with the action and appeal the denial after final judgment is entered. CCP §§904.1-904.2. To do so, however, is neither a speedy nor adequate remedy. See *Rio Del Mar Country Club v Superior Court* (1948) 84 CA2d 214, 190 P2d 295.

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§39.79 2. Plaintiff's Remedies When Dismissal Granted

Plaintiff may appeal the dismissal. An order of dismissal is equivalent to a final judgment and may be directly appealed. CCP §904.1(a)(1). See *Daley v Butte* (1964) 227 CA2d 380, 38 CR 693. See generally California Civil Appellate Practice (3d ed Cal CEB 1996).

The plaintiff may also move to vacate the order of dismissal under CCP §473, on grounds of mistake, inadvertence, surprise, excusable neglect, or attorney neglect for those dismissals that occur because the plaintiff failed to oppose a dismissal motion. *Peltier v McCloud River R.R.* (1995) 34 CA4th 1809, 41 CR2d 182. However, filing an attorney's declaration under CCP §473 that a dismissal was due to the attorney's fault for any other reasons will not provide a plaintiff with additional grounds for relief for failure to bring an action to trial under the discretionary and mandatory dismissal statutes. *Bernasconi Commercial Real Estate v St. Joseph's Regional Healthcare Sys.* (1997) 57 CA4th 1078, 67 CR2d 475 (mandatory dismissal provisions); *Peltier v McCloud River R.R., supra* (discretionary dismissal provisions). For discussion of CCP §473, see chap 38. The motion to vacate the dismissal may be served on the opposing party's attorney. See *Maxwell v Cooltech, Inc.* (1997) 57 CA4th 629, 67 CR2d 293 (attorney-client relationship continues for purpose of accepting service of motion to vacate dismissal).

If the motion to vacate is denied, the order refusing to vacate the dismissal is independently appealable, together with the original order of dismissal. *Farrar v McCormick* (1972) 25 CA3d 701, 102 CR 190. See *Daley v Butte* (1964) 227 CA2d 380, 388, 38 CR 693.

Another option is for plaintiff to obtain a writ of mandate from a reviewing court directing the trial court to vacate its order of dismissal and reset the action for trial. See *Brown v Superior Court* (1970) 7 CA3d 366, 86 CR 670; *Derry v Superior Court* (1968) 266 CA2d 556, 72 CR 313.

For discussion of appellate review of rulings on motions for discretionary dismissal, see §39.94.

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§39.80 E. Appellate Review: Abuse of Discretion Test

Dismissal under CCP §583.210 (service and filing proof of service of the summons) or CCP §583.310 (bringing action to trial) is mandatory and not subject to extension, excuse, or exception, except as expressly provided by statute. CCP §§583.250(b), 583.360(b). No judicially created excuses may be developed. See 6 Witkin, California Procedure, *Proceedings Without Trial* §§346-350 (5th ed 2008). However, a trial court has broad discretion in ruling whether the plaintiff has proved one of the statutory excuses (*e.g.,* impossibility), and its ruling will not be reversed except on a showing of clear abuse of discretion. *Tresway Aero, Inc. v Superior Court* (1971) 5 C3d 431, 436, 96 CR 571.

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VIII. DELAY IN PROSECUTION: DISCRETIONARY DISMISSAL

§39.81 A. Who Makes Motion; Court's Authority; Grounds

The court may grant dismissal for a delay in prosecution on the motion of a defendant or cross-defendant or on its own motion. CCP §583.410. Dismissal under CCP §§583.410-583.430 is without prejudice. CCP §581(g). Thus, the plaintiff has the right to renew the action if the statute of limitations has not run.

NOTE: The court does have the inherent authority to dismiss and impose appropriate sanctions under CCP §583.410 (see §39.65) and to make any order necessary to effectuate its authority under CCP §583.430(b). Thus, the court does have the authority to dismiss *with* prejudice.

The court also has discretion to require, as a condition of granting or denying dismissal for delay in prosecution, that the parties comply with terms or conditions it deems proper to effectuate "substantial justice." CCP §583.430(a). See Cal Rules of Ct 3.1342(f) (court may defer its ruling pending performance by either party relating to trial or dismissal of case). Under CCP §583.430(b) the court may make any provisional or conditional orders to effectuate its authority, such as (Comment to CCP §583.340):

- Require the defendant to waive the statute of limitations;
- Require the defendant to dismiss a cross-complaint;
- Require completion of discovery;
- Require the filing of a certificate of readiness for trial; or
- Require preparation of a motion to advance the trial date.

To dismiss an action for delay in prosecution under CCP §583.410(a), one of the conditions given in CCP §583.420 must exist:

- Summons has not been served within 2 years after the action was commenced (see §39.82);
- The action was not brought to trial within 2 years after it was commenced (see §39.83); or
- A new trial was granted, and within 2 years the action has not been brought to retrial after (1) a mistrial or jury disagreement, (2) entry of judgment when no appeal was taken, or (3) remittitur was filed by the trial court after appeal (see §39.84).

The court must entertain a motion under CCP §§583.410-583.430 according to procedures and criteria prescribed in rules of court adopted by the Judicial Council. CCP §583.410(b). See Cal Rules of Ct 3.1342. For discussion, see §§39.85-39.92.

PRACTICE TIP: Frequently, it is good strategy for the defense to use the discretionary dismissal provisions as a response in opposing a plaintiff's 11th-hour efforts to prosecute an action. Defense counsel usually, however, should consider waiting to make a motion under the mandatory dismissal provisions because the courts, except in extreme circumstances, are reluctant to grant a discretionary dismissal for delay in prosecution. See CCP §583.130 (in construing provisions of statute, policy favoring trial or other disposition on the merits is generally preferred over policy requiring dismissal for failure to proceed with reasonable diligence). A motion made under CCP §§583.410-583.430 often prompts the plaintiff's attorney to diligent, if belated, effort in the action. If expiration of the 5-year period is approaching plaintiff might respond by immediately making a motion to advance the case preferentially for trial under CCP §36(e). See §39.50.

The court, independent of its discretion to dismiss for delay in prosecution (CCP §§583.410-583.430), on the motion of a defendant or its own motion, has the authority to dismiss an action under the "inherent authority of the court." CCP §583.150. For discussion, see §§39.65-39.70 (other grounds for involuntary dismissal).

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§39.82 1. Failure to Serve Summons Within 2 Years

The court, in its discretion, may dismiss an action if plaintiff fails to serve summons within 2 years after the action is commenced. CCP §583.420(a)(1); *Hawks v Hawks* (2006) 141 CA4th 1435, 47 CR3d 145 (discretionary dismissal only after 2-year delay). Absent a showing of "manifest" abuse, the trial court's ruling will not be disturbed. *Blank v Kirwan* (1985) 39 C3d 311, 216 CR 718.

The provisions for computing any extension of time for service of summons (CCP §§583.220-583.240) are applicable to discretionary dismissal for delay in prosecution. CCP §583.420(b). Consequently, the discretionary dismissal period may be extended by stipulation or by a stay in prosecution of the action that affected service or because defendant was not amenable to service, the validity or service was the subject of litigation, or if for any other reason service was "impossible, impracticable or futile" to effect for reasons beyond the plaintiff's control. For applicable discussion, see §39.18.

The court must exercise its discretion in accord with the procedures and criteria set forth in Cal Rules of Ct 3.1342(e). For discussion, see §39.90.

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§39.83 2. Failure to Bring Action to Trial or Conditionally Settle It Within 2 Years

The trial court has the discretion to dismiss an action if it is not brought to trial or "conditionally settled" within 2 years after commencement. Cal Rules of Ct 3.1340 (adopted by the Judicial Council under the authority of CCP §§583.410(b) and 583.420(a)(2)(B)). For definition of "conditionally settled," see Cal Rules of Ct 3.1340(c).

NOTE: Before Rule 3.1340 was adopted, 3 years was required from commencement of the action before the court could exercise its discretion under CCP §§583.410-583.430. See CCP §583.420(a)(2)(A).

The provisions governing the tolling and computation of the time period for mandatory dismissal based on failure to bring an action to trial within 5 years (CCP §§583.330-583.350) are the same as for discretionary dismissal. CCP §583.420(b). Consequently, the discretionary dismissal period may be extended by stipulation, by suspension of the court's jurisdiction, because the prosecution of the action was stayed or enjoined, or if for any other reason bringing the action to trial was "impossible, impracticable or futile." For applicable discussion, see §§39.46-39.57.

The court must exercise its discretion in accord with the procedures and criteria set forth in Cal Rules of Ct 3.1342(e). CCP §583.410(b). For discussion, see §39.90. See also *Seacall Dev., Ltd. v Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 86 CR2d 229 (dismissal of petition for writ of mandate after 2 years for failure to prosecute vacated in light of attorney's abandonment of client and client's immediate action after learning of dismissal).

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/§39.84 3. Failure to Bring Action to Retrial Within 2 Years of Previous Disposition

§39.84 3. Failure to Bring Action to Retrial Within 2 Years of Previous Disposition

The court has the authority to exercise its discretion to dismiss an action when the case has not been brought to retrial within 2 years after the following events:

- A court order declaring a mistrial or the jury's inability to reach a decision (CCP §583.420(a)(3)(A));
- An order granting a new trial, if after judgment no appeal is taken (CCP §583.420(a)(3)(B)); or
- Remittitur is filed by the clerk of the trial court affirming the granting of a new trial or ordering a new trial after reversing judgment (CCP §583.420(a)(3)(C)).

The court must exercise its discretion in accord with the procedures and criteria set forth in Cal Rules of Ct 3.1342(e). For discussion, see §39.90.

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B. Applicable Procedures

§39.85 1. Motion for Discretionary Dismissal

Special procedures prescribed in Cal Rules of Ct 3.1342 govern a discretionary motion to dismiss for delay in prosecution under CCP §§583.410-583.430. CCP §583.410(b).

NOTE: The motion is normally made by a defendant, but the court may make its own motion to dismiss under this statute. CCP §583.410(a). If the court intends to dismiss on its own motion, the clerk is to set a hearing and mail notice to all parties at least 20 calendar days before the hearing date. Cal Rules of Ct 3.1340(b).

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§39.86 a. Serve Notice 45 Days Before Hearing

A notice of motion for dismissal under CCP §§583.410-583.430 must be served and filed at least 45 days before the date set for the hearing of the motion. Cal Rules of Ct 3.1342(a). If the moving papers are served by mail, the notice period is extended in accordance with CCP §1013(a).

The long notice period gives the plaintiff time to move the case toward trial before the motion is heard. See *Farrar v McCormick* (1972) 25 CA3d 701, 705, 102 CR 190.

PRACTICE TIP: If defendant is making a motion for discretionary dismissal in response to plaintiff's motion to advance a case for trial under CCP §36(e) (*e.g.,* because the 5-year mandatory dismissal period has almost run), that plaintiff's motion requires only the usual 16-day notice (plus 5 days for service by mail on party residing in California). See CCP §1005(b). A defendant should consider moving for an order shortening time, so that the motions may be heard together.

California Rules of Court 3.1342 specifically applies to a "party seeking dismissal." The court when making its own motion is required to give only 20 days' notice. Cal Rules of Ct 3.1340(b).

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§39.87 b. File Supporting Papers

A memorandum in support of the motion must be filed with the motion to dismiss. Cal Rules of Ct 3.1112(a), 3.1113(a). See discussion in chap 12. The moving party also may file a declaration stating facts in support of the motion to dismiss. Cal Rules of Ct 3.1342(a).

PRACTICE TIP: Although the language of Cal Rules of Ct 3.1342(a) is permissive, it is good practice to file a declaration supporting the motion. This is the most convenient way to put before the court the facts showing why the case should be dismissed. These facts should include those that show prejudice to the defendant because of the delay (see §39.92). List exact dates (*e.g.,* dates on which the complaint was filed, the defendant served, etc.), so that the court does not need to search through the record to determine the length of time periods.

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§39.88 c. No Stay in Proceedings

The filing of a notice of motion to dismiss an action at the court's discretion under CCP §§583.420-583.430 does not preclude the plaintiff from further prosecuting the case in order to bring it to trial. Cal Rules of Ct 3.1342(a). Indeed, the purpose of the longer notice period is to give the plaintiff a chance to move the case closer to trial. See *Farrar v McCormick* (1972) 25 CA3d 701, 705, 102 CR 190.

PRACTICE TIP: Because the motion often alerts the plaintiff to problems of delay in the case resulting in renewed efforts to prosecute the action, defense counsel should consider waiting for the longer statutory periods to pass before making a motion for *mandatory* dismissal under CCP §583.210 (failure to serve summons within 3 years and return it to court within 60 days thereafter), CCP §583.310 (failure to bring action to trial within 5 years), or CCP §583.320 (failure to bring to retrial within 3 years).

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§39.89 2. Opposition and Reply Papers; Timing

If an opposing party fails to serve and file written opposition to a motion for discretionary dismissal, the court may construe that failure as an admission that the motion is meritorious and may grant the motion without a hearing on the merits. Cal Rules of Ct 3.1342(b).

A party serving papers opposing the motion must do so within 15 days after being served with the notice of motion. A supporting memorandum should be included. Counsel should also prepare and attach a supporting affidavit or declaration stating facts showing why the motion should be denied. See Cal Rules of Ct 3.1112(a), 3.1113(a).

If the moving party files a response within 15 days after service of the written opposition (see Cal Rules of Ct 3.1113(c)), then the opposing party may, within 5 days after service of the response, serve and file a reply. Cal Rules of Ct 3.1342(d).

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3. Court's Ruling

§39.90 a. Criteria Court Must Consider

Discretionary dismissal for delay in prosecution must be in accord with rules prescribed by the Judicial Council. CCP §583.410(b). The California Judicial Council adopted Cal Rules of Court 3.1342(e), which provides that the court is required to consider all matters relevant to a proper determination of the motion, including the following:

- The entire court file in the case including the affidavits and declarations and supporting data submitted by the parties;
- When applicable, the availability of the moving party and other parties for service of process;
- Plaintiff's diligence in seeking to effect service of process;
- The extent to which the parties engaged in any settlement negotiations or discussions;
- The parties' diligence in conducting discovery and other pretrial proceedings, including any extraordinary relief sought by either party;
- The nature and complexity of the case (see *Denham v Superior Court* (1970) 2 C3d 557, 86 CR 65);
- The law applicable to the case;
- The pendency of related litigation involving similar facts or determinative of the legal or factual issues in the case;
- The nature of any extensions of time or other delay attributable to either party;
- The condition of the court's calendar;
- The availability of an earlier trial date if the matter were ready for trial;
- Whether the interests of justice are best served by dismissal or trial of the case; and
- Any other facts or circumstances relevant to the fair determination of the issue.

The court must be guided by the policies set forth in CCP §583.130, which favor the right of parties to make stipulations in their own interests and dispose of litigation on its merits over the policy requiring dismissal for failure to prosecute an action with reasonable diligence. Cal Rules of Ct 3.1342(e).

Failure to consider the factors enumerated in Cal Rules of Ct §3.1342(e) constitutes an abuse of discretion. *Dockery v Hyatt* (1985) 169 CA3d 830, 215 CR 488. See also *Lopez v Larson* (1979) 91 CA3d 383, 153 CR 912 (court held press of business and attorney's workload is a factor to consider in reviewing a motion to dismiss). But see *Freedman v PG&E* (1987) 196 CA3d 696, 242 CR 8 (court held attorney's neglect is chargeable to client), and *Carroll v Abbott Labs. Inc.* (1982) 32 C3d 892, 187 CR 592 (client's liability for the neglect of attorney).

In a proceeding for dismissal under CCP §583.410, the court may require the parties to comply with any conditions or terms that in its discretion seem proper to effectuate substantial justice. CCP §583.430(a). See Cal Rules of Ct 3.1342(f) (court may defer its ruling pending performance by either party relating to trial or dismissal of case). For example, the court might condition the denial of a motion to dismiss on the plaintiff's promptly expediting certain discovery procedures and paying the defendant's costs of making the motion for discretionary dismissal.

The court also has the authority to make any order necessary to effectuate its ruling on the motion, including but not limited to provisions and conditional orders. CCP §583.430(b).

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§39.91 b. Burden of Proof on Defendant

The defendant has the burden of demonstrating that a dismissal is proper and warranted under the circumstances of the case. CCP §583.410(a). *Hocharian v Superior Court* (1981) 28 C3d 714, 170 CR 790. See *Martin v K & K Props.* (1987) 188 CA3d 1559, 1566, 234 CR 161 (plaintiff's 3-year delay in filing a cross-complaint and failure to initiate discovery within 4 years justified dismissal). Defendant should show the existence of factors listed in Cal Rules of Ct 3.1342(e) (see §39.90) as well as prejudice (see §39.92).

The burden then shifts to plaintiff, who must demonstrate excusable delay. *Freedman v PG&E* (1987) 196 CA3d 696, 704, 242 CR 8. In *Cubit v Ridgecrest Community Hosp.* (1987) 194 CA3d 1552, 240 CR 346, the court determined that when a delay between filing of the complaint and the motion to dismiss increases from 2 years to 5, "the showing required to excuse a failure to bring a case to trial grows greater and greater." 194 CA3d at 1566. See also *Corlett v Gordon* (1980) 106 CA3d 1005, 165 CR 524 (the closer the 5-year period is to running, the greater the showing required to excuse a failure to bring an action to trial within the 5-year mandatory period).

PRACTICE TIP: Both plaintiff and defendant should use *facts* to support their positions. Vague references to the "complexity of the case" do not comprise an adequate showing. See, *e.g., Longshore v Pine* (1986) 176 CA3d 731, 737, 222 CR 364 (specific information needed to meet plaintiff's burden of excuse).

The fact that the trial court has routinely set a case for trial is immaterial. *Lopez v State* (1996) 49 CA4th 1292, 57 CR2d 266; *Gunner v Van Ness Garage* (1957) 150 CA2d 345, 310 P2d 32. The court cannot be expected to consider whether a case meets the criteria for dismissal at a routine trial setting conference. *Lopez v State, supra*.

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§39.92 c. Is Prejudice to Defendant Required?

Recent decisions have construed CCP §§583.410-583.430 to require a showing of prejudice to the defendant to justify dismissal as a result of the delay. *Hurtado v Statewide Home Loan Co.* (1985) 167 CA3d 1019, 213 CR 712 (dismissal overruled because no showing of prejudice). See *Troupe v Courtney* (1985) 169 CA3d 930, 215 CR 703. However, the California Supreme Court held that the defendant was not required to show that he had been prejudiced by the plaintiff's delay. The court reasoned that the "legislative policy underlying section 583 is not grounded solely in prejudice caused by delay to a defendant. Its purpose, too, is to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence." *Blank v Kirwan* (1985) 39 C3d 311, 332, 216 CR 718. See also *Longshore v Pine* (1986) 176 CA3d 731, 222 CR 364.

Nonetheless, even after *Blank v Kirwan, supra,* appellate courts have reaffirmed the vitality of "prejudice" as a factor that, while not expressly enumerated in Cal Rules of Ct 3.1342(e), should be considered by the trial court in the exercise of its discretion, especially in a close case. See *Rim Forest Lumber Co. v Woodside Constr. Co.* (1987) 190 CA3d 454, 235 CR 443; *Hilburger v Madsen* (1986) 177 CA3d 45, 222 CR 713, disapproved on other grounds in *Woods v Young* (1991) 53 C3d 315, 279 CR 613.

In attempting to reconcile the conflicting viewpoints, it appears that the absence of prejudice is not necessarily fatal to defendant's motion to dismiss. *Blank v Kirwan, supra*. But, to the extent that defendant can demonstrate that he or she was prejudiced by plaintiff's delay, the chances for dismissal will increase. See *Freedman v PG&E* (1987) 196 CA3d 696, 242 CR 8; *Adams v Roses* (1986) 183 CA3d 498, 228 CR 339.

Appellate courts have also differed about whether there is or should be a "presumption" of prejudice due to delay by the plaintiff. The following decisions question the existence of such a presumption: *City of Los Angeles v Gleneagle Dev. Co.* (1976) 62 CA3d 543, 563, 133 CR 212; *Visco v Abatti* (1983) 144 CA3d 904, 192 CR 833. However, one court of appeal held that prejudice to a defendant may be presumed when the plaintiff's delay in the service of a summons is prolonged and defendant is unaware of the existence of the action. *Luti v Graco, Inc.* (1985) 170 CA3d 228, 238, 215 CR 902. See also *Lopez v Larson* (1979) 91 CA3d 383, 400, 153 CR 912 (dicta that there is an inherent prejudice to defendant when plaintiff has delayed service of summons and complaint, and the court may presume prejudice resulting from the delay in the service of summons). Another court concluded that in certain circumstances, prejudice may be presumed: A court does not abuse its discretion in presuming prejudice when a delay in service of the summons and complaint is prolonged and unjustified and defendants had no actual knowledge of the existence of the action. *Adam,* 183 CA3d at 505.

In summary, there appears to be no presumption of prejudice to the defendant from a delay in bringing the action to trial (see *Cordova v Vons Grocery Co.* (1987) 196 CA3d 1526, 242 CR 605), and no requirement that defendant make a showing of prejudice before an action may be dismissed (*Longshore v Pine* (1986) 176 CA3d 731, 222 CR 364), but the courts do seem to be able to find a presumption of prejudice from a delay in serving summons, probably because the defendant is unaware of the existence of the action when not served (see *Luti v Graco, supra*).

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§39.93 C. Effect of Denial: Motion May Be Made Again

The court's discretionary denial of a motion to dismiss is not a determination that plaintiff's delay was justified as a matter of law and does not bar future motions to dismiss, especially by persons who are not then parties to the action. *Feingersh v Lutheran Hosp. Soc'y* (1977) 66 CA3d 406, 136 CR 155 (decided under former CCP §583(a)). However, when a second motion to dismiss is made on an alleged new set of facts, the parties must comply with the provisions of CCP §1008, requiring disclosure of the previous motion and when and what judge made the order or decision. See discussion in §12.113.

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§39.94 D. Appellate Review

A judgment of dismissal is directly appealable. CCP §904.1. There is no appeal from the denial of the motion to dismiss because it is only an interlocutory order. While the order is interlocutory, defendant may, by writ of mandate or prohibition, seek to have the appellate court review the order. *J.C. Penney Co. v Superior Court* (1959) 52 C2d 666, 343 P2d 919. For further discussion of procedures after a court ruling, see §§39.78-39.79.

Plaintiff's petition seeking review of the propriety of the trial court's decision to dismiss an action must show a clear or manifest abuse of discretion. *Blank v Kirwan* (1985) 39 C3d 311, 331, 216 CR 718.

A grant of dismissal undergoes closer scrutiny than does a denial of a motion to dismiss. *Hilburger v Madsen* (1986) 177 CA3d 45, 51, 222 CR 713, disapproved on other grounds in *Woods v Young* (1991) 53 C3d 315, 279 CR 613. See *Freedman v PG&E* (1987) 196 CA3d 696, 242 CR 8 (questioning *Hurtado v Statewide Home Loan Co.* (1985) 167 CA3d 1019, 213 CR 712, in which the court held that the abuse of discretion standard did not apply). One court outlined the basic factors that should guide courts when reviewing a trial court's decision to grant a dismissal under former CCP §583(a). Competing policies under the statute must be weighed, namely, the policy that promotes diligent prosecution against the policy that seeks disposition of litigation on the merits rather than on procedural grounds. The policy of disposing of litigation on the merits is more powerful than the policy that seeks to promote prompt and diligent prosecution. *Cubit v Ridgecrest Community Hosp.* (1987) 194 CA3d 1552, 1566, 240 CR 346. See also *Wilson v Sunshine Meat & Liquor Co.* (1983) 34 C3d 554, 562, 194 CR 773. A corollary of that rule is that a court's denial of a defendant's motion to dismiss is usually presumed to be correct. See *Denham v Superior Court* (1970) 2 C3d 557, 564, 86 CR 65 (appellate test is whether trial court abused its discretion; if record is silent, appellate court will presume that plaintiff made a sufficient showing of excuse to justify denial of discretionary motion for dismissal).

The court's decision on a motion for discretionary dismissal must be made in accord with the conditions set out in CCP §583.420 and the criteria prescribed in Cal Rules of Ct 3.1342. See *Seacall Dev., Ltd. v Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 86 CR2d 229 (dismissal of petition for writ of mandate after 2 years for failure to prosecute vacated in light of attorney's abandonment of client, client's immediate action after learning of dismissal, and fact that policy against delay under 2-year discretionary dismissal statute is not as strong as under mandatory 5-year rule).

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IX. VOLUNTARY DISMISSAL

A. Description and Use

1. Applicability

§39.95 a. When Dismissal Applicable

Code of Civil Procedure §581, subject to certain exceptions, extends to the plaintiff the absolute right to dismiss an action either in whole or in part. This statute also provides for dismissal by consent of the parties or by the court in particular situations. Dismissal under §581 may be with or without prejudice. It is applicable to all civil actions or special proceedings, including the following:

- Intervention proceedings (*Egly v Superior Court* (1970) 6 CA3d 476, 86 CR 18);
- Actions seeking injunctive relief (*Simpson v Superior Court* (1945) 68 CA2d 821, 158 P2d 46);
- Eminent domain proceedings (*Whittier Union High Sch. Dist. v Beck* (1941) 45 CA2d 736, 114 P2d 731); and
- Actions in interpleader (*Kaufman v Superior Court* (1896) 115 C 152, 46 P 904).

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/§39.96 b. When Dismissal Inapplicable

§39.96 b. When Dismissal Inapplicable

The plaintiff does not have the right to dismiss voluntarily under CCP §581 the following actions or proceedings:

- **Order to show cause.** Code of Civil Procedure §581 does not apply to an order to show cause, because it is not an "action" within the meaning of the statute. *Marriage of Hurt* (1985) 172 CA3d 872, 218 CR 451.
- **Probate, child custody, guardianship.** A plaintiff has no absolute right to dismiss probate, child custody, or guardianship actions. *Malibu Outrigger Bd. of Governors v Superior Court* (1980) 103 CA3d 573, 165 CR 1.
- **Class action.** A plaintiff has no absolute right, without court approval, to dismiss a class action. When a plaintiff sues on behalf of a class, he or she assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for an individual gain. *Marcarelli v Cabell* (1976) 58 CA3d 51, 54, 129 CR 509.

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§39.97 2. Effect of Trial Court Delay Reduction Act Rules

The Trial Court Delay Reduction Act (Govt C §§68600-68620) has had a significant impact on the dismissal statutes. See chap 40. Counsel should consult local rules for the effect of the fast-track rules on the dismissal statutes for each county in which a case is pending. However, plaintiff's right to voluntarily dismiss a case without prejudice under CCP §581, if there has been "no trial of the issues," is not impaired by local fast-track rules regulating the action's progress. *Harris v Billings* (1993) 16 CA4th 1396, 20 CR2d 718 (court improperly vacated dismissal without prejudice and ordered dismissal with prejudice for failure to comply with local rules).

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§39.98 3. Tactical Considerations

When a case seems weak, voluntary dismissal before trial may prevent the plaintiff from having to pay attorney fees to a prevailing defendant. See *Marina Glencoe, L.P. v Neue Sentimental Film AG* (2008) 168 CA4th 874, 877, 85 CR3d 800 (voluntary dismissal with prejudice may prevent court from awarding attorneys fees under CC §1717).

The plaintiff may be able to exchange a voluntary dismissal for the defendant's waiver of costs during the settlement negotiations of a low-value case (*e.g.,* after discovery of damaging documentary evidence or admission at deposition that is fatal to a cause of action). See *Cal-Vada Aircraft, Inc. v Superior Court* (1986) 179 CA3d 435, 224 CR 809 (plaintiff may voluntarily dismiss without prejudice after court's order of summary adjudication when unresolved material issues remain). But see *Miller v Marina Mercy Hosp.* (1984) 157 CA3d 765, 204 CR 62 (matters deemed admitted under former CCP §2033; party not permitted to dismiss voluntarily without prejudice when admitted matter would effectively dispose of case).

In some instances, dismissal may reduce any potential liability the plaintiff or the plaintiff's counsel could have for malicious prosecution or abuse of process in maintaining the action if discovery does not support the defendant's liability. See §§1.4-1.5.

The defendant may, however, be able to request sanctions under CCP §128.7, which is based on Fed R Civ P 11, in a subsequent lawsuit for the plaintiff's filing of an action for an improper purpose that had just been dismissed elsewhere. See §1.6. The plaintiff may also be barred by collateral estoppel from relitigating issues actually adjudicated in the earlier action. See §38.119.

NOTE: Plaintiff's counsel should be cautious about voluntarily dismissing an action with prejudice. This step could cause disciplinary or malpractice problems if the client reconsiders and tries to file the action again before the statute of limitations has run. The reasons for any dismissal with prejudice should be documented and justified by the circumstances (*e.g.,* dismissal with prejudice bargained for during settlement negotiations).

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B. Dismissal Before Trial Commenced

§39.99 1. Dismissal as Matter of Right

An action may be dismissed before trial in the following circumstances:

- By the plaintiff unilaterally, on payment of any costs, with or without prejudice, regarding any defendant or cause of action, or regarding the complaint in its entirety (CCP §§581(b)(1), 581(c)); or
- By any party on written consent of all other parties (CCP §581(b)(2)).

A plaintiff as a matter of right may dismiss an action until there has been a hearing and decision on questions of law. *Datner v Mann Theatres Corp.* (1983) 145 CA3d 768, 193 CR 676. With certain exceptions (see §39.96), the plaintiff's right to dismiss is virtually absolute. See 6 Witkin, California Procedure, *Proceedings Without Trial* §§283-285 (5th ed 2008).

A plaintiff's right to dismiss in an action in which no affirmative relief has been sought may be exercised without the parties' knowledge or court's consent any time before trial has commenced. *Wilson v Los Angeles County Civil Serv. Comm'n* (1954) 126 CA2d 679, 273 P2d 34. Neither the clerk nor the court can refuse to enter the dismissal. *Klinghoffer v Barasch* (1970) 4 CA3d 258, 262, 84 CR 350. Nor may the court set aside such a dismissal. *Simpson v Superior Court* (1945) 68 CA2d 821, 158 P2d 46.

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2. Limitations on Right to Dismiss

§39.100 a. Cross-Complaint Seeking Affirmative Relief

A plaintiff loses the right to dismiss an action voluntarily when the defendant has sought affirmative relief by a cross-complaint. CCP §581(h). Counsel for the cross-complainant must consent to the dismissal in writing. CCP §581(b)(2).

Affirmative relief has been defined as (*Simpson v Superior Court* (1945) 68 CA2d 821, 824, 158 P2d 46):

> the allegations of new matter which in effect amounts to a counter attack. In other words, the relief sought, if granted, operates not as a defense but affirmatively and positively to defeat plaintiff's cause of action.

See also *Wilson v Los Angeles County Civil Serv. Comm'n* (1954) 126 CA2d 679, 273 P2d 34.

An answer does not seek affirmative relief unless it contains "affirmative allegations or introduces new affirmative matter entitling the pleader to such relief." *Estate of Somers* (1947) 82 CA2d 757, 759, 187 P2d 433.

The generally designated name of the pleading is not determinative of whether affirmative relief is sought. Rather, the controlling factor is whether affirmative relief is requested. *Guardianship of Lyle* (1946) 77 CA2d 153, 174 P2d 906.

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§39.101 b. Complaint in Intervention

A complaint in intervention that seeks affirmative relief against either the plaintiff or a third party has the same effect as a cross-complaint under CCP §581(h) and may not be dismissed if dismissing the plaintiff's underlying case does not operate to dismiss the complaint in intervention. *Bogardus v Santa Ana Walnut Growers Ass'n* (1940) 41 CA2d 939, 108 P2d 52.

However, if the complaint contains no allegation of new affirmative matters, the plaintiff retains the absolute right to dismiss against the intervenor and defendant. *Klinghoffer v Barasch* (1970) 4 CA3d 258, 84 CR 350.

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§39.102 c. Motion for Change of Venue Pending

A plaintiff is prevented from dismissing the action while a defendant's motion is pending to transfer the action to another court under CCP §396b. CCP §581(h). Following the grant or denial of the defendant's motion for change of venue, the plaintiff reacquires the ability to dismiss. On dismissal for failure to pay transfer fees and costs after successful motion for change of venue, see §§20.28-20.29.

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§39.103 d. Plaintiff Not Sole Party-in-Interest

A plaintiff may not have a right to dismissal in certain representative actions, *e.g.,* custody or guardianship proceedings. *Ford v Superior Court* (1959) 171 CA2d 228, 230, 340 P2d 296. The rationale is that an action based not on any statutory provision but on the inherent power of the court cannot be dismissed without court approval. Additionally, the welfare of a child is the primary interest of the court, not the parties to the action. *Guardianship of Lyle* (1946) 77 CA2d 153, 157, 174 P2d 906.

A shareholder's derivative suit may not be dismissed voluntarily. *Ensher v Ensher, Alexander & Barsoom, Inc.* (1960) 187 CA2d 407, 410, 9 CR 732. A stockholder bringing a derivative suit on behalf of the corporation is not permitted to dismiss the matter without the trial court's consent. *Spellacy v Superior Court* (1937) 23 CA2d 142, 147, 72 P2d 262.

Dismissals of class actions are governed by Cal Rules of Ct 3.770 and require court approval. *Marcarelli v Cabell* (1976) 58 CA3d 51, 129 CR 509.

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§39.104 3. When "Trial Commenced"

A plaintiff has the right to dismiss without prejudice "at any time before the actual commencement of trial." CCP §581(b)(1). Under CCP §581(a)(6), a trial is deemed to have commenced:

- At the beginning of any party's opening statement or argument; or, if none,
- At the time of administering the oath or affirmation to the first witness or at the introduction of any evidence.

However, other limitations have evolved through the courts' construction of the term "commencement of trial." *Harris v Billings* (1993) 16 CA4th 1396, 1402, 20 CR2d 718. These limitations generally arise when the action has proceeded to a determinative adjudication, or to a decision that is tantamount to an adjudication. *Harris v Billings, supra*.

Code of Civil Procedure §581(a) is illustrative rather than exclusive of the circumstances under which a trial has begun. *Miller v Marina Mercy Hosp.* (1984) 157 CA3d 765, 768, 204 CR 62 (party who has admitted matters that would effectively dispose of case may no longer voluntarily dismiss). The term "commencement of trial" includes other procedures that "effectually dispose of the case." *Wells v Marina City Prop.* (1981) 29 C3d 781, 785, 176 CR 104. See *Lewis C Nelson & Sons, Inc. v Lynx Iron Corp.* (2009) 174 CA4th 67, 76, 94 CR3d 468 (voluntary dismissal filed 1 day after defendant filed motion to enforce settlement timely; trial court had issued no tentative ruling, and ruling in defendant's favor was not inevitable); *Gogri v Jack In The Box Inc.* (2008) 166 CA4th 255, 261, 82 CR3d 629 (voluntary dismissal filed before court issued tentative ruling on motion for summary judgment was timely); *Gray v Superior Court* (1997) 52 CA4th 165, 60 CR2d 428 (plaintiff's right to voluntarily dismiss cut off by commencement of evidentiary proceedings before referee in partition action); *Hartbrodt v Burke* (1996) 42 CA4th 168, 49 CR2d 562 (plaintiff requested dismissal without prejudice to avoid terminating sanctions for failure to comply with discovery order); *M & R Props. v Thomson* (1992) 11 CA4th 899, 14 CR2d 579 (plaintiff's right to voluntarily dismiss cut off after tentative ruling granting motion to dismiss for failure to bring to trial within 5 years effectively disposed of case); *Cal-Vada Aircraft, Inc. v Superior Court* (1986) 179 CA3d 435, 441, 224 CR 809 (trial is considered commenced when there has been an effective disposition of all issues of law, *e.g.,* by pretrial motion).

NOTE: In *Franklin Capital Corp. v Wilson* (2007) 148 CA4th 187, 200, 55 CR3d 424, the Fourth District Court of Appeal adopted a "mere formality" test in an attempt to harmonize the many opinions that discuss when a trial has commenced. This test states that a voluntary dismissal is ineffective if it was made in light of a public and formal indication by the trial court of the legal merits of the case, or the dismissing plaintiff's procedural dereliction made dismissal inevitable. 148 CA4th at 200. The court found that a plaintiff's voluntary dismissal of a case, one day before an "order to show cause" hearing for dismissal or other sanctions, was effective. In *Gogri,* 166 CA4th at 268 n9, the court noted that the *Franklin* "mere formality" test is not the exclusive means for determining the timeliness of a voluntary dismissal.

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§39.105 a. Demurrer Sustained Without Leave to Amend

A plaintiff's right to dismiss voluntarily terminates after a court sustains a general demurrer without leave to amend; the demurrer is a conclusive determination on the merits and is the equivalent of a "trial." *Goldtree v Spreckels* (1902) 135 C 666, 67 P 1091. If the court grants a demurrer to some but not all causes of action, the plaintiff may voluntarily dismiss the remaining causes of action under CCP §581. *Gogri v Jack In The Box Inc.* (2008) 166 CA4th 255, 272 n13, 82 CR3d 629.

Simply filing a demurrer does not divest a plaintiff of the ability to dismiss. Until the court's ruling on the demurrer, the plaintiff's right to dismiss remains absolute. *Wells v Marina City Prop.,* 29 C3d at 789. The plaintiff retains the right to voluntarily dismiss the action without prejudice even on learning of the court's tentative ruling on a demurrer before the hearing. *Datner v Mann Theatres Corp.* (1983) 145 CA3d 768, 193 CR 676.

The plaintiff's right to a voluntary dismissal after a demurrer has been submitted to the court for a decision was affirmed in *United Shippers, Inc. v Superior Court* (1980) 104 CA3d 359, 162 CR 871 (decided under former CCP §581). *United Shippers* supports the view that a plaintiff may voluntarily dismiss an action at any time before the court *issues a ruling* in a matter that disposes of the entire action (*e.g.,* by granting a demurrer or a special motion to strike a SLAPP suit under CCP §425.16).

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§39.106 b. Demurrer Sustained With Leave to Amend

If the court sustains the demurrer with leave to amend, the plaintiff may dismiss the action without prejudice until the time to amend expires. *Wells v Marina City Prop.* (1981) 29 C3d 781, 789, 176 CR 104; *Parsons v Umansky* (1994) 28 CA4th 867, 34 CR2d 144. The plaintiff also retains the absolute right to voluntarily dismiss an amended complaint without prejudice following a demurrer to the original complaint with leave to amend. *Christensen v Dewor Devs.* (1983) 33 C3d 778, 191 CR 8.

One court held that an executed stipulation between the parties that a demurrer will be taken off calendar in exchange for the plaintiff's agreement to file an amended complaint by a specific date was the equivalent of a stipulation that the demurrer was sustained with leave to amend within the time specified and allowed by the stipulation and thus subject to a motion to dismiss under the terms of now former CCP §581(c). *Harding v Collazo* (1986) 177 CA3d 1044, 1053, 223 CR 329.

However, if a plaintiff has leave to amend and fails to amend within the time authorized by the court or the parties' stipulation, the plaintiff has been held to have no right to a voluntary dismissal under former CCP §581. *Wells v Marina City Prop., supra* (plaintiff's failure to amend within time set by court constitutes admission of inability to rectify the deficiencies in complaint). Accordingly, the court will not allow the plaintiff to dismiss the action in hopes of receiving a favorable result from a different trial forum. The only recourse available to the plaintiff is an appeal, not a dismissal.

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§39.107 c. Summary Judgment

The plaintiff has no right to voluntarily dismiss an action without prejudice after summary judgment has been granted. See *Malovec v Hamrell* (1999) 70 CA4th 434, 441, 82 CR2d 712 (right to voluntarily dismiss without prejudice is terminated when court rules dispositively on case).

A plaintiff may not voluntarily dismiss without prejudice after an adverse tentative ruling on a summary judgment motion is issued and the hearing is commenced and continued under CCP §437c(h) for the sole purpose of allowing the plaintiff to gather opposition evidence it claimed was previously unavailable. *Mary Morgan, Inc. v Melzark* (1996) 49 CA4th 765, 57 CR2d 4. A plaintiff may voluntarily dismiss an action before the court issues its tentative ruling on a summary judgment motion. *Gogri v Jack In The Box Inc.* (2008) 166 CA4th 255, 261, 264, 82 CR3d 629.

A plaintiff who does not file opposition to a summary judgment motion may not avoid summary judgment by voluntarily dismissing the complaint without prejudice after the time for filing opposition to the motion has passed. *Cravens v State Bd. of Equalization* (1997) 52 CA4th 253, 60 CR2d 436. In *Cravens*, the plaintiff did not file the dismissal until the day before hearing date. The court ruled that a plaintiff who waits until after the time to file an opposition to dismiss the complaint is subject to the trial court's continuing jurisdiction to rule on the summary judgment motion. Conversely, a trial court erred in granting defendant's summary judgment motion after plaintiff filed voluntary dismissal one day before the summary judgment opposition was due. *Zapanta v Universal Care, Inc.* (2003) 107 CA4th 1167, 132 CR2d 842.

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§39.108 d. Partial Summary Adjudication

Summary adjudication of some but not all issues in a case is not considered a trial within the meaning of CCP §581. *Cal-Vada Aircraft, Inc. v Superior Court* (1986) 179 CA3d 435, 224 CR 809. Under CCP §581(c), a plaintiff may voluntarily dismiss the complaint or any of its causes of action in respect to any defendant or defendants. Accordingly, the court is without further jurisdiction on those issues or parties after the plaintiff has dismissed them.

However, the *Cal-Vada* court suggested that a plaintiff who refiles a complaint after voluntary dismissal and a partial summary adjudication of issues could be collaterally estopped from litigating in the subsequent case the same issues that had been resolved in the summary adjudication of issues. 179 CA3d at 445. Although this issue was not decided, it is arguable that if a question has actually been litigated, then, in an action involving the same parties in later litigation, collateral estoppel is applicable. See Restatement (Second) of Judgments §25 (1980).

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§39.109 e. After Unfavorable Judicial Arbitration Award

A party is not entitled to a voluntary dismissal after an adverse judicial arbitration award. *Kelley v Bredelis* (1996) 45 CA4th 1819, 53 CR2d 536 (dismissal with prejudice); *Herbert Hawkins Realtors, Inc. v Milheiser* (1983) 140 CA3d 334, 189 CR 450 (dismissal without prejudice). See *Harris v Billings* (1993) 16 CA4th 1396, 20 CR2d 718. After an adverse award, a party may either request a trial de novo or allow the award to be entered as a judgment that may be vacated under CCP §1286.2. If a party withdraws the request or voluntarily dismisses its complaint, the parties are restored to their positions before requesting a trial de novo and the award becomes final under CCP §1141.20. See §37.46.

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C. Voluntary Dismissal During Trial

§39.110 1. With Prejudice

On commencement of trial, the plaintiff may no longer voluntarily dismiss an action without prejudice. CCP §581(b)(1). Any dismissal after the trial commences must be with prejudice to the right to file the same action again. CCP §581(e). However, a party may obtain a dismissal without prejudice after trial has commenced on the written consent of all affected parties or on court order after a showing of good cause. CCP §581(e).

A dismissal with prejudice terminates the action. *Gagnon Co. v Nevada Desert Inn, Inc.* (1955) 45 C2d 448, 455, 289 P2d 466. Merely labeling an action as dismissed with prejudice is inconclusive. Instead, the focus is on the "nature of the action and the character of the judgment." *Gagnon Co. v Nevada Desert Inn, Inc., supra.*

NOTE: Thus, when the dismissal order does not state whether the action is dismissed with or without prejudice, the record must reflect that there was an actual determination on the merits if it is to be considered a dismissal with prejudice.

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2. Without Prejudice

§39.111 a. By Stipulation

Under CCP §581(e), voluntary dismissals may be entered without prejudice to the plaintiff bringing the same action again if the applicable statute of limitation has not run, when all affected parties consent. There is no requirement that the consent be written; it is binding on the parties whether the stipulation of counsel is filed with the court clerk or entered in the minutes. CCP §283; *Harding v Collazo* (1986) 177 CA3d 1044, 223 CR 329, citing *Smith v Whittier* (1892) 95 C 279, 30 P 529.

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§39.112 b. By Court Order

The plaintiff may make a motion after trial commences to dismiss without prejudice on a showing of good cause. CCP §581(e). The court may also dismiss the action without prejudice because of the plaintiff's failure to prosecute under CCP §§583.110-583.430. See CCP §581(b)(4), (g). In addition, the court may dismiss without prejudice if the plaintiff abandons the matter.

Additionally, the court may dismiss without prejudice the entire action, or dismiss only with respect to that defendant, when either party fails to appear at the trial and the other party asks for the dismissal (CCP §581(b)(5), (*l*)) or when the dismissal is made under CCP §418.10 (motion to stay or dismiss action on inconvenient forum grounds) (CCP §581(h)).

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D. Procedures

§39.113 1. Request for Dismissal; Attorney's Written Consent

The plaintiff's attorney fills out the form of Request for Dismissal (Judicial Council Form CIV-110) (see §39.130) and files it with the court clerk.

Voluntary dismissal is not permitted except by the written consent of the plaintiff's attorney of record, or, if consent is not obtained, by court order after notice has been given to the plaintiff's attorney of record. CCP §581(i). That is, a represented party may not unilaterally decide to dismiss an action without counsel's knowledge and agreement.

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/§39.114 2. Court Order of Dismissal

§39.114 2. Court Order of Dismissal

A court-ordered dismissal must be a written order signed by the court and filed in the action. CCP §581d. Once filed, the order constitutes a judgment and is effective for all purposes. CCP §581d.

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§39.115 3. Entry of Dismissal

The written notice of dismissal must be entered into the clerk's register and is immediately effective for all purposes. CCP §581d. Once entered, no further court action is necessary to make the dismissal effective. *Hopkins v Superior Court* (1902) 136 C 552, 69 P 299.

The clerk's duty to enter dismissal is ministerial. The dismissal is effective when filed, even if the clerk fails to enter it. *Associated Convalescent Enters. v Carl Marks & Co.* (1973) 33 CA3d 116, 108 CR 782.

The clerk can be compelled to enter the dismissal on motion or by writ of mandate. *Silverton v Free* (1953) 120 CA2d 389, 261 P2d 17. See also 6 Witkin, California Procedure, *Proceedings Without Trial* §306 (5th ed 2008).

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§39.116 4. Setting Aside Dismissal

A plaintiff may set aside a dismissal if it resulted from mistake, inadvertence, surprise, excusable neglect, or attorney neglect. CCP §473(b); *Isaacs v Jones* (1933) 135 CA 47, 26 P2d 533. The motion to vacate must be made within a reasonable time not to exceed 6 months after entry of dismissal. CCP §473; *Davies v Superior Court* (1964) 228 CA2d 535, 39 CR 693. On CCP §473 motions, see chap 38.

The motion to vacate the dismissal may be served on the opposing party's attorney. See *Maxwell v Cooltech, Inc.* (1997) 57 CA4th 629, 67 CR2d 293 (attorney-client relationship continues for purpose of accepting service of motion to vacate dismissal).

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E. Effect of Dismissal

§39.117 1. Without Prejudice

A dismissal without prejudice permits the plaintiff to file another action on the same claim, as long as it is filed within the applicable statute of limitations period. *Gagnon Co. v Nevada Desert Inn, Inc.* (1955) 45 C2d 448, 289 P2d 466; *Kuperman v Great Republic Life Ins. Co.* (1987) 195 CA3d 943, 241 CR 187.

Unless otherwise indicated, a dismissal will be considered to be without prejudice. *Lewis v Johnson* (1939) 12 C2d 558, 563, 86 P2d 99. See *Cardiff Equities, Inc. v Superior Court* (2008) 166 CA4th 1541, 1550, 83 CR3d 699 (plaintiff voluntarily dismissed first case after motion to compel arbitration had been granted, but before arbitration had begun, and filed second case containing only causes of action that were not subject to arbitration).

See also discussion in §§39.111-39.112 (dismissal of action without prejudice during trial).

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§39.118 a. Action Not Res Judicata

A voluntary dismissal is not a final judgment. *International Indus. v Olen* (1978) 21 C3d 218, 145 CR 691. A dismissal without prejudice avoids the bar of res judicata in a later action. *Crosswhite v American Ins. Co.* (1964) 61 C2d 300, 38 CR 412; *Kuperman v Great Republic Life Ins. Co.* (1987) 195 CA3d 943, 241 CR 187.

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§39.119 b. Collateral Estoppel May Be Applicable

Collateral estoppel may preclude the same parties from litigating issues actually summarily adjudicated without substantial controversy in the earlier lawsuit. See *Cal-Vada Aircraft, Inc. v Superior Court* (1986) 179 CA3d 435, 446, 224 CR 809 (issue raised but undecided).

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§39.120 2. With Prejudice

A dismissal with prejudice operates as a retraxit and terminates the lawsuit. *Kronkright v Gardner* (1973) 31 CA3d 214, 107 CR 270. The dismissal is like a judgment and is res judicata as to the claim dismissed. *Fisher v Eckert* (1949) 94 CA2d 890, 212 P2d 64; *Spreckels v Spreckels* (1916) 172 C 818, 158 P 543. That is, the dismissal will bar the action only to the extent that the facts alleged are insufficient to constitute a cause of action. If additional facts are alleged that cure any defects in the original pleadings, the dismissal does not act as a bar to a subsequent action. *Wells v Marina City Prop.* (1981) 29 C3d 781, 176 CR 104; *Keidatz v Albany* (1952) 39 C2d 826, 249 P2d 264.

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3. Costs and Fees

§39.121 a. Costs Recoverable After Dismissal Without Prejudice

After a plaintiff has voluntarily dismissed the action, the court is without jurisdiction to act with respect to claims or parties except to award costs and statutory attorney fees. *Associated Convalescent Enters. v Carl Marks & Co.* (1973) 33 CA3d 116, 108 CR 782. See also *Parrott v Mooring Townhomes Ass'n, Inc.* (2003) 112 CA4th 873, 876, 6 CR3d 116. To prevent frivolous suits, a defendant is entitled to recover court costs incurred when the plaintiff dismisses without prejudice. *Catello v I.T.T. Gen. Controls* (1984) 152 CA3d 1009, 200 CR 4 (voluntary dismissal of complaint in intervention immediately before trial entitles defendant to costs as a prevailing party).

To recover court costs after the plaintiff voluntarily dismisses an action, the defendant must timely apply for a costs award. See CCP §1032; Cal Rules of Ct 3.1700. The defendant need not file a proposed judgment together with its costs memorandum. *Fries v Rite Aid Corp.* (2009) 173 CA4th 182, 188, 92 CR3d 523.

In a multiplaintiff action, a prevailing defendant is entitled to recover costs incurred from a plaintiff who dismisses, even when the remaining plaintiffs maintain their actions. The voluntary dismissal of an action by one of several plaintiffs creates liability for costs, even though the balance of the action proceeds to trial. *Catello v I.T.T. Gen. Controls* (1984) 152 CA3d 1009, 1014, 200 CR 4. Thus, the holding in *Foreman Roofing* permits costs only to the extent that the nonprevailing party would not have incurred such expenses but for the intervention.

However, the court in *Burrow v Pike* (1987) 190 CA3d 384, 400, 235 CR 408, held that *Catello* does not support an award of costs when the defendant is not the prevailing party. Although CCP §1032 permits recovery of costs, a defendant is entitled to such costs only on a judgment in its favor. It would be inequitable to allow losing defendants to transfer the cost of litigation to a party who intervened in the action of a plaintiff who later dismissed the complaint. *Burrow v Pike, supra.*

PRACTICE TIP: The plaintiff's attorney should consider negotiating a waiver of the defendant's costs before requesting a voluntary dismissal without prejudice.

Voluntary dismissal of claims against one defendant triggers that defendant's time period to request attorney fees and costs regardless of the pendency of claims against other defendants. The dismissed defendant must file its memorandum of costs within 15 days after service of the notice of entry of dismissal (Cal Rules of Ct 3.1700(a)) and, because a voluntary dismissal is a judgment with the meaning of Cal Rules of Ct 8.104(a), the dismissed defendant must file its motion for attorney fees within 60 days after notice of entry of dismissal (Cal Rules of Ct 8.104(a), 3.1702(b)). *Sanabria v Embrey* (2001) 92 CA4th 422, 425, 111 CR2d 837 (attorney fees under contract).

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§39.122 b. Attorney Fees After Voluntary Dismissal

Unless provided for by contract, statute, or other law, attorney fees are not recoverable as costs. CCP §§1021, 1033.5(a)(10); *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 1341, 5 CR2d 154 (parties may agree that prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract).

In contract actions, the right to recover fees is governed by CC §1717. Under CC §1717, attorney fees are permitted in any action on a contract that specifically permits such recovery. To qualify for §1717 fees, the party seeking the award must be declared the "prevailing party" in the action. *Bank of Idaho v Pine Ave. Assoc.* (1982) 137 CA3d 5, 186 CR 695. See *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614 (CC §1717 requires that any contractual provision for attorney fees to prevailing party must be applied mutually, even if contract specifies that only one party may recover fees). See also *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1088, 95 CR2d 198 (CC §1717 gives trial court broad discretion to award attorney fees to prevailing party, even when that party is represented by in-house counsel).

However, CC §1717(b)(2) provides that when "an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." Thus, when a defendant is dismissed from an action voluntarily, §1717(b)(2) precludes the award of attorney fees incurred in defending causes of action based on the contract, even if the contract authorizes recovery of those fees. *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830.

The recovery of attorney fees authorized by contract that are incurred in defending a tort or other noncontract claim, and that are otherwise recoverable as a matter of contract law, is *not* barred by CC §1717 or the decision in *International Indus. v Olen* (1978) 21 C3d 218, 145 CR 691. *Santisas v Goodin, supra*. In *Santisas*, the court held that the defendants were not entitled to recover attorney fees under CC §1717 on the breach of contract cause of action because plaintiffs had voluntarily dismissed the action. However, defendants were entitled, under the attorney fee provision of the agreement, to recover attorney fees as prevailing parties on the tort causes of action. See also *Castro v Superior Court* (2004) 116 CA4th 1010, 1024, 10 CR3d 865 (when lis pendens is withdrawn while motion to expunge is pending, moving party is neither automatically entitled to nor automatically denied attorney fees under CCP §405.38; trial court has discretion to award attorney fees based on determination of which party would have prevailed on motion to expunge and "whether, in light of all the circumstances, the imposition of fees would otherwise be unjust").

PRACTICE TIP: The plaintiff's attorney should consider negotiating a waiver of the defendant's attorney fees for tort or other noncontract claims before requesting a voluntary dismissal without prejudice.

Dismissal entered on the plaintiff's motion or by stipulation of the parties, before or during trial, is voluntary and precludes an award of attorney fees. CC §1717; *D & J, Inc. v Ferro Corp.* (1986) 176 CA3d 1191, 222 CR 656.

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4. Sanctions on Dismissal

§39.123 a. When Imposed

A trial court is permitted to impose sanctions if a separate motion is made by a party. CCP §128.7(c)(1). Based on Fed R Civ P 11, CCP §128.7 gives the court power to award reasonable expenses and attorney fees for pleadings, petitions, or other papers that are (1) "presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"; (2) based on claims or legal contentions that are unwarranted by existing law or a nonfrivolous argument for the "extension, modification, or reversal of existing law or the establishment of new law"; or (3) based on factual contentions that are without evidentiary support. CCP §128.7(b)-(c). For further discussion, see §1.6.

The availability of CCP §128.7 sanctions against an offending plaintiff that has voluntarily dismissed its action depends on whether the sanctions motion is filed before or after the dismissal. A defendant cannot obtain CCP §128.7 sanctions by filing a motion for them after a voluntary dismissal. *Hart v Avetoom* (2002) 95 CA4th 410, 415, 115 CR2d 511. Conversely, the court may award sanctions if the voluntary dismissal comes after the sanctions motion is filed. *Eichenbaum v Alon* (2003) 106 CA4th 967, 973, 131 CR2d 296.

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§39.124 b. Procedures for Recovering Sanctions

Under CCP §128.7, a motion for sanctions must be made separately from other motions or requests. CCP §128.7(c)(1). It may not be included as an additional prayer for relief in another motion. In making its decision on the motion, the court shall consider whether a party seeking sanctions has exercised due diligence in determining what sanctions should be ordered. CCP §128.7(c).

Like Fed R Civ P 11, on which it is based, CCP §128.7 provides a safe harbor for avoiding an award of sanctions. A motion under §128.7 must be filed before completion of the case, and it may not be filed or presented to the court unless the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or corrected within 21 days after the motion is served (or any other period the court prescribes). CCP §128.7(c)(1). See *Li v Majestic Indus. Hills LLC* (2009) 177 CA4th 585, 594, 99 CR3d 334 (error to award §128.7 sanctions for frivolous motion to vacate when court denied motion to vacate only 19 days after service of §128.7 motion thus denying plaintiff 21-day safe harbor period); *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 73 CR2d 655 (safe harbor provisions of CCP §128.7(c)(1) precluded imposition of sanctions because sanctioned attorneys were not served with the sanctions motions the required number of days before they were filed to allow correction of conduct cited). Therefore, to comply with the safe harbor provision, a party seeking sanctions must proceed in two steps: First, the party must file a notice of motion for sanctions on the offending party at least 21 days before filing the motion with the court. See *Galleria Plus, Inc. v Hanmi Bank* (2009) 179 CA4th 535, 537, 101 CR3d 803 (reversing order granting sanctions because notice of motion for sanctions failed to state date of motion hearing, rendering notice fatally defective). The notice must describe the offending conduct specifically. CCP §128.7(c)(1); *Barnes v Department of Corrections* (1999) 74 CA4th 126, 130, 87 CR2d 594. Second, the motion may then be filed with the court if the offending party has not withdrawn the pleading or has not corrected the objectionable conduct. 74 CA4th at 130.

If investigation or discovery has not been completed, counsel should be able to request the court to extend the safe harbor period while the investigation or discovery proceeds.

A trial court may bring a motion for sanctions on its own initiative. CCP §128.7(c)(2). To comply with the safe harbor provisions, however, the court must bring the motion before it has ruled on the issue dispositively, such as in a summary judgment motion. *Malovec v Hamrell* (1999) 70 CA4th 434, 82 CR2d 712.

Although sanctions for violating CCP §128.7(b) may be imposed on attorneys, law firms, or parties, monetary sanctions are not available against a represented party for violating CCP §128.7(b)(2) (frivolous arguments). CCP §128.7(d)(1). Nor are monetary sanctions available when the court brings a motion for sanctions on its own initiative. *Malovec v Hamrell, supra*. Self-represented attorneys cannot recover their own attorney fees as sanctions under CCP §128.7. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475.

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§39.125 F. Review on Appeal

As a general rule, neither a plaintiff nor a defendant has a right to appeal a voluntary dismissal. *Rosen v Robert P. Warmington Co.* (1988) 201 CA3d 939, 247 CR 635. The rationale is that dismissal of the action is a ministerial act of the clerk, not a judicial act. *Gray v Superior Court* (1997) 52 CA4th 165, 60 CR2d 428; *Associated Convalescent Enters. v Carl Marks & Co.* (1973) 33 CA3d 116, 120, 108 CR 782.

A plaintiff may appeal, however, from a judgment entered following a dismissal. *King v Superior Court* (1936) 12 CA2d 501, 56 P2d 268. A plaintiff's appeal following the sustaining of a demurrer without leave to amend is directed at the order of dismissal, not at the order sustaining the demurrer. *Dollar-A-Day Rent-A-Car Sys. v Pacific Tel. & Tel. Co.* (1972) 26 CA3d 454, 102 CR 651.

NOTE: Although a party may not appeal a voluntary dismissal, it may file a motion to vacate a dismissal. The denial of the motion is also nonappealable, but may be reviewed by extraordinary writ. *Gray v Superior Court* (1997) 52 CA4th 165, 60 CR2d 428.

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X. FORMS

A. Mandatory Dismissal

§39.126 1. Form: Notice of Motion to Dismiss

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO** _ _[*E.G., PROSECUTE ACTION/SERVE SUMMONS/BRING ACTION TO TRIAL*]_ _**; SUPPORTING MEMORANDUM;** _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Please take notice that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**, defendant,** _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §**_ _[*specify, e.g., 583.210(a)/583.310*]_ _ **for an order to dismiss this action. The grounds for issuance of this order are that plaintiff,** _ _[*name*]_ _**, has failed to** _ _[*e.g., serve and return the summons on the complaint within 3 years after commencement of this action, as required by Code of Civil Procedure §583.210(a)/bring this action to trial within 5 years after commencement of the action, as required by Code of Civil Procedure §583.310*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: A memorandum in support of the motion must accompany the notice of motion. Cal Rules of Ct 3.1112(a), 3.1113(a). This form is designed for use when dismissal for failure to prosecute is mandatory. For discussion of procedures for dismissal under mandatory statutes, see §§39.71-39.80. On procedures for discretionary dismissals for delay in prosecution, see §§39.81-39.94.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/§39.127 2. Form: Declaration Supporting Motion to Dismiss

§39.127 2. Form: Declaration Supporting Motion to Dismiss

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION TO**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**DISMISS FOR FAILURE TO**
	)	_ _[*E.G., PROSECUTE*
	)	*ACTION/SERVE*
	)	*SUMMONS/BRING ACTION TO*
	)	*TRIAL*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*defendant/attorney for the defendant,* _ _[*name*]_ _]_ _, **in this action, filed by plaintiff,** _ _[*name*]_ _**, on** _ _[*date*]_ _**. If called to testify in this matter, I could and would competently testify to the following matters, which are of my own personal knowledge.**

[*Option 1: If motion is based on statutory time period*]

2. _ _[*State facts on which motion for dismissal is based, e.g., Summons on the complaint has not been served and returned within 3 years after the date of filing/This action has not been brought to trial within 5 years after the date of filing*]_ _**.**

[*Option 2: If motion is based on failure to use reasonable diligence*]

2. Plaintiff has not prosecuted this action with reasonable diligence in that _ _[*state facts showing lack of reasonable diligence, e.g., plaintiff has conducted no discovery and has made no effort to bring the action to trial since the action was filed over 2 years ago*]_ _**.**

[*Add if appropriate*]

3. The parties stipulated in writing that the time to _ _[*e.g., serve and return the summons on the complaint/bring the action to trial*]_ _ **may be extended to** _ _[*date*]_ _**, but that date has passed and there is no stipulation now in effect.**

[*Add if appropriate*]

[4.]_ _[*Defendant was not amenable to the process of the Court/The jurisdiction of the Court to try this action was suspended*]_ _ **from** _ _[*date*]_ _**, to** _ _[*date*]_ _**, because** _ _[*state reasons*]_ _**.**

[*Continue*]

[5.]_ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: The declaration should state all facts concerning the relevant statutory period. Any periods during which the statutory time was tolled should be included. For discussion of conditions that toll the period for service of summons, see §§39.16-39.18. On papers supporting motion, see §§39.74, 39.87.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/§39.128 3. Form: Order of Dismissal

§39.128 3. Form: Order of Dismissal

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER OF DISMISSAL**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for an order of dismissal was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

1. This action be dismissed.

2. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: For discussion of orders involving mandatory dismissal statutes, see §39.76. If the dismissal is made at the court's discretion under CCP §§583.410-583.430, the order should include language to the effect that the court, having considered all the criteria set forth in Cal Rules of Ct 3.1342(e), and satisfactory proof having been made, orders the action dismissed. See discussion in §39.90.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§39.129 4. Form: Notice of Entry of Dismissal

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF ENTRY OF DISMISSAL (CAL RULES OF CT 3.1390)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

PLEASE TAKE NOTICE that, on request of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, the Court has entered a dismissal in this action on** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: A copy of the order granting dismissal should be attached. For discussion, see §39.76.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/39 Dismissal/ B. Voluntary Dismissal/§39.130 1. Form: Request for Dismissal (Judicial Council Form CIV-110)

B. Voluntary Dismissal

§39.130 1. Form: Request for Dismissal (Judicial Council Form CIV-110)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
REQUEST FOR DISMISSAL ☐ **Personal Injury, Property Damage, or Wrongful Death** ☐ **Motor Vehicle** ☐ **Other** ☐ **Family Law** ☐ **Eminent Domain** ☐ **Other *(specify)* :**	CASE NUMBER:
- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -	

1. TO THE CLERK: Please **dismiss** this action as follows:
   a. (1) ☐ With prejudice (2) ☐ Without prejudice
   b. (1) ☐ Complaint (2) ☐ Petition
   (3) ☐ Cross-complaint filed by *(name)*: on *(date)*:
   (4) ☐ Cross-complaint filed by *(name)*: on *(date)*:
   (5) ☐ Entire action of all parties and all causes of action
   (6) ☐ Other *(specify)*:*

2. *(Complete in all cases except family law cases.)*
   ☐ Court fees and costs were waived for a party in this case. *(This information may be obtained from the clerk. If this box is checked, the declaration on the back of this form must be completed).*

Date:

. . . . . .

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

▶ _____
(SIGNATURE)

*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

Attorney or party without attorney for:
☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross–Complainant

3. **TO THE CLERK:** Consent to the above dismissal is hereby given.**
   Date:

_____

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

▶ _____
(SIGNATURE)

** If a cross-complaint – or Response (Family Law) seeking affirmative relief – is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) or (j).

Attorney or party without attorney for:
☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross–Complainant

(To be completed by clerk)

4. ☐ Dismissal entered as requested on *(date)*:
5. ☐ Dismissal entered on *(date)*: as to only *(name)*:
6. ☐ Dismissal **not entered** as requested for the following reasons *(specify)*:

7. a. ☐ Attorney or party without attorney notified on *(date)*:
   b. ☐ Attorney or party without attorney not notified. Filing party failed to provide
   ☐ a copy to be conformed ☐ means to return conformed copy

Date: Clerk, by _____, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-110 [Rev. July 1, 2009]

REQUEST FOR DISMISSAL

CEB

Code of Civil Procedure, § 581 et seq.;
Gov. Code, § 68637(c); Cal. Rules of Court, rule 3.1390
www.courtinfo.ca.gov

Print

CIV-110

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

Declaration Concerning Waived Court Fees

The court has a statutory lien for waived fees and costs on any recovery of $10,000 or more in value by settlement, compromise, arbitration award, mediation settlement, or other recovery. The court's lien must be paid before the court will dismiss the case.

1. The court waived fees and costs in this action for *(name):*
2. The person in item 1 (*check one):*
   a. ☐ is not recovering anything of value by this action.
   b. ☐ is recovering less than $10,000 in value by this action.
   c. ☐ is recovering $10,000 or more in value by this action. *(If item 2c is checked, item 3 must be completed.)*
3. ☐ All court fees and costs that were waived in this action have been paid to the court *(check one):* ☐ Yes ☐ No

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY MAKING DECLARATION) (SIGNATURE)

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On effect of dismissal with or without prejudice, see §§39.110-39.112.

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§39.131 2. Form: Notice of Entry of Voluntary Dismissal

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF ENTRY OF**
vs	)	**DISMISSAL**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

PLEASE TAKE NOTICE that a dismissal was entered in this action at the request of plaintiff, _ _[*name*]_ _**, on** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: On clerk's duty to enter dismissal into court register, see §39.115.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§39.132 3. Form: Judgment of Dismissal

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _, **Defendant(s)**	**No. _ _ _ _ _ _** **JUDGMENT OF DISMISSAL**

It appearing from the files and records in this action that (1) plaintiff, _ _[*name*]_ _, filed with the court clerk a request for entry of dismissal of the complaint in its entirety, and (2) the clerk entered dismissal on _ _[*date*]_ _, and good cause appearing,

IT IS ORDERED that:

1. This action be dismissed.

2. Defendant, _ _[*name*]_ _, be awarded costs in the amount of $_ _ _ _ _ _.

3. _ _[*State any additional orders*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §39.121 on costs recoverable at defendant's request after a dismissal without prejudice.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Case Management Conferences

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I. INTRODUCTION

§40.1 A. Scope of Chapter

This chapter discusses judicial case management under the Trial Court Delay Reduction Act (Govt C §§68600-68620), which applies to all actions and proceedings in superior court in each county (Govt C §68605.5), except juvenile, probate, and domestic relations cases (Govt C §68608(a)). Cases may also be exempted by local rule. See, *e.g.*, Los Angeles Ct R 7.2(b).

It discusses differential case management rules (see §§40.5-40.16), procedures for assignment to a case management plan (see §§40.17-40.35), special rules for the management of complex cases (see §§40.36-40.46), the case management conference (see §§40.47-40.58), the case management statement and order (see §§40.59-40.70), settlement conferences (see §§40.71-40.87), final status conference (see §40.88), and sanctions (see §40.89). For forms, see §§40.90-40.93.

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B. Governing Law

§40.2 1. Statutes

Case management is governed by the Trial Court Delay Reduction Act (Govt C §§68600-68620), rules of court (see §40.3), and local rules (see §40.4).

- Title of act. Govt C §68600.
- Standards for timely disposition. Govt C §68603.
- Statistics on compliance with standards for timely disposition. Govt C §68604.
- Application of article. Govt C §68605.5.
- Judicial responsibilities. Govt C §68607.
- Effect of challenge under CCP §170.6. Govt C §68607.5.
- Exempt cases; sanctions for noncompliance. Govt C §68608.
- Uninsured motorist cases. Govt C §68609.5.
- Programs for training judges. Govt C §68610.
- Judicial development of procedures, standards, and policies. Govt C §68612.
- Funding of programs. Govt C §68613.
- Judicial council's contracting out for performance of duties. Govt C §68615.
- Procedure and time limitations. Govt C §68616.
- Report to legislature re Centers for Complex Litigation. Govt C §68617.
- Delay reduction for limited civil cases. Govt C §68620.

Other statutes govern trial-setting preference. See, *e.g.,* CCP §§36(a) (aged, ill parties), 36(b) (party under age 14), 527(e) (preliminary injunction granted), 1062.3(a) (declaratory relief actions); see chap 35.

Other procedures govern case management before trial. Consolidation (procedure to combine separately filed lawsuits that involve common question of law or fact) is governed by CCP §1048(a). See chap 43. Severance or bifurcation (procedure that enables the court to divide lawsuit into one or more parts) is governed by CCP §1048(b). See chap 43. Coordination (procedure in which civil actions, pending in different courts, may be tried together) is governed by CCP §403. See chap 44.

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§40.3 2. California Rules of Court

The Judicial Council has adopted rules under Govt C §68603(c) establishing a "case differentiation classification system." See Cal Rules of Ct 3.700-3.735.

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§40.4 3. Local Rules

Under the Trial Court Delay Reduction Act (Govt C §§68600-68620), each court may have its own delay reduction case management rules. Govt C §68612. Many counties have promulgated local rules governing case management. See, *e.g.,* San Francisco Ct R 3.0-3.8 (civil case management); Los Angeles Ct R 7.0-7.20 (superior court delay reduction); San Diego Ct R 2.1.1-2.1.19 (case management); Orange Ct R 351-392 (case management); Santa Clara Ct R 1A-1E (differential civil case management system).

PRACTICE TIP: Counsel will normally find it useful to contact the clerk of the particular court in which an action or proceeding may be, or has been, filed to learn that court's delay-reduction rules. The rules are also available on the court's website. A list of superior court websites appears at www.courtinfo.ca.gov/courts/trial/courtlist.htm.

Plaintiff's attorney must review the rules before filing a complaint. A defendant's attorney must do so as soon as possible after service. An attorney who already has a set of local rules should check with the clerk's office to ensure that the set is current. The burden is clearly on the attorney to know the current rules.

The Judicial Council has preempted local rules "relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and form and format of papers" (Cal Rules of Ct 3.20(a)) and specifically excludes from preemption "local court rules adopted under the Trial Court Delay Reduction Act." Cal Rules of Ct 3.20(b)(4). There may, however, be some gray areas. For example, it may be unclear whether a requirement that a party meet and confer with the other parties before filing a motion is a rule implementing delay reduction goals or a rule relating to motions. Attorneys should check for amendments to local rules and, when necessary to resolve a matter, ask the court whether a local rule has been reinterpreted in light of Cal Rules of Ct 3.20 and 2.100(a).

NOTE: Local rules that manage complex litigation are not preempted by Cal Rules of Ct 3.20 and 2.100(a). See *Volkswagen of Am., Inc. v Superior Court* (2001) 94 CA4th 695, 703, 114 CR2d 541.

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II. DIFFERENTIAL CASE MANAGEMENT RULES

§40.5 A. Purpose

The Judicial Council has adopted Cal Rules of Ct 3.700-3.715 for use by the courts to establish a case differentiation classification system based on the relative complexity of cases. These rules provide longer periods for the timely disposition of more complex cases. The rules may provide a presumption that all cases, when filed, must be classified in the least complex category. Govt C §68603(c); see Cal Rules of Ct, Standards of J Admin 2.1.

The California Rules of Court are to be construed and administered to secure the fair, timely, and efficient disposition of every civil case. The rules are to be applied in a fair, practical, and flexible manner so as to achieve the ends of justice. Cal Rules of Ct 3.700.

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§40.6 B. Effect of Local Practice

Each court must adopt local rules on differential case management as provided consistent with Cal Rules of Ct 3.720-3.730 (case management conference, meet-and-confer requirement, case management order) and Cal Rules of Ct, Standards of J Admin 2.1. Cal Rules of Ct 3.711. These rules vary, and the attorney must become completely familiar with the local delay reduction rules of any court in which he or she has cases pending. See, *e.g.*, *Moyal v Lanphear* (1989) 208 CA3d 491, 499, 256 CR 296 (attorney has professional responsibility to be familiar with local court management rules). See §40.4 (local court rules).

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C. Court's Role in Case Management

§40.7 1. Monitoring Case Progress

Courts now must take an active role in monitoring case progress and ensuring that attorneys take all steps necessary to prepare a case for trial or an informed settlement, including all discovery, as early as possible. Judges have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action. Govt C §68607. See also Cal Rules of Ct, Standards of J Admin 2.1.

The judges of the program shall, consistent with the policies of trial court delay reduction:

- Actively monitor, supervise, and control the movement of all cases assigned to the program from the time of filing of the first document invoking court jurisdiction through final disposition. Govt C §68607(a).
- Seek to meet the standards for timely disposition adopted under Govt C §68603. Govt C §68607(b).
- Establish procedures for early identification of cases within the program that may be protracted and for giving those cases special administrative and judicial attention as appropriate, including special assignment. Govt C §68607(c).
- Establish procedures for early identification and timely and appropriate handling of cases within the program that may be amenable to settlement or other disposition techniques. Govt C §68607(d).
- Adopt a trial-setting policy that, to the maximum extent possible, schedules a trial date within the time standards adopted under Govt C §68603 and that schedules a sufficient number of cases to ensure efficient use of judicial time while minimizing resetting caused by overscheduling. Govt C §68607(e).
- Commence trials on the date scheduled. Govt C §68607(f).
- Adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation. Govt C §68607(g). On continuances generally, see chap 42.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.8 2. Internal Court Management Procedures

§40.8 2. Internal Court Management Procedures

Each trial court must perform the following (Cal Rules of Ct 10.901):

- Maintain a calendar and case flow management system, which will ensure that a sufficient number of cases are set for trial, based on the court's experience, so that all departments will be occupied with judicial business;
- Adopt for judges and court personnel an internal operations manual of policies and procedures necessary for efficient operation and management of the court;
- Maintain and periodically review for accuracy written local court procedures, policies, and operating practices not contained in local rules for quick, accurate, and complete reference; and
- Ensure that calendaring functions are performed as directed by the court and that personnel rendering direct and immediate service to the court are within its administrative control to the maximum extent consistent with the existing organizational structures.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/ D. Time Standards for Disposing of Cases/§40.9 1. Guidelines for Disposing of Case

D. Time Standards for Disposing of Cases

§40.9 1. Guidelines for Disposing of Case

The Judicial Council states that the goal of each trial court should be to process general civil cases so that all cases are disposed of within two years after their filing. Cal Rules of Ct, Standards of J Admin 2.2(d). Each trial court should dispose of at least as many civil cases as are filed each year and, if necessary to meet the case-processing standards in Cal Rules of Ct, Standards of J Admin 2.2(d), dispose of more cases than are filed. As the court disposes of inactive cases, it should identify active cases that may require judicial attention. Cal Rules of Ct, Standards of J Admin 2.2(e).

More specifically, the goal is to manage general civil cases, except those exempt under Cal Rules of Ct, Standards of J Admin 2.2(g), so that they meet the following case disposition rules (Cal Rules of Ct, Standards of J Admin 2.2(f); see Cal Rules of Ct 3.713(b)):

- Unlimited civil cases (Cal Rules of Ct, Standards of J Admin 2.2(f)(1)):
- 75 percent are disposed of within 12 months.
- 85 percent are disposed of within 18 months; and
- 100 percent are disposed of within 24 months.
- Limited civil cases (Cal Rules of Ct, Standards of J Admin 2.2(f)(2)):
- 90 percent of the cases to be disposed of within 12 months;
- 98 percent within 18 months; and
- 100 percent within 24 months.

The goals in Cal Rules of Ct, Standards of J Admin 2.2(f)(1)-(2) are guidelines for the court's disposition of all unlimited and limited civil cases filed in that court. In managing individual civil cases, the court must consider each case on its merits. To enable the fair and efficient resolution of civil cases, each case should be set for trial as soon as appropriate for that individual case consistent with Cal Rules of Ct 3.729. Cal Rules of Ct, Standards of J Admin 2.2(f)(3).

These recommended time standards are intended to guide the trial courts in applying the policies and principles of Cal Rules of Ct, Standards of J Admin 2.1. They are administrative, justice-oriented guidelines to be used in the management of the courts. They are intended to improve the administration of justice by encouraging prompt disposition of all matters coming before the courts. The standards establish goals for all cases filed and are not meant to create deadlines for individual cases. Through its case management practices, a court may achieve or exceed the goals stated in these standards for the overall disposition of cases. The standards should be applied in a fair, practical, and flexible manner. They are not to be used as the basis for sanctions against any court or judge. Cal Rules of Ct, Standards of J Admin 2.2(b).

The exceptions to these rules are:

- Exceptional civil cases, *i.e.*, a case that meets the criteria set forth in Cal Rules of Ct 3.715 and 3.400. Cal Rules of Ct, Standards of J Admin 2.2(g).
- Small claims cases (90 percent disposed of within 75 days after filing; 100 percent disposed of within 95 days after filing). Govt C §68620(b); Cal Rules of Ct, Standards of J Admin 2.2(h).
- Unlawful detainer (90 percent disposed of within 30 days after filing; 100 percent disposed of within 45 days after filing). Govt C §68620(b); Cal Rules of Ct, Standards of J Admin 2.2(i).

PRACTICE TIP: The target date for disposing of a case varies among courts and, to some extent, by case type and complexity, but courts usually try to ensure that cases will be ready to begin trial within one year after filing. See §40.13. In some courts, judges plan on a trial between 18 and 24 months after filing when they believe that a trial will be required to dispose of the case, with the judgment about whether a trial will be required made approximately four to six months after filing. In any event, counsel with cases subject to a trial court delay reduction program cannot approach their trial preparation in a relaxed manner and assuming that trial is years

away.

Each court has a general schedule with one or more points (*e.g.,* return of summons, filing of at-issue memorandum, holding of first status conference), measured after the date of filing of the complaint, by which specified phases of case preparation are to have been completed or events are to have taken place.

Firm trial dates are a key feature of delay-reduction programs. The goal for all trial reduction cases is to start trial on the first assigned trial date. A firm trial date, under which the attorney need prepare for trial only once, may be viewed as a major benefit attorneys receive to compensate them for the court's assumption of control over the pace of litigation.

The point at which a trial date is selected varies considerably among courts and individual cases. A firm policy against continuances is also basic to delay-reduction programs. See Govt C §68607(g), discussed at §40.7.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.10 2. General Civil Cases Defined; Exemptions

§40.10 2. General Civil Cases Defined; Exemptions

The Trial Court Delay Reduction Act (Govt C §§68600-68620) applies to all actions and proceedings in all trial courts; "general civil case" means all civil cases (Cal Rules of Ct, Standards of J Admin 2.2(f)), except the following (Govt C §68605.5):

- Probate. Govt C §68608(a).
- Family law, juvenile proceedings. Govt C §60608(a).
- Small claims. Govt C §68620(b); Cal Rules of Ct, Standards of J Admin 2.2(h).
- Unlawful detainer. Govt C §68620(b); Cal Rules of Ct, Standards of J Admin 2.2(i).
- Civil cases that involve exceptional circumstances or will require continuing review. Cal Rules of Ct, Standards of J Admin 2.2(g).
- Cases assigned to a judge or judges for all purposes. Govt C §68608(a).
- Cases exempted by local rule. See, *e.g.*, Los Angeles Ct R 7.2(b).

Each court must adopt a case management and calendaring system for general civil cases that will advance the goals of Cal Rules of Ct, Standards of J Admin 2.1. Cal Rules of Ct 10.900. Some courts have adopted local variations in establishing time standards for disposition of cases, although these standards are often superseded by statewide case management rules. See Cal Rules of Ct 3.700-3.715. See also Cal Rules of Ct 3.20, 2.100(a).

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§40.11 3. Cases Removed From Court's Control

If a case is removed from the court's control, the period of time until the case is restored to court control should be excluded from the case disposition time standards. The matters that remove a case from the court's control for the purposes of this section include (Cal Rules of Ct, Standards of J Admin 2.2(n)(1)):

- The filing of a notice of conditional settlement under Cal Rules of Ct 3.1385;
- An automatic stay resulting from the filing of an action in a federal bankruptcy court;
- The removal of the case to federal court;
- An order of a federal court or higher state court staying the case;
- An order staying the case based on proceedings in a court of equal standing in another jurisdiction;
- The pendency of contractual arbitration under CCP §1281.4;
- The pendency of attorney fee arbitration under Bus & Prof C §6201;
- A stay by the reporting court for active military duty or incarceration; and
- For 180 days, the exemption for uninsured motorist cases under Cal Rules of Ct 3.712(b).

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E. Differentiation of Cases to Achieve Goals

§40.12 1. Evaluation and Assignment

The court must evaluate each case on its own merits as provided in Cal Rules of Ct 3.715 under procedures adopted by local court rules. After evaluation, the court must (Cal Rules of Ct 3.714(a)):

- Assign the case to the case management program for review under Cal Rules of Ct 3.720-3.730 for disposition under the case disposition time goals in Cal Rules of Ct 3.714(b) (see §40.13);
- Exempt the case as an exceptional case under Cal Rules of Ct 3.714(c) (see §40.14) from the case disposition time goals specified in Cal Rules of Ct 3.713(b) and monitor it with the goal of disposing of it within 3 years (see §40.9); or
- Assign the case to a local case management plan for disposition within 6 to 9 months after filing (Cal Rules of Ct 3.714(d); see §40.15).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.13 2. Case Management Plans

§40.13 2. Case Management Plans

Civil cases assigned to the case management program for review under Cal Rules of Ct 3.720-3.730 should be managed so as to achieve the following goals (Cal Rules of Ct 3.714(b)):

- **Unlimited civil cases.** The goal of each trial court should be to manage unlimited civil cases from filing so that (Cal Rules of Ct 3.714(b)(1)):
- 75 percent are disposed of within 12 months.
- 85 percent are disposed of within 18 months; and
- 100 percent are disposed of within 24 months.
- **Limited civil cases.** The goal of each trial court should be to manage limited civil cases from filing so that (Cal Rules of Ct 3.714(b)(2)):
- 90 percent are disposed of within 12 months;
- 98 percent are disposed of within 18 months; and
- 100 percent are disposed of within 24 months.

These goals are guidelines for the court's disposition of all unlimited and limited civil cases filed in that court. Cal Rules of Ct 3.714(b)(3). For example, a paint manufacturer brought into construction litigation as cross-defendant for equitable indemnity 14 months after filing of complaint was entitled to its requested 6-month continuance to give it adequate time to do sufficient discovery to prepare and schedule a timely summary judgment motion even though the 2-year limit of the delay reduction rules was thereby exceeded, because the rules must give way to the statutory right to bring summary judgment motion. *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7.

In managing individual civil cases, the court must consider each case on its merits. To enable the fair and efficient resolution of civil cases, each case should be set for trial as soon as appropriate for that individual case consistent with Cal Rules of Ct 3.729. Cal Rules of Ct 3.714(b)(3).

There is no sanction or penalty for the court or parties if disposition does not occur, either by settlement or trial, within a specified period after filing. The Judicial Council time standards are guidelines to be used in court management and are not intended as a basis for sanctions. Cal Rules of Ct, Standards of J Admin 2.2(b).

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§40.14 3. Exemption of Exceptional Cases

The court may in the interest of justice exempt a general civil case from the case disposition time goals of Cal Rules of Ct 3.713(b) if it finds that the case involves exceptional circumstances that will prevent the court and the parties from meeting the goals and deadlines imposed by the program. In making the determination, the court is guided by Cal Rules of Ct 3.715 and 3.400. Cal Rules of Ct 3.714(c)(1).

If the court exempts the case from the case disposition time goals, the court must establish a case progression plan and monitor the case to ensure its timely disposition consistent with the exceptional circumstances, with the goal of disposing of the case within 3 years. Cal Rules of Ct 3.714(c)(2).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.15 4. Local Case Management Plans

§40.15 4. Local Case Management Plans

For expedited case disposition, the court may by local rule adopt a case management plan that establishes a goal for disposing of appropriate cases within 6 to 9 months after filing. The plan must establish a procedure to identify the cases to be assigned to the plan. Cal Rules of Ct 3.714(d)(1). The plan must be used only for uncomplicated cases amenable to early disposition that do not need a case management conference or review or similar event to guide the case to early resolution. Cal Rules of Ct 3.714(d)(2).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.16 F. Case Evaluation Factors

§40.16 F. Case Evaluation Factors

In applying Cal Rules of Ct 3.714, the court must estimate the maximum time that will reasonably be required to dispose of each case in a just and effective manner. The court must consider the following factors and any other information the court deems relevant, understanding that no one factor or set of factors will be controlling and that cases may have unique characteristics not susceptible to precise definition (Cal Rules of Ct 3.715):

- Type and subject matter of the action;
- Number of causes of action or affirmative defenses alleged;
- Number of parties with separate interests;
- Number of cross-complaints and the subject matter;
- Complexity of issues, including issues of first impression;
- Difficulty in identifying, locating, and serving parties;
- Nature and extent of discovery anticipated;
- Number and location of percipient and expert witnesses;
- Estimated length of trial;
- Whether some or all issues can be arbitrated;
- Statutory priority for the issues;
- Likelihood of review by writ or appeal;
- Amount in controversy and the type of remedy sought, including measures of damages;
- Pendency of other actions or proceedings which may affect the case;
- Nature and extent of law and motion proceedings anticipated;
- Nature and extent of the injuries and damages;
- Pendency of underinsured claims; and
- Any other factor that would affect the time for disposition of the case.

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III. PROCEDURES FOR ASSIGNMENT TO CASE MANAGEMENT PLAN

§40.17 A. Case Assignment Procedure

Cases are assigned to a case management plan according to local practice. Each court must adopt a calendaring system for general civil cases that will advance the delay reduction rules. Cal Rules of Ct 10.900-10.901. Courts are usually "master calendar" or "direct (or independent) calendar" courts. In master calendar courts, cases are assigned to trial to a court department that is ready and able to hear the case, usually on the day the case is ready for trial. *Grant v Superior Court* (2001) 90 CA4th 518, 524, 108 CR2d 825. The presiding judge may, however, on the noticed motion of a party or on the court's motion, order the assignment of any case to one judge for all or such limited purposes as will promote the efficient administration of justice. Cal Rules of Ct 3.734.

Most other courts, such as those in the Central District of Los Angeles, are "direct calendar" courts, that is, they follow the federal system in assigning one judge for all purposes including trial. *Zilog, Inc. v Superior Court* (2001) 86 CA4th 1309, 1320, 104 CR2d 173; see, *e.g.*, Los Angeles Ct R 7.3(i). For example, in the Central District of Los Angeles, a case is randomly assigned to an I/C (individual calendar) judge in a manner that ensures that the parties and attorneys will not be able to anticipate any case assignment. The name of the judge is designated by the clerk on the summons and original complaint; the clerk also assigns a status conference date and attaches a status conference questionnaire and a notice of case assignment. It is the duty of each plaintiff (and cross-complainant) to serve a copy of the notice, the status conference questionnaire, and the date of the status conference along with the complaint (and cross-complaint). Los Angeles Ct R 7.1(b), 7.3(b)-(c). The courts in San Diego County issue a notice of case assignment, which includes the name, physical location, and department of the assigned judge, if any. It is the duty of the plaintiff to serve all defendants with a copy of the notice of case assignment. San Diego Ct R 2.1.3.

The case will also be assigned to a case differential plan; *i.e.*, it will be evaluated and assigned to the case management program for review under Cal Rules of Ct 3.720-3.730 for disposition under the case disposition time goals in Cal Rules of Ct 3.714(b), it will be exempted as an exceptional case (see Cal Rules of Ct 3.714(c)), or it will be assigned to a local case management plan (Cal Rules of Ct 3.714(d)). Cal Rules of Ct 3.714(a); see §40.13.

Procedures may vary according to local rule, although some procedures appear to be the same in all counties, such as the use of the mandatory Civil Case Cover Sheet (Judicial Council Form CM-010) (see §40.90), the Case Questionnaire (Judicial Council Form DISC-010) in limited civil cases (see §40.92), and the Case Management Statement (Judicial Council Form CM-110) (see §40.93). These procedures, as well as examples of local court procedures, are discussed below.

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B. Filing and Service

1. Documents to Be Filed With Complaint and Summons

§40.18 a. Civil Case Cover Sheet

The first paper filed in a civil action or proceeding, except those filed in small claims or under the Probate, Family, or Welfare and Institutions Codes, must be accompanied by the Civil Case Cover Sheet (Judicial Council Form CM-010). Cal Rules of Ct 3.220(a)-(b). A fileable version of the Judicial Council form is available on the Judicial Council's website at www.courtinfo.ca.gov.

If a party provides a defective or incomplete cover sheet at the time the party's first paper is submitted for filing, the court clerk must file the paper. Failure of a party or a party's counsel to file a cover sheet as required by this rule may subject that party, its counsel, or both, to sanctions under Cal Rules of Ct 2.30. Cal Rules of Ct 3.220(c). For form, see §40.90. On sanctions, see §40.89.

Local court rules may require additional cover sheets. Los Angeles County requires that a local form, titled Civil Case Cover Sheet Addendum and Statement of Location (Los Angeles Form CIV-109), be attached and submitted. See Los Angeles Ct R2.0. The form is available on the court's website at www.lasuperiorcourt.org and is reproduced in §40.91.

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§40.19 b. Case Questionnaire

In limited civil cases (cases under $25,000), the plaintiff has the option of completing the Case Questionnaire (Judicial Council Form DISC-010) and serving it with the complaint. See, *e.g.*, San Francisco Ct R 3.4(B). If the plaintiff carries out this option, the plaintiff must use this form of case questionnaire. See §40.92. A fileable version of the Judicial Council form is available on the Judicial Council's website at www.courtinfo.ca.gov.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.20 c. Time for Filing

§40.20 c. Time for Filing

Delay reduction rules shall not require shorter time periods than service of the complaint within 60 days after filing. Govt C §68616(a); Cal Rules of Ct 3.110(b). See, *e.g.*, San Diego Ct R 2.1.5 (requiring service and filing of proof of service within 60 calendar days after filing). Exceptions, for longer periods of time, (1) may be granted as authorized by local rule, and (2) shall be granted on a showing that service could not reasonably be achieved within the time required and with the exercise of due diligence consistent with the amount in controversy. Govt C §68616(a); Cal Rules of Ct 3.110(b).

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§40.21 d. Unnamed Doe Defendants

Unnamed (Doe) defendants shall not be dismissed or severed before the conclusion of the introduction of evidence at trial, except on the parties' stipulation or motion. Govt C §68616(h).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.22 e. Cross-Complaints

§40.22 e. Cross-Complaints

Cross-complaints must be served and a proof of service filed within 30 days after the filing date unless an appearance is made within the 30 days. Cal Rules of Ct 3.110(c).

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§40.23 f. Improper Refiling of Case

Local rules often provide that it is not permissible to dismiss and refile a case for the purpose of obtaining a different judge. See, *e.g.*, Los Angeles Ct R 7.9(d)-(e); Orange Ct R 309.

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2. Responsive Pleadings

§40.24 a. Time for Response

Service of responsive pleadings within 30 days after service of the complaint. The parties may stipulate to an additional 15 days. Exceptions, for longer periods of time, may be granted as authorized by local rule. Govt C §68616(b); see Cal Rules of Ct 3.110(d). See also, *e.g.*, San Francisco Ct R 3.3(B).

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§40.25 b. Stipulated Single Continuance Policy

Within 30 days after service of the responsive pleadings, the parties may, by stipulation filed with the court, agree to a single continuance not to exceed 30 days. Govt C §68616(d). It was the legislature's intent that these stipulations not detract from the courts' efforts to comply with the standards of timely disposition. To this end, the Judicial Council shall develop statistics that distinguish between cases involving, and not involving, these stipulations. Govt C §68616(d).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.26 3. Other Papers

§40.26 3. Other Papers

Time for service of notice or other paper under CCP §§1005 and 1013 and time to plead after service of summons under CCP §412.20 shall not be shortened except as provided in those sections. Govt C §68616(c).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.27 C. Assignment of Related Cases

§40.27 C. Assignment of Related Cases

Local rules may govern the assignment of related cases. In Los Angeles County, a case may be ordered related to another case, including a probate or family law case, when it appears that the cases (Los Angeles Ct R 7.3(f), Cal Rules of Ct 3.300):

- Involve the same parties and are based on the same or similar claims;
- Arise from the same or substantially identical transactions, happenings, or events, requiring a determination of the same or substantially identical questions of law and/or fact;
- Involve claims against, title to, possession of, or damages to the same property; or
- Are likely for other good reasons to require substantial duplication of labor if heard by different judges.

For example, in Los Angeles County, counsel must file a notice of related case within 15 days after becoming aware that the cases are related, and there are court procedures for determination and case assignment. See Los Angeles Ct R 7.3(f); Cal Rules of Ct 3.300.

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D. Coordination, Consolidation, and Severance

§40.28 1. Coordination

Coordination is a procedure in which civil actions, pending in different courts, that share a common question of law or fact may be consolidated by a motion to transfer in noncomplex cases (CCP §403) or by a petition for coordination in complex cases (CCP §404). Local case management rules often govern the procedures for coordination. See*, e.g.,* Los Angeles Ct R 7.3(h). On coordination, see chap 44.

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§40.29 2. Consolidation

Consolidation is a procedure that allows, and in some instances requires, the court to combine separately filed lawsuits that involve a common question of law or fact. See CCP §1048(a). It may be governed by local case management rules. See, *e.g.,* Los Angeles Ct R 7.3(g). On consolidation, see chap 43.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.30 3. Severance or Bifurcation

§40.30 3. Severance or Bifurcation

Severance or bifurcation is a procedure that enables the court to divide a lawsuit into one or more parts, to resolve the parts separately, and to determine the order in which the parts will be resolved. CCP §1048(b). Bifurcation is a subject for discussion at the case management conference (Cal Rules of Ct 3.727(10)) and may be governed by local rules. On bifurcation, see chap 43.

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§40.31 E. Discovery

The Trial Court Delay Reduction Act (Govt C §§68600-68620) provides that CCP §§2016.010-2036.050 shall govern discovery, except in arbitration proceedings. Govt C §68616(f).

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§40.32 F. Peremptory Challenges

Despite CCP §170.6, in direct calendar courts, challenges under that section shall be exercised within 15 days after the party's first appearance. Master calendar courts shall be governed solely by §170.6. Govt C §68616(i); *Grant v Superior Court* (2001) 90 CA4th 518, 524, 108 CR2d 825.

Local rules also govern the manner of challenge, which may differ according to whether the judge is a master calendar or independent calendar judge. See, *e.g.*, Los Angeles Ct R 7.5(d).

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§40.33 G. Case Removed to Federal Court

Local case management rules may govern the removal of cases to federal court. In Los Angeles County, for example, if a case is removed to federal court, the court will order a date, no earlier than 90 days after the date of removal, by which counsel shall file a Notice of Status of Removed Case. If the case has not been remanded to the trial court by that time, it will be recorded as completed without the need to conduct a further status conference. Los Angeles Ct R 7.8. See also Orange Ct R 392.

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§40.34 H. Diagnostic Questions

The following questions may be helpful to attorneys approaching a case that is subject to procedures implementing the Trial Court Delay Reduction Act (Govt C §§68600-68620):

Plaintiffs

1. **Which court or courts are proper forums?**
2. **Do you have a copy of current local rules for each such court? If not, or if uncertain, call the clerk's office to obtain one, or consult the county court's website. A list of the superior court websites is available at www.courtinfo.ca.gov/courts/trial/otherwebsites.htm.**
3. **What is the projected time to trial under the rules? Is there a longer period allowed by rule or practice?**
4. **Do you have a reasonable likelihood of preparing this case for trial within the time period allowed by the rules?**
5. **Are the facts or issues sufficiently complex or the discovery problems sufficiently great that you might obtain a longer time period to trial?**
6. **Does the court require a cover sheet with the complaint? If so, be sure to obtain and complete the form before filing the complaint.**
7. **When are service of process and return of process required?**
8. **When is any challenge to a judge required?**

Defendants

1. **When is the answer due?**
2. **Do you have the current local rules? If not, or if uncertain, call the clerk's office right away.**
3. **What is the projected time to trial under the rules? Is there a longer period allowed by rule or practice?**
4. **Do you have a reasonable likelihood of preparing this case for trial within the time period allowed by the rules?**
5. **Are the facts or issues sufficiently complex or the discovery problems sufficiently great that you might obtain a longer time period to trial?**
6. **Does the court require a cover sheet with the answer? If so, be sure to obtain and complete the form before filing the answer.**
7. **When is any challenge to a judge required?**
8. **Can the case be settled before filing an answer?**

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.35 I. Suggestions for Handling Delay Reduction Cases

§40.35 I. Suggestions for Handling Delay Reduction Cases

- Ensure that your staff knows which cases are being managed by the court under a trial court delay reduction plan and which ones are exempt.
- Use a different-colored file jacket for exempt cases.
- Starting at the outset of the case, calendar all dates for filings and events as early as possible. Put the dates on the front or the inside cover of the case file also.
- Place a reminder on your desk, in the case file, and on office calendars a specified number of days (*e.g.,* 7, 10, or 14) before any date for a filing or event.
- Based on available information, identify possible deponents as early as possible and establish a tentative schedule (*e.g.,* depose X in third month after filing and Y in fourth month) to ensure that all discovery can be completed within the time period allowed.
- Calendar dates for submitting other discovery, *e.g.,* interrogatories, requests for admission.
- Identify potential experts as early as possible.

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IV. SPECIAL RULES FOR MANAGEMENT OF COMPLEX CASES

§40.36 A. Definition

A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel. Cal Rules of Ct 3.400(a).

NOTE: Local rules that manage complex litigation are not preempted by Cal Rules of Ct 3.20 and 2.100(a). See *Volkswagen of Am., Inc. v Superior Court* (2001) 94 CA4th 695, 703, 114 CR2d 541.

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§40.37 1. Factors

In deciding whether an action is a complex case under Cal Rules of Ct 3.400(a), the court shall consider, among other things, whether the action is likely to involve (Cal Rules of Ct 3.400(b)):

- Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- Management of a large number of witnesses or a substantial amount of documentary evidence;
- Management of a large number of separately represented parties;
- Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
- Substantial postjudgment judicial supervision.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.38 2. Provisional Designation

§40.38 2. Provisional Designation

Except as provided in Cal Rules of Ct 3.400(d) (court's discretion; see §40.39), an action is provisionally a complex case if it involves one or more of the following types of claims (Cal Rules of Ct 3.400(c)):

- Antitrust or trade regulation claims;
- Construction defect claims involving many parties or structures;
- Securities claims or investment losses involving many parties;
- Environmental or toxic tort claims involving many parties;
- Claims involving mass torts;
- Claims involving class actions; or
- Insurance coverage claims arising from any of the claims listed immediately above.

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§40.39 3. Court's Discretion

Despite Cal Rules of Ct 3.400(c) (provisional designation; see §40.38), an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine. A court may declare by local rule that certain types of cases are or are not provisionally complex under this rule. Cal Rules of Ct 3.400(d).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.40 B. Complex Case Designation

§40.40 B. Complex Case Designation

A plaintiff may designate an action a complex case by filing and serving with the initial complaint the Civil Case Cover Sheet (Judicial Council Form CM-010) marked to indicate that the action is a complex case. Cal Rules of Ct 3.401. For form, see §40.90.

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C. Complex Case Counterdesignations

§40.41 1. Noncomplex Counterdesignation

If a Civil Case Cover Sheet (Judicial Council Form CM-010) designating an action as a complex case has been filed and served and the court has not previously declared the action to be a complex case, a defendant may file and serve no later than its first appearance a counter Civil Case Cover Sheet designating the action as not a complex case. For form, see §40.90. The court must decide, with or without a hearing, whether the action is a complex case within 30 days after the filing of the counterdesignation. Cal Rules of Ct 3.402(a).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.42 2. Complex Counterdesignation

§40.42 2. Complex Counterdesignation

A defendant may file and serve no later than its first appearance a counter Civil Case Cover Sheet (Judicial Council Form CM-010) designating the action as a complex case. The court must decide, with or without a hearing, whether the action is a complex case within 30 days after the filing of the counterdesignation. Cal Rules of Ct 3.402(b). For form, see §40.90.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.43 3. Joint Complex Designation

§40.43 3. Joint Complex Designation

A defendant may join the plaintiff in designating an action as a complex case. Cal Rules of Ct 3.402(c).

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D. Action by Court

§40.44 1. Decision on Complex Designation

Except as provided in Cal Rules of Ct 3.402 (complex case counterdesignations), if a Civil Case Cover Sheet (Judicial Council Form CM-010) (see §40.90) that has been (Cal Rules of Ct 3.403(a))

> filed and served designates an action as a complex case, or checks a case type described as provisionally complex civil litigation, the court must decide as soon as reasonably practicable, with or without a hearing, whether the action is a complex case.

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§40.45 2. Court's Continuing Power

With or without a hearing, the court may decide on its own motion, or on a noticed motion by any party, that a civil action is a complex case or that an action previously declared to be a complex case is not a complex case. Cal Rules of Ct 3.403(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.46 E. Electronic Service

§40.46 E. Electronic Service

The court may provide in a case management order that documents filed electronically in a central electronic depository available to all parties are deemed served on all parties. Cal Rules of Ct 3.751.

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V. CASE MANAGEMENT CONFERENCE

§40.47 A. Background

In the past, most California superior courts routinely held trial-setting, pretrial, arbitration status, and status conferences. The Trial Court Delay Reduction Act (Govt C §§68600-68620) significantly changed these practices. Counties have adopted delay reduction rules consolidating the trial setting, pretrial, arbitration, and status conferences into a single conference. Local rules control its timing, purposes, and procedures. Govt C §68612.

There is no uniformity in the terminology chosen for this one comprehensive conference. Most counties and Cal Rules of Ct 3.722 call it the "case management conference" (San Francisco Ct R 3.4; Los Angeles Ct R 7.9; San Diego Ct R 2.1.9). For purposes of this discussion, it will be referred to as the case management conference.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.48 B. Initial Case Management Review; Exemptions

§40.48 B. Initial Case Management Review; Exemptions

In each case, the court must set an initial case management conference to review the case. Cal Rules of Ct 3.722(a). This rule applies to every general civil case except complex cases and cases exempt under Cal Rules of Ct 3.712(b)-(c) (uninsured motorist cases; cases included in petition for coordination), Cal Rules of Ct 3.714(c)-(d) (exceptional cases; uncomplicated cases), Cal Rules of Ct 3.725 (management of short cause cases), and Cal Rules of Ct 2.573 (False Claim Act cases). Cal Rules of Ct 3.721.

The court may order, on the stipulation of all parties or the court's own motion, that a case is a short cause case exempted from case management review and set the case for trial. Cal Rules of Ct 3.735(b). A short cause case is a civil case in which the time estimated for trial by all parties or the court is 5 hours or less. All other cases are long cause cases. Cal Rules of Ct 3.735(a). If a short cause case is not completely tried within 5 hours, the judge may declare a mistrial or, in the judge's discretion, may complete the trial. In a mistrial, the case will be treated as a long cause case and must be promptly set for either a new trial or for a case management conference. Cal Rules of Ct 3.735(c).

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§40.49 C. Referral to Arbitration

No case may be referred to arbitration prior to 210 days after the filing of the complaint, exclusive of the stipulated period provided for in Govt C §68616(d). No rule adopted under this article may contravene CCP §§638-639. Govt C §68616(g). If parties agree to use an alternative dispute resolution (ADR) process, they must jointly complete the ADR stipulation form provided for under Cal Rules of Ct 3.221 and file it with the court. Cal Rules of Ct 3.726.

In each general civil case (except exempted cases under Cal Rules of Ct 3.721) the court at the time of the case management conference or review must ascertain whether the case is suitable for judicial arbitration. Cal Rules of Ct 3.721, 3.722(a). Local rules may also govern referral to arbitration. See, *e.g.,* Los Angeles Ct R 7.9(c) (court shall refer all appropriate cases to judicial arbitration or mediation).

On judicial arbitration, see chap 37.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.50 D. Subjects Considered at Case Management Conference

§40.50 D. Subjects Considered at Case Management Conference

At the conference, the court must review the case comprehensively and decide whether to assign the case to an alternative dispute resolution process, whether to set the case for trial, and the other matters stated in Cal Rules of Ct 3.720-3.730. Cal Rules of Ct 3.722(a). The initial case management conference should generally be the first case management event conducted by court order in each case, except for orders to show cause. Cal Rules of Ct 3.722(a).

At a case management conference the parties must address, if applicable, and the court may take appropriate action with respect to, the following (Cal Rules of Ct 3.727; see San Francisco Ct R 3.4; Los Angeles Ct R 7.9(a)):

- Whether there are any related cases (see, *e.g.*, Los Angeles Ct R 7.3(f));
- Whether all parties named in the complaint or cross-complaint have been served, appeared, or been dismissed;
- Whether any additional parties may be added or the pleadings may be amended;
- Whether, if a cause is a limited civil case, the economic litigation procedures under CCP §§90-100 will apply to it or whether the party intends to bring a motion to exempt the case from these procedures;
- Whether any other matters (*e.g.,* the bankruptcy of a party) may affect the court's jurisdiction or processing of the case;
- Whether the parties have stipulated to, or the case should be referred to, judicial arbitration or any other form of Alternative Dispute Resolution (ADR) and, if so, the date by which the ADR must be completed (see, *e.g.*, Los Angeles Ct R 7.9(c));
- Whether an early settlement conference should be scheduled and, if so, on what date (see Cal Rules of Ct 3.1380);
- Whether discovery has been completed and, if not, the date by which it will be completed;
- What discovery issues are anticipated;
- Whether the case should be bifurcated or a hearing should be set for a motion to bifurcate under CCP §598 (see CCP §1048(b); see chap 43);
- Whether there are any cross-complaints that are not ready to be set for trial and, if so, whether they should be severed;
- Whether the case is entitled to any statutory preference and, if so, the statute granting the preference (see, *e.g.,* CCP §§36(a) (aged, ill parties), 36(b) (party under age 14), 527(e) (preliminary injunction granted), 1062.3(a) (declaratory relief actions));
- Whether a jury trial is demanded, and, if so, the identity of each party requesting a jury trial;
- If the trial date has not been previously set, the date by which the case will be ready for trial and the available trial dates;

NOTE: A jury trial must be demanded when the case is first set for trial (if set on notice or stipulation) or within 5 days after notice of setting (if, as is usually the case, the matter is set without notice or stipulation). CCP §631(d)(4); see chap 41.

- The estimated length of trial;
- The nature of the injuries;
- The amount of damages, including any special or punitive damages;
- Any additional relief sought;
- Whether any insurance coverage issues may affect resolution of the case; and
- Any other matters that should be considered by the court or addressed in the case management order.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.51 E. Meet-and-Confer Requirement

§40.51 E. Meet-and-Confer Requirement

Unless the court orders another time period, no later than 30 calendar days before the date set for the case management conference, the parties must meet and confer, in person or by telephone, to consider each issue identified in Cal Rules of Ct 3.727(e) (subjects to be considered at case management conference; see §40.50) and, in addition, to consider the following (Cal Rules of Ct 3.724; see, *e.g.*, Los Angeles Ct R 7.9(b)(1)):

- Resolving any discovery disputes and setting a discovery schedule;
- Identifying and, if possible, informally resolving any anticipated motions;
- Identifying the facts and issues in the case that are uncontested and may be the subject of stipulation;
- Identifying the facts and issues in the case that are in dispute;
- Determining whether the issues can be narrowed by eliminating any claims or defenses by means of a motion or otherwise;
- Possible settlement;
- Identifying the dates on which all parties and their attorneys are available or not available for trial, including the reasons for unavailability; and
- Other relevant matters.

Local rules may set different time requirements for the meet-and-confer. See, *e.g.*, Orange Ct R 315 (20 days after service of responsive pleading). The rules may also require the filing of a meet-and-confer statement. See, *e.g.*, Orange Ct R 441 (joint meet-and-confer statement required to be filed within 30 days after service of the responsive pleading).

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§40.52 F. Setting the Conference; Notice

Except in complex cases, the court may not require a status conference sooner than 30 days after service of the first responsive pleadings. Govt C §68616(e). In every general civil case except complex cases and those cases exempted (see §40.48), the court must review the case no later than 180 days after the filing of the initial complaint. Cal Rules of Ct 3.721.

Notice of the date of the case management conference must be given no later than 45 days before the conference, unless the court orders otherwise. The court may provide by local rule for the time and manner of giving notice to the parties. Cal Rules of Ct 3.722(b).

The attorney must, however, consult local rules to ascertain when the case management conference will be set. In some counties, the timing of the conference is controlled by the filing of the complaint. For example, in Los Angeles Superior Court, the first case management conference is held no later than 180 days after the complaint is filed. Los Angeles Ct R 7.9(a).

Procedures for notice of the case management conference vary, depending on the manner in which the conference date is set. For example, in San Francisco Superior Court the county clerk designates a status conference date on the face of the complaint when it is filed. The plaintiff is responsible for notifying all defendants of this date. San Francisco Ct R 3.4(A). Notice thus can be served with the complaint.

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G. Attending Case Management Conference

§40.53 1. Who Must Attend

At the case management conference, counsel for each party and each self-represented party must appear personally or by telephone under Cal Rules of Ct 3.670; must be familiar with the case; and must be prepared to discuss and commit the party's position on the issues list in Cal Rules of Ct 3.727, 3.724 (subjects to be considered at case management conference and at meet-and-confer). Cal Rules of Ct 3.722(c).

The attorney should consult local rules to learn whether any additional parties must attend the case management conference. See, *e.g.*, San Diego Ct R 2.1.9 (parties familiar with case and possessing authority to enter into stipulations must be present).

Telephone appearances are allowed for the case management conference, unless the court determines on a hearing-by-hearing basis that a personal appearance would materially assist in the determination of proceedings or the effective management or resolution of the case. Cal Rules of Ct 3.670(e)(2).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.54 2. Familiarity With Case

§40.54 2. Familiarity With Case

The attorney who attends the case management conference must be familiar with the case. See Cal Rules of Ct 3.722(a).

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§40.55 3. Order Without Appearance

The case management order may, however, be made without an appearance of the parties or attorneys. If, based on its review of the written submissions of the parties and such other information as is available, the court determines that appearances at the conference are not necessary, the court may issue a case management order and notify the parties that no appearance is required. Cal Rules of Ct 3.722(d).

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§40.56 4. Excuse From Attendance in Limited Civil Cases

In all general civil cases, except those exempted under Cal Rules of Ct 3.721 (see §40.48), the court must review the case and issue a case management order under Cal Rules of Ct 3.720-3.730, but by local rule the court may provide that counsel and self-represented parties are not to attend a case management conference in limited civil cases, unless ordered to do so by the court. Cal Rules of Ct 3.722(e). See, *e.g.*, Los Angeles Ct R 7.9(d)(1).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.57 H. Additional Case Management Conference

§40.57 H. Additional Case Management Conference

The court on its own motion may order, or a party or parties may request, that an additional case management conference be held at any time. A party should be required to appear at an additional conference only if an appearance is necessary for the effective management of the case. In determining whether to hold an additional conference, the court must consider each case individually on its own merits. Cal Rules of Ct 3.723.

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§40.58 I. Conducting the Conference

The case management conference is conducted in the manner provided by local rule. Cal Rules of Ct 3.728. Generally, the subjects in Cal Rules of Ct 3.727 are considered. See §40.50. For example, in Orange County plaintiff's counsel shall arrange the case management conference (called the "issue conference") at a mutually agreeable time and location, and the parties shall (Orange Ct R 317):

- Exchange exhibits and inspect photos and diagrams (to be submitted on the day of trial), excluding those contemplated to be used for impeachment or rebuttal.
- Stipulate to all facts amenable to stipulation.
- Prepare a joint statement of the case.
- Prepare a joint witness list, including impeachment or rebuttal witnesses.
- Prepare a joint list of controverted issues. If all the parties fail to agree to an issue as controverted or uncontroverted, then the issue is controverted (required for both jury and nonjury trials).
- Exchange all motions in limine and other pretrial motions.
- Prepare voir dire questions for the court to include in its voir dire (jury trials only).
- Execute the statement of compliance.

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VI. CASE MANAGEMENT STATEMENT AND ORDER

§40.59 A. Background: Former At-Issue Memorandum

The at-issue memorandum (governed by former Cal Rules of Ct 209; repealed in 2002), which informed the court that the essential parties were ready to resolve the issues of the case, has been replaced by the case management statement, governed by Cal Rules of Ct 3.720-3.730. See §§40.60-40.70.

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B. Case Management Statement

§40.60 1. Service and Filing

No later than 15 calendar days before the date set for the case management conference or review, each party must file a case management statement and serve it on all other parties in the case. Cal Rules of Ct 3.725(a).

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§40.61 2. Use of Judicial Council Form

The parties must use the mandatory Case Management Statement (Judicial Council Form CM-110). See §40.93. All applicable items on the form must be completed. In lieu of each party's filing a separate case management statement, any two or more persons may file a joint statement. Cal Rules of Ct 3.725(b).

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§40.62 3. Effect of Local Rules

Local rules may also govern the case management statement. See, *e.g.,* San Francisco Ct R 3.4(B) ("filing of case management statement 25 days before the conference will facilitate the issuance of a case management order without an appearance"); Los Angeles Ct R 7.9(b)(2) (each party must file Case Management Statement (Judicial Council Form CM-110) and serve it on all parties in the case no later than 15 days before the date set for case management conference); San Diego Ct R 2.1.9.(B) (case management statement must be completed and timely filed). Some counties, for example, require the case management statement to be joint and filed at least 5 days before the case management conference. Orange Ct R 369.

For a form of case management statement, see §40.93.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.63 4. Content of Case Management Statement

§40.63 4. Content of Case Management Statement

The Case Management Statement (Judicial Council Form CM-110) (see §40.93) requests the following information:

- The case title and number.
- Whether the statement is submitted by one party or jointly.
- When the complaint and cross-complaint, if any, were filed.
- Whether all essential parties have been served with process, have appeared, or been dismissed, and which additional parties may be added.
- A description of the case.
- Whether a jury is demanded.
- The estimated date for trial.
- The estimated length of the trial.
- The dates on which parties or attorneys will not be available for trial.
- The names, addresses, and telephone numbers of the attorneys for the parties and of any parties appearing without counsel.
- Whether the case is entitled to preference.
- Whether the parties have agreed to, or the case has gone to, alternative dispute resolution.
- Whether the parties are willing to participate in mediation, nonbinding judicial arbitration, binding judicial arbitration, binding private arbitration, or neutral case evaluation.
- Whether the parties are willing to participate in an early settlement conference.
- Information on any insurance carriers involved in the case.
- Whether any matters, such as pending bankruptcy, might affect the court's jurisdiction in processing the case.
- Whether there are any related cases or the parties intend to file a motion to consolidate or coordinate.
- Whether the parties intend to file a motion to bifurcate specific issues or causes of action.
- Whether the parties expect to file any motions before trial.
- The status of discovery.
- Whether economic litigation procedures for limited civil cases (CCP §§90-98) apply to the case.
- Whether additional matters should be considered or determined at the case management conference.
- Whether the meet-and-confer requirement has been met and whether the parties reached agreement on any matters.

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§40.64 5. Effect of Failure to Request Jury Trial

It may be risky for a plaintiff's attorney to fail to demand a jury in the case management statement. Although the California Supreme Court has long held that a party's failure to demand a jury trial in an at-issue memorandum (governed by former Cal Rules of Ct 209; repealed in 2002) does not result in a waiver of the right to a jury trial (see *Mutual Bldg. & Loan Ass'n v Corum* (1934) 220 C 282, 30 P2d 509), later appellate cases have held that a party responding with no in an at-issue memorandum to the question of whether a jury is demanded has consented in writing to waive that right. *March v Pettis* (1977) 66 CA3d 473, 476, 136 CR 3 (failure to request a jury in at-issue memorandum, however, did not in itself constitute waiver under former CCP §631(2) (now CCP §631(a)(2)). In *March*, the defendants filed a countermemorandum in which a jury was demanded, but they later waived their right to a jury, and the plaintiff demanded a jury trial and offered to tender jury fees. The court held that relief from a waiver by written consent under former CCP §631(2) was not an absolute right, and that the trial court did not abuse its discretion by denying the plaintiff a jury trial. *March v Pettis*, *supra*. See also *Taylor v Union Pac. R.R.* (1976) 16 C3d 893, 130 CR 23.

PRACTICE TIP: An attorney whose client wishes to have a jury trial is well-advised to demand one in the case management statement. Plaintiff's counsel in particular should be cautious about not demanding a jury trial when one is desired, and should not assume that (1) the defendant will probably demand one (and therefore will be responsible for depositing the jury fees), or (2) similar to the facts in *March*, if the defendant demands a jury trial but later waives it, the court will always entertain the plaintiff's demand for a jury at that time.

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§40.65 C. Responsive Statement

Under the current delay reduction rules, each party must file and serve a case management statement on all other parties in the case. See Cal Rules of Ct 3.725(a). Conflicts are resolved by the court at the case management conference. Cal Rules of Ct 3.727. Any two parties may, however, file a joint statement. Cal Rules of Ct 3.725(b); see also Orange Ct R 369 (requiring joint case management statement).

Under the rules that existed before delay reduction, an attorney served with the former at-issue memorandum would immediately scrutinize it and, if he or she disagreed with any part, file and serve a countermemorandum within 10 days after service of the memorandum or within 5 days after service in an unlawful detainer proceeding (former Cal Rules of Ct 209(d) (repealed July 1, 2002)).

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§40.66 1. Motion to Strike

It is unclear whether a motion to strike can be used under the civil trial court management rules in cases using a case management statement. Cal Rules of Ct 3.700-3.735.

NOTE: Before implementation of the delay reduction rules, when an attorney disagreed with a statement in the former at-issue memorandum that the case is at issue as to all essential parties or that the case is entitled to setting priority, he or she might file, in addition to a countermemorandum, a motion to strike the at-issue memorandum. Although no statute or court rule expressly authorized this motion, a court could entertain it in the exercise of its inherent power to control its proceedings. Motions to strike were often made when a plaintiff added a new defendant, either by a Doe amendment or by serving a previously named defendant, after the at-issue memorandum was filed. Motions to strike were also made when a defendant filed a cross-complaint naming new cross-defendants after the at-issue memorandum was filed. The motion, if granted, removed the case from the civil active list and had the effect of postponing the trial date. The party seeking to set the case for trial had to then file and serve a new at-issue memorandum and, unless a motion to advance was granted, the case would be placed at the end of the civil active list.

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§40.67 2. Motion for Advisory Jury

Unless a jury trial is a matter of right (in which event the demand should be made in the at-issue memorandum or countermemorandum), former Cal Rules of Ct 377 (repealed Jan. 1, 2003) required that a party desiring a jury trial, when the right to a jury trial is not guaranteed by law, shall file and serve a noticed motion after the issue is joined and before or at the time of filing the former at-issue memorandum, or within 5 days after service of the memorandum by any other party. The Advisory Committee Comment to former Rule 377 states that the rule was repealed because it was obsolete and contained unduly burdensome procedures. The comment further states that repeal of the rule is not intended to prevent a party from requesting an advisory jury. In an appropriate case, a party may request, and the court in its discretion may approve, having an advisory jury.

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§40.68 D. Case Management Order

The court must enter a case management order setting a schedule for subsequent proceedings and otherwise providing for the management of the case. The order should include such provisions as may be appropriate, including (Cal Rules of Ct 3.728):

- Referral of the case to judicial arbitration or some other form of alternative dispute resolution (ADR);
- A date for completion of the arbitration process or other form of ADR process if the case has been referred to such a process;
- If a trial date has not previously been set, a date certain for trial if the case is ready to be set for trial;
- Whether the trial will be a jury trial or a nonjury trial;
- The identity of each party demanding a jury trial;
- The estimated length of the trial;
- Whether all parties necessary to the disposition of the case have been served or have appeared;
- The dismissal or severance of the unserved or nonappearing defendants from the action;
- The names and addresses of the attorneys who will try the case;
- The date, time, and place for a mandatory settlement conference as provided in Cal Rules of Ct 3.1380;
- The date, time, and place for the final case management conference before trial if such a conference is required by the court or the judge assigned to the case;
- The date, time, and place of any further case management conferences or review; and
- Any additional orders that may be appropriate, including orders on matters listed in Cal Rules of Ct 3.727 (case management conference; see §40.50) or 3.724 (meet and confer; see §40.51).

The order issued after the case management conference or review controls the subsequent course of action or proceeding unless it is modified by a subsequent order. Cal Rules of Ct 3.730.

A case management order requiring unilateral disclosure of identity, curriculum vitae, and opinion with regard to each medical expert who would support plaintiffs' claims was not proper exercise of trial court's power to manage complex litigation. *Hernandez v Superior Court* (2003) 112 CA4th 285, 296, 4 CR3d 883.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.69 E. Setting Trial Date

§40.69 E. Setting Trial Date

In setting a case for trial, the court, at the initial case management conference or any other proceeding at which the case is set for trial, must consider all relevant facts and circumstances. These may include (Cal Rules of Ct 3.729):

- The type and subject matter of the action to be tried.
- Whether the case has statutory priority.
- The number of causes of action, cross-actions, and affirmative defenses that will be tried.
- Whether any significant amendments to the pleadings have been made recently or are likely to be made before trial.
- Whether the plaintiff intends to bring a motion to amend the complaint to seek punitive damages under CCP §425.13.
- The number of parties with separate interests who will be involved in the trial.
- The complexity of the issues to be tried, including issues of first impression.
- Any difficulties in identifying, locating, or serving parties.
- Whether all parties have been served and, if so, the date on which they were served.
- Whether all parties have appeared in the action and, if so, the date on which they appeared.
- How long the attorneys who will try the case have been involved in the action.
- The trial date or dates proposed by the parties and their attorneys.
- The professional and personal schedules of the parties and their attorneys, including any conflicts with previously assigned trial dates or other significant events.
- The amount of discovery, if any, that remains to be conducted n the case.
- The nature and extent of law and motion proceedings anticipated, including whether any motions for summary judgment will be filed.
- Whether any other actions or proceedings that are pending may affect the case.
- The amount in controversy and the type of remedy sought.
- The nature and extent of the injuries or damages, including whether these are ready for determination.
- The court's trial calendar, including the pendency of other trial dates.
- Whether the trial will be a jury or a nonjury trial.
- The anticipated length of trial.
- The number, availability, and locations of witnesses, including those who reside outside the county, state, or country.
- Whether there have been any previous continuances of the trial or delays in setting the case for trial.
- The achievement of a fair, timely, and efficient disposition of the case.
- Any other factor that would significantly affect the determination of the appropriate date of trial.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.70 F. Checklist: Procedure for Case Management Statement

§40.70 F. Checklist: Procedure for Case Management Statement

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All Parties

- Determine and calendar any deadline for filing case management statement or any other status report or statement required by local rules (see Cal Rules of Ct 3.725(a) (no later than 15 calendar days before the date set for the case management conference)
- Determine whether every essential party has (1) been served with process or appeared and (2) filed answer to complaint or cross-complaint naming party
- No later than 30 days before the case management conference, meet and confer with all other parties regarding issues listed in Cal Rules of Ct 3.727-3.724 (Cal Rules of Ct 3.724)
- Prepare Case Management Statement (Judicial Council Form CM-110) (see §40.93)
- File case management statement and serve on all other parties

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VII. COURT SETTLEMENT CONFERENCES

A. Mandatory Settlement Conference

§40.71 1. Authority and Purpose

The mandatory settlement conference is governed by Cal Rules of Ct 3.1380 and local rules. It has become the most important of all pretrial conferences and plays a major role in keeping superior court trial calendars within manageable limits. A large percentage of cases settle at this point because the parties are able to engage in a free-ranging discussion in the presence of a judge who will *not* be the trial judge, assuring the parties that honest communications with the judge about the weaknesses of their case will not prejudice them for trial. The judge also plays an invaluable role as a neutral person with experience on the jury value of the asserted claims and defenses, and the probabilities of their success at trial.

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§40.72 2. Procedure to Set

The court may set a mandatory settlement conference on its own motion or at the request of any party. See Cal Rules of Ct 2.1380(a); Los Angeles Ct R 7.9(d). Most superior courts have adopted local rules for scheduling mandatory settlement conferences. For example, in San Francisco, the mandatory settlement conference must be set within 3 weeks before the date set for trial. San Francisco Ct R 5.0(C). These rules have the legal effect of procedural statutes, and the court may impose sanctions on anyone who fails to comply with the rules, or fails to participate in good faith in any conference, unless good cause is shown. On sanctions, see §40.89.

The date and time of an early settlement conference may be set at the case management conference. See Cal Rules of Ct 3.727(7). See §40.50.

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3. Settlement Conference Statements

§40.73 a. Requirements

Each party must submit to the court and serve on every other party a mandatory settlement conference statement containing a good faith settlement demand and an itemization of economic and noneconomic damages at least 5 court days before the date set for the settlement conference. Cal Rules of Ct 3.1380(c). Each statement must discuss in detail all the facts and law pertinent to liability and damages as to that party and comply with any additional requirements imposed by local rule. Cal Rules of Ct 3.1380(c).

Many counties require each party to file a written settlement conference statement and impose additional requirements. See, *e.g.,* Los Angeles Ct R 7.9(e). In Los Angeles, for example, the settlement conference statement must contain a concise statement of the material facts of the case and the factual and legal contentions in dispute. Los Angeles Ct R 7.9(e). The statement must also identify all parties and their capacities in the action and cite authorities that support legal propositions important in resolving the case. Los Angeles Ct R 7.9(e).

In San Francisco, superior court settlement conference statements must include, *e.g.*:

- A written factual statement of the case and all relevant legal issues and contentions;
- The most recent medical reports;
- A summary of injuries and residuals and a statement of economic and noneconomic damages;
- The names, addresses, and specialties of expert witnesses who will be called;
- An evaluation of the percentage of liability attributed to each defendant for purposes of allocation of noneconomic damages; and
- A statement setting forth the latest demands and offers between the parties.

At the conclusion of the conference, the settlement statement and other material furnished to the court must not be made part of the clerk's file. San Francisco Ct R 5.0(G).

PRACTICE TIP: Counsel may attach copies of reports, photographs, or other pertinent documents to a settlement conference statement. Consult local court rules for the specific information and documentation to bring to the settlement conference.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.74 b. Example for Personal Injury Case

§40.74 b. Example for Personal Injury Case

EXAMPLE: In a personal injury case, a two-to-three page statement might contain the following information:

- Names and ages of plaintiff(s) and defendant(s);
- Date, time, and location of accident;
- Nature of case, *e.g.,* auto v auto, auto v pedestrian, slip and fall, construction, medical malpractice;
- Weather, traffic, and visibility;
- Type, year, and condition of plaintiff's and defendant's vehicles;
- Nature and estimated amount of property damage;
- Brief statement of facts;
- Diagram of accident scene;
- Plaintiff's liability theories;
- Defendant's theories and affirmative defenses;
- Names of independent witnesses;
- Brief summary of plaintiff's injuries and present residuals;
- Amount of past and future medical expenses, and other special damages;
- Prior or subsequent accidents or medical condition;
- Defense medical report;
- Loss of wages or income, including description of the type of employment or business, specific dates of unemployment, and projected future losses;
- Estimated percentage of comparative fault;
- Verdict range; and
- Amount of demand and offer.

In a personal injury action, the special damages should be up-to-date, and listed, totaled, and categorized separately as medical and related expenses (including hospitalization, ambulance charges, and drugs), and loss of earnings. The attorney should also organize in a separate file and bring to the conference all medical reports and records, depositions (with key passages marked), photographs, books, records, diagrams, maps, bills, contracts, and other documents pertinent to settlement of the case.

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4. Attendance at Conference

§40.75 a. Attorneys

Trial counsel must attend the settlement conference. Cal Rules of Ct 3.1380(b). Counsel's good faith participation is a requisite in a successful settlement conference. The attorneys must be there not merely to learn more about their adversary's case, but with a willingness to consider points made by the settlement judge and opposing counsel. Sanctions may be imposed on attorneys who fail to appear at a settlement conference or participate in good faith. Cal Rules of Ct 3.1380, 2.30. On sanctions, see §40.89.

NOTE: Some local rules require that the settlement conference be attended by the trial attorney. See, *e.g.,* San Francisco Ct R 5.0(E). When an attorney has associated another attorney to try the case, both should attend the conference.

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§40.76 b. Attorney Familiarity With Case

Various local rules require that the trial attorney who attends the conference be intimately familiar with all available evidence on both liability and damages and be prepared to discuss the case in depth. In Los Angeles, for example, attorneys for all parties appearing in the action shall attend the conference and be "intimately familiar" with the pertinent available evidence involving both liability and damages. The attorney shall be prepared to discuss the case in depth and, except for good cause shown, shall be the attorney who will try the case. See Los Angeles Ct R 7.9(d)(3). These requirements should be met even when not explicitly mandated by local rules.

If the conference is held within three weeks before trial, preparation will be facilitated by the likelihood that the trial attorneys have issued subpoenas, interviewed witnesses, prepared trial briefs, researched jury instructions, and otherwise become familiar with the facts and applicable law. By the time of the conference, all counsel should have discussed their respective evaluations with their clients and principals, and obtained appropriate settlement authority.

PRACTICE TIP: Attorneys preparing to appear before a judge with unfamiliar settlement conference procedures may ask other attorneys regarding the manner in which the particular judge is likely to conduct the conference.

Some local rules require the parties to convey settlement demands and offers before the conference. See, *e.g.,* San Francisco Ct R 5.0(G).

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§40.77 c. Parties, Representatives of Insurers and Other Entities

The parties and persons with full authority to settle the case must personally attend the conference, unless excused by the court for good cause. If any consent to settle is required for any reason, the party with consensual authority must be personally present at the conference. See Cal Rules of Ct 3.1380(b). See also San Francisco Ct R 5.0(E); Los Angeles Ct R 7.9(d)(1). In Los Angeles, the following must also be present: (1) the litigants unless consent of a particular litigant is not required for settlement, (2) an authorized representative of any insurance company that has coverage involved in the case, and (3) an authorized representative of a corporation or other business or government entity that is a litigant. These persons shall have the full authority to make decisions or negotiate concerning the settlement of the case. Los Angeles Ct R 7.9(d)(1). Lienholders are required to attend the conference or be available by telephone. Los Angeles Ct R 7.9(d)(4).

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.78 d. Telephone Appearance

§40.78 d. Telephone Appearance

Telephone appearances are not allowed for the settlement conference unless the court permits telephone appearances at those conferences. Cal Rules of Ct 3.670(e)(3).

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§40.79 e. Excuses From Attendance

Local rules may also govern other attendance matters, such as those excused from attendance. See, *e.g*., Los Angeles Ct R 7.9(d)(2). When courts evaluate requests to be excused from the mandatory settlement conference, they tend to construe the term "good cause" as it is used in Cal Rules of Ct 3.1380(b).

PRACTICE TIP: The attorney should check with the clerk of the judge who is assigned to the settlement conference to determine the judge's view of "good cause" before submitting a request to be excused from attendance.

Local rules generally require that such requests be in writing. See, *e.g.,* Los Angeles Ct R 7.9(d)(2) (request to be excused must be by written stipulation or ex parte application). The attorney should also check with the clerk of the settlement conference judge before the date of the settlement conference to ascertain whether the request to be excused has been granted. Most local rules provide that parties excused from personal attendance must still be available for telephone communication during the conference. See, *e.g.,* Los Angeles Ct R 7.9(d)(2).

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§40.80 5. Continuances

Some local rules provide that a settlement conference may be continued at the discretion of the judge to whom it has been assigned. See, *e.g.*, Santa Clara Ct R 7(D) (party requesting continuance must appear ex parte and show good cause why settlement conference should be continued). But see Govt C §68607(g) (court should adopt firm, consistent policy against continuances). Local rules should be consulted, inasmuch as they differ from county to county.

PRACTICE TIP: In general, a court will not grant a continuance absent an affirmative showing of good cause, and counsel must request any continuance by noticed motion with supporting declarations, even if the parties have agreed or stipulated to the continuance. Courts may ask attorneys to give mandatory settlement conferences reasonable priority over other court engagements.

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6. Conduct of Conference

§40.81 a. Judge's Role

Settlement conferences are generally conducted by a judge and attorneys in chambers while the parties wait in the courtroom. Ordinarily, the judge will, on counsel's request:

- Confer with counsel collectively about the case. Then, depending on the circumstances of the case, the judge may confer separately with counsel for the respective parties or groups of parties and may, in certain circumstances, confer directly with the litigants.
- Make an independent evaluation of the case and offer an opinion on probabilities regarding trial results to counsel as appropriate in the circumstances.
- Cause the terms of a settlement and the express consent of the litigants, as well as counsel, to the settlement to be placed on the record, and retain jurisdiction under CCP §664.6 to enforce the settlement.

NOTE: Under Cal Rules of Ct 3.1380(d), the court cannot appoint a person to conduct a mediation, or appoint a person to conduct the settlement conference, who is also serving as a mediator in the action. See also *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 53 CR3d 115 (case management-ordered mediation was improper).

The judge is not empowered to compel litigants to settle the case, but can direct attorneys and parties to negotiate between themselves under reasonable conditions. *Wisniewski v Clary* (1975) 46 CA3d 499, 505, 120 CR 176. See also *People v Cimarusti* (1978) 81 CA3d 314, 146 CR 421 (abuse of discretion to refuse to set case for trial). Furthermore, even if a judge is disqualified in the case or proceeding, he or she is permitted to perform limited judicial functions, including presiding over settlement conferences (CCP §170.4(a)(6)), without any statutory obligation of disclosure. *Adams v Commission on Judicial Performance* (1995) 10 C4th 866, 903, 42 CR2d 606.

JUDICIAL PERSPECTIVE: An experienced, patient, and skillful settlement judge serves as a catalyst for settlement by creating a climate conducive to negotiation. Judges differ in the manner in which they conduct a settlement conference. Many begin by asking each attorney to summarize key facts and contentions. Some assume a more active role, asking probing questions, and pointing out respective strengths and weaknesses, and offering their own viewpoints as to verdict potential and settlement value. Most judges will meet separately with the attorneys for each side, and may require group or separate discussions until either settlement is reached, or the judge concludes that the case must go to trial.

PRACTICE TIP: At times, the attorneys can agree on terms of settlement, but find that one or more of the parties do not agree. The judge can often be asked to assure the dissenting party that the proposed settlement is fair and in that party's best interests. With counsel's consent, the settlement judge can speak with the party directly.

Some judges conclude a successful settlement by having one of the attorneys read the terms of settlement into the court record. If this is done, the record should also show that the parties themselves understand and consent to the settlement's terms.

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§40.82 b. Presentation by Plaintiff's Attorney

The judge may ask plaintiff's counsel to begin the settlement conference by summarizing the facts, theories of recovery, and basis for the relief sought. The summary should be precise and factually accurate, but it may state facts and contentions in the light most favorable to the client. Plaintiff's counsel may then be asked to state the latest and lowest demand, which need not be the minimum offer acceptable to the client. Some judges will ask plaintiff's attorney privately to state the minimum amount acceptable to the client, or whether the attorney has good "client control." The attorney should respond to these questions without disclosing confidential information or undermining his or her ability to obtain the best possible recovery for the client.

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§40.83 c. Presentation by Defendant's Attorney

Defendant's attorney should be prepared to summarize facts and contentions as seen by the defense, including a concise discussion of pleaded affirmative defenses. Counsel may point out any misleading factual statements in plaintiff's counsel's summary of the case. Defense counsel should anticipate being asked the limits of the settlement authority given by the defendant or insurer, but any response should protect the client's bargaining position. Often the defense attorney will ask the judge to excuse plaintiff's counsel during discussions of settlement authority.

PRACTICE TIP: When a plaintiff has sued more than one defendant, defense counsel should consider ways to present a united front against the plaintiff, with provision for a separate resolution of differences between defendants. For example, a preliminary agreement that one defendant will pay 60 percent of the settlement, and another will pay 40 percent, permits defendants to concentrate settlement conference discussion on reducing the plaintiff's demand.

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§40.84 7. Duty to Notify Court of Settlement

If an entire case is settled or otherwise disposed of, the plaintiff must immediately file written notice of the settlement or other disposition with the court and serve the notice on any arbitrator or other court-connected ADR neutral involved in the case. The plaintiff must also immediately give oral notice to all of the above if a hearing, conference, or trial is imminent. Cal Rules of Ct 3.1385(a). Local rules often have procedures for filing written notice with the court and notifying any ADR neutrals. See, *e.g.*, Los Angeles Ct R 7.9(f); San Diego Ct R 2.2.4(A).

The plaintiff must also file a request for dismissal within 45 days after settlement, and there are additional requirements for conditional settlement. See Cal Rules of Ct 3.1385(b)-(c). In addition, if the party required to file the dismissal does not do so, the court must dismiss the entire case 45 days after it receives notice of settlement unless good cause is shown why the case should not be dismissed. Cal Rules of Ct 3.1385(b). Allegations that an enforceable settlement has not been reached constitute good cause. *Irvine v Regents of Univ. of Cal.* (2007) 149 CA4th 994, 1000, 57 CR3d 500.

The same dismissal requirement is imposed for conditional settlements. Cal Rules of Ct 3.1385(c). A settlement with open terms is not a conditional settlement, or a settlement at all, and Cal Rules of Ct 3.1385 does not apply. *Levitz v Warlocks* (2007) 148 CA4th 531, 534, 55 CR3d 800.

On notifying the court of settlement, see §46.37.

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§40.85 8. Sanctions for Failure to Attend or Participate

Various monetary and procedural sanctions are authorized by CCP §575.2 and Cal Rules of Ct 2.30(b). Failure to attend a settlement conference or to participate in good faith constitutes an unlawful interference with court proceedings. CCP §575.2 (failure to comply with local rules sanctionable). In addition, Cal Rules of Ct 2.30(b) permits reasonable sanctions for failure to comply with the rules of court. The court may order the person at fault to pay the opposing party's reasonable expenses and attorney fees incurred in connection with the sanctions motion or order to show cause. Cal Rules of Ct 2.30(d). But see *Vidrio v Hernandez* (2009) 172 CA4th 1443, 1454, 92 CR3d 178 (reversing award of sanctions against non-party insurer whom trial court believed acted in bad faith at policyholder's settlement conference; conduct of insurer was not sanctionable under any statute or rule of court). On sanctions, see §40.89.

Local rules may have their own provisions on sanctions. See, *e.g.,* Los Angeles Ct R 7.13 (sanctions for failure or refusal to comply with local rules). If local rules require the attendance of a representative of an insurer of a party, the settlement conference judge may impose sanctions against that carrier, and, if appropriate, against the insured's attorneys for the carrier's failure to attend. *City of El Monte v Takei* (1984) 158 CA3d 244, 204 CR 559. Striking an answer and entering a default, however, is rarely, if ever, appropriate, even for failure to attend a settlement conference. *Evarone v Twentieth Century Hosts, Inc.* (1979) 98 CA3d 90, 159 CR 294.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.86 B. Voluntary Settlement Conference

§40.86 B. Voluntary Settlement Conference

The courts generally encourage counsel who desire to settle a case early in the proceeding to schedule a voluntary settlement conference before a judge. Such conferences often prove fruitful from the standpoint of obtaining an independent evaluation of verdict value and settlement potential.

Some courts by local rule permit voluntary or "specially set" settlement conferences. For example, in San Francisco, a party to a civil proceeding may apply ex parte to the presiding judge for a specially set settlement conference by filing an ex parte application that shall include proof of service on all counsel and/or self-represented parties. A response to the application may be filed by opposing counsel and/or a self-represented party within two court days after being served with the application. San Francisco Ct R 5.0(D). In addition, an "early" settlement conference can be set at the case management conference. See Cal Rules of Ct 3.727(7).

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§40.87 C. Informal Chambers Conference

The final opportunity for the court and the attorneys to meet before trial to narrow the issues and attempt settlement of the case is at an informal chambers conference immediately before the trial. The informal conference is entirely a creature of local rule and custom and is not to be confused with other pretrial conferences. The primary shortcoming of the informal conference is that, because it does not occur until immediately before trial, pretrial preparation time has already been invested and all attendant expense incurred.

In Los Angeles County, the trial judge may request counsel to explore settlement further but is urged not to engage in settlement discussions unless all counsel and parties agree on the record to discussions with the judge and to waive any right to assert a disqualification based on the judge's participation. Los Angeles Ct R 8.21. If a settlement is reached, its terms and the consent of the parties and counsel should be stated on the record. Los Angeles Ct R 8.21.

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§40.88 VIII. FINAL STATUS CONFERENCE

Many jurisdictions require counsel to attend a final status conference (sometimes known as a trial management conference) a few days before trial. See, *e.g.,* Los Angeles Ct R 7.9(h) (to be held not more than 10 days before trial date). The date for this conference is typically set at the same time the trial date is set. The purpose of the conference is to narrow the issues and organize the case for trial. Local rules must be consulted to ascertain the conference's procedural requirements for a particular court.

Before the final status conference, some courts require counsel to meet and confer about exhibits, jury instructions, and witness lists. See, *e.g.,* Los Angeles Ct R 7.9(h). Counsel may also be expected to discuss which issues are contested and which are not. In some jurisdictions, counsel must file with the court a joint exhibit list, a joint witness list, jury instructions, a list of disputed and undisputed issues, and a statement of the case before the final status conference. In addition, some courts require counsel to exchange motions in limine before the conference and be prepared to argue them at the conference. See, *e.g.*, Los Angeles Ct R 7.9(h).

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§40.89 IX. SANCTIONS

The Trial Court Delay Reduction Act (Govt C §§68600-68620) encourages judges to impose sanctions—including dismissing actions or striking pleadings if it appears that less severe sanctions would be ineffective—to achieve its purposes. Govt C §68608(b).

The court may impose sanctions for failure to comply with local rules promulgated under CCP §575.1 for the supervision and management of actions. CCP §575.2. In addition, superior courts have the authority under Cal Rules of Ct 2.30 to impose monetary sanctions to an aggrieved party or the court, or both, based on a failure to comply with the applicable rules, unless good cause is shown. But see *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 70 CR2d 449 (terms of Cal Rules of Ct 2.30(d) exceed rule-making authority of Judicial Council in permitting court to impose attorney fees as sanction "in addition to any other sanction permitted by law").

Most local rules provide for sanctions as well. For example, in Los Angeles, the rules provide that the court may impose appropriate sanctions for failure or refusal to comply with (1) the delay reduction rules, (2) any order made under the rules, or (3) the time standards or deadlines set by the rules. Los Angeles Ct R 7.13. These sanctions may be imposed on the party, the party's counsel, or both. Los Angeles Ct R 7.13.

PRACTICE TIP: Attorneys have the responsibility to comply with the time requirements for filings and events set forth in local rules or to justify in writing a failure to do so. A party that neither complies nor provides justification will be served with an order to show cause why he or she should not be sanctioned, financially or in some other way. The sanction is usually a monetary one, but it may, in extreme instances, take the form of the dismissal of a complaint or the striking of a defense. See CCP §575.2; Govt C §68608(b); Cal Rules of Ct 2.30.

A court may not dismiss an action for noncompliance with local court rules implementing the Trial Court Delay Reduction Act (Govt C §§68600-68620) if noncompliance is the fault of counsel, not the litigant. *Garcia v McCutchen* (1997) 16 C4th 469, 66 CR2d 319. Code of Civil Procedure §575.2(b) also prohibits dismissal as a sanction when noncompliance with local court rules is counsel's fault.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/ X. FORMS/§40.90 A. Form: Civil Case Cover Sheet (Judicial Council Form CM-010)

X. FORMS

§40.90 A. Form: Civil Case Cover Sheet (Judicial Council Form CM-010)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	

CIVIL CASE COVER SHEET	**Complex Case Designation**	CASE NUMBER:
☐ **Unlimited** (Amount demanded exceeds $25,000) ☐ **Limited** (Amount demanded is $25,000 or less)	☐ **Counter** ☐ **Joinder** Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	JUDGE: DEPT:

Items 1–6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:

Auto Tort
- ☐ Auto (22)
- ☐ Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- ☐ Asbestos (04)
- ☐ Product liability (24)
- ☐ Medical malpractice (45)
- ☐ Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- ☐ Business tort/unfair business practice (07)
- ☐ Civil rights (08)
- ☐ Defamation (13)
- ☐ Fraud (16)
- ☐ Intellectual property (19)
- ☐ Professional negligence (25)
- ☐ Other non-PI/PD/WD tort (35)

Employment
- ☐ Wrongful termination (36)
- ☐ Other employment (15)

Contract
- ☐ Breach of contract/warranty (06)
- ☐ Rule 3.740 collections (09)
- ☐ Other collections (09)
- ☐ Insurance coverage (18)
- ☐ Other contract (37)

Real Property
- ☐ Eminent domain/Inverse condemnation (14)
- ☐ Wrongful eviction (33)
- ☐ Other real property (26)

Unlawful Detainer
- ☐ Commercial (31)
- ☐ Residential (32)
- ☐ Drugs (38)

Judicial Review
- ☐ Asset forfeiture (05)
- ☐ Petition re: arbitration award (11)
- ☐ Writ of mandate (02)
- ☐ Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)
- ☐ Antitrust/Trade regulation (03)
- ☐ Construction defect (10)
- ☐ Mass tort (40)
- ☐ Securities litigation (28)
- ☐ Environmental/Toxic tort (30)
- ☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- ☐ Enforcement of judgment (20)

Miscellaneous Civil Complaint
- ☐ RICO (27)
- ☐ Other complaint *(not specified above)* (42)

Miscellaneous Civil Petition
- ☐ Partnership and corporate governance (21)
- ☐ Other petition *(not specified above)* (43)

2. This case ☐ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
   a. ☐ Large number of separately represented parties
   b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. ☐ Substantial amount of documentary evidence
   d. ☐ Large number of witnesses
   e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
   f. ☐ Substantial postjudgment judicial supervision
3. Remedies sought *(check all that apply)*: a. ☐ monetary b. ☐ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action *(specify)*:
5. This case ☐ is ☐ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. *(You may use form CM-015.)*

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on **all** other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 [Rev. July 1, 2007]

CIVIL CASE COVER SHEET

Cal. Rules of Court, rules 2.30, 3.220, 3.400–3.403, 3.740;
Cal. Standards of Judicial Administration, std. 3.10
www.courtinfo.ca.gov

Print

CM-010

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you **must** complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than $25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort
- Auto (22)–Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

Other PI/PD/WD (Personal Injury/ Property Damage/Wrongful Death) Tort
- Asbestos (04)
  - Asbestos Property Damage
  - Asbestos Personal Injury/ Wrongful Death
- Product Liability *(not asbestos or toxic/environmental)* (24)
- Medical Malpractice (45)
  - Medical Malpractice–Physicians & Surgeons
  - Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
  - Premises Liability (e.g., slip and fall)
  - Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
  - Intentional Infliction of Emotional Distress
  - Negligent Infliction of Emotional Distress
  - Other PI/PD/WD

Non-PI/PD/WD (Other) Tort
- Business Tort/Unfair Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
  - Legal Malpractice
  - Other Professional Malpractice *(not medical or legal)*
- Other Non-PI/PD/WD Tort (35)

Employment
- Wrongful Termination (36)
- Other Employment (15)

Contract
- Breach of Contract/Warranty (06)
  - Breach of Rental/Lease Contract *(not unlawful detainer or wrongful eviction)*
  - Contract/Warranty Breach–Seller Plaintiff *(not fraud or negligence)*
  - Negligent Breach of Contract/ Warranty
  - Other Breach of Contract/Warranty
- Collections (e.g., money owed, open book accounts) (09)
  - Collection Case–Seller Plaintiff
  - Other Promissory Note/Collections Case
- Insurance Coverage *(not provisionally complex)* (18)
  - Auto Subrogation
  - Other Coverage
- Other Contract (37)
  - Contractual Fraud
  - Other Contract Dispute

Real Property
- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
  - Writ of Possession of Real Property
  - Mortgage Foreclosure
  - Quiet Title
  - Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

Unlawful Detainer
- Commercial (31)
- Residential (32)
- Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)*

Judicial Review
- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
  - Writ–Administrative Mandamus
  - Writ–Mandamus on Limited Court Case Matter
  - Writ–Other Limited Court Case Review
- Other Judicial Review (39)
  - Review of Health Officer Order
  - Notice of Appeal–Labor Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)
- Antitrust/Trade Regulation (03)
- Construction Defect (10)
- Claims Involving Mass Tort (40)
- Securities Litigation (28)
- Environmental/Toxic Tort (30)
- Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

Enforcement of Judgment
- Enforcement of Judgment (20)
  - Abstract of Judgment (Out of County)
  - Confession of Judgment *(non-domestic relations)*
  - Sister State Judgment
  - Administrative Agency Award *(not unpaid taxes)*
  - Petition/Certification of Entry of Judgment on Unpaid Taxes
  - Other Enforcement of Judgment Case

Miscellaneous Civil Complaint
- RICO (27)
- Other Complaint *(not specified above)* (42)
  - Declaratory Relief Only
  - Injunctive Relief Only *(non-harassment)*
  - Mechanics Lien
  - Other Commercial Complaint Case *(non-tort/non-complex)*
  - Other Civil Complaint *(non-tort/non-complex)*

Miscellaneous Civil Petition
- Partnership and Corporate Governance (21)
- Other Petition *(not specified above)* (43)
  - Civil Harassment
  - Workplace Violence
  - Elder/Dependent Adult Abuse
  - Election Contest
  - Petition for Name Change
  - Petition for Relief From Late Claim
  - Other Civil Petition

Comment: This is the mandatory form of Civil Case Cover Sheet (Judicial Council Form CM-010). It must

accompany the first paper filed in a civil action or proceeding, except those filed in small claims or under the Probate, Family, or Welfare and Institutions Codes. Cal Rules of Ct 3.220(a)-(b). A fileable version of the Judicial Council form is available on the Judicial Council's website at www.courtinfo.ca.gov. On the civil case cover sheet, see §40.18.

In Los Angeles, the Civil Case Cover Sheet Addendum and Statement of Location (Los Angeles County Form CIV-109) must be attached to this form. See §40.91.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.91 B. Form: Civil Case Cover Sheet Addendum and Statement of Location (Los Angeles County Form CIV-109)

§40.91 B. Form: Civil Case Cover Sheet Addendum and Statement of Location (Los Angeles County Form CIV-109)

SHORT TITLE:	CASE NUMBER

CIVIL CASE COVER SHEET ADDENDUM AND STATEMENT OF LOCATION (CERTIFICATE OF GROUNDS FOR ASSIGNMENT TO COURTHOUSE LOCATION)

This form is required pursuant to LASC Local Rule 2.0 in all new civil case filings in the Los Angeles Superior Court.

Item I. Check the types of hearing and fill in the estimated length of hearing expected for this case:

JURY TRIAL? ☐ YES CLASS ACTION? ☐ YES LIMITED CASE? ☐ YES TIME ESTIMATED FOR TRIAL ☐ HOURS/ ☐ DAYS

Item II. Select the correct district and courthouse location (4 steps – If you checked "Limited Case", skip to Item III, Pg. 4):

Step 1: After first completing the Civil Case Cover Sheet Form, find the main civil case cover sheet heading for your case in the left margin below, and, to the right in Column **A**, the Civil Case Cover Sheet case type you selected.

Step 2: Check **one** Superior Court type of action in Column **B** below which best describes the nature of this case.

Step 3: In Column **C**, circle the reason for the court location choice that applies to the type of action you have checked. For any exception to the court location, see Los Angeles Superior Court Local Rule 2.0.

Applicable Reasons for Choosing Courthouse Location (see Column C below)

1. Class Actions must be filed in the County Courthouse, Central District.
2. May be filed in Central (Other county, or no Bodily Injury/Property Damage).
3. Location where cause of action arose.
4. Location where bodily injury, death or damage occurred.
5. Location where performance required or defendant resides.
6. Location of property or permanently garaged vehicle.
7. Location where petitioner resides.
8. Location wherein defendant/respondent functions wholly.
9. Location where one or more of the parties reside.
10. Location of Labor Commissioner Office.

Step 4: Fill in the information requested on page 4 in Item III; complete Item IV. Sign the declaration.

	A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Auto Tort	Auto (22)	☐ A7100 Motor Vehicle - Personal Injury/Property Damage/Wrongful Death	1., 2., 4.
	Uninsured Motorist (46)	☐ A7110 Personal Injury/Property Damage/Wrongful Death – Uninsured Motorist	1., 2., 4.
Other Personal Injury/Property Damage/Wrongful Death Tort	Asbestos (04)	☐ A6070 Asbestos Property Damage ☐ A7221 Asbestos - Personal Injury/Wrongful Death	2. 2.
	Product Liability (24)	☐ A7260 Product Liability (not asbestos or toxic/environmental)	1., 2., 3., 4., 8.
	Medical Malpractice (45)	☐ A7210 Medical Malpractice - Physicians & Surgeons ☐ A7240 Other Professional Health Care Malpractice	1., 2., 4. 1., 2., 4.
	Other Personal Injury Property Damage Wrongful Death (23)	☐ A7250 Premises Liability (e.g., slip and fall) ☐ A7230 Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., assault, vandalism, etc.) ☐ A7270 Intentional Infliction of Emotional Distress ☐ A7220 Other Personal Injury/Property Damage/Wrongful Death	1., 2., 4. 1., 2., 4. 1., 2., 3. 1., 2., 4.
Non-Personal Injury/Property Damage/Wrongful Death Tort	Business Tort (07)	☐ A6029 Other Commercial/Business Tort (not fraud/breach of contract)	1., 2., 3.
	Civil Rights (08)	☐ A6005 Civil Rights/Discrimination	1., 2., 3.
	Defamation (13)	☐ A6010 Defamation (slander/libel)	1., 2., 3.
	Fraud (16)	☐ A6013 Fraud (no contract)	1., 2., 3.

Print

SHORT TITLE:	CASE NUMBER

A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons -See Step 3 Above
Non-Personal Injury/Property Damage/ Wrongful Death Tort (Cont'd.) — Professional Negligence (25)	☐ A6017 Legal Malpractice	1., 2., 3.
	☐ A6050 Other Professional Malpractice (not medical or legal)	1., 2., 3.
Non-Personal Injury/Property Damage/ Wrongful Death Tort (Cont'd.) — Other (35)	☐ A6025 Other Non-Personal Injury/Property Damage tort	2.,3.
Employment — Wrongful Termination (36)	☐ A6037 Wrongful Termination	1., 2., 3.
Employment — Other Employment (15)	☐ A6024 Other Employment Complaint Case	1., 2., 3.
	☐ A6109 Labor Commissioner Appeals	10.
Contract — Breach of Contract/ Warranty (06) (not insurance)	☐ A6004 Breach of Rental/Lease Contract (not Unlawful Detainer or wrongful eviction)	2., 5.
	☐ A6008 Contract/Warranty Breach -Seller Plaintiff (no fraud/negligence)	2., 5.
	☐ A6019 Negligent Breach of Contract/Warranty (no fraud)	1., 2., 5.
	☐ A6028 Other Breach of Contract/Warranty (not fraud or negligence)	1., 2., 5.
Contract — Collections (09)	☐ A6002 Collections Case-Seller Plaintiff	2., 5., 6.
	☐ A6012 Other Promissory Note/Collections Case	2., 5.
Contract — Insurance Coverage (18)	☐ A6015 Insurance Coverage (not complex)	1., 2., 5., 8.
Contract — Other Contract (37)	☐ A6009 Contractual Fraud	1., 2., 3., 5.
	☐ A6031 Tortious Interference	1., 2., 3., 5.
	☐ A6027 Other Contract Dispute(not breach/insurance/fraud/negligence)	1., 2., 3., 8.
Real Property — Eminent Domain/Inverse Condemnation (14)	☐ A7300 Eminent Domain/Condemnation Number of parcels_____	2.
Real Property — Wrongful Eviction (33)	☐ A6023 Wrongful Eviction Case	2., 6.
Real Property — Other Real Property (26)	☐ A6018 Mortgage Foreclosure	2., 6.
	☐ A6032 Quiet Title	2., 6.
	☐ A6060 Other Real Property (not eminent domain, landlord/tenant, foreclosure)	2., 6.
Unlawful Detainer — Unlawful Detainer-Commercial (31)	☐ A6021 Unlawful Detainer-Commercial (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer — Unlawful Detainer-Residential (32)	☐ A6020 Unlawful Detainer-Residential (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer — Unlawful Detainer-Drugs (38)	☐ A6022 Unlawful Detainer-Drugs	2., 6.
Judicial Review — Asset Forfeiture (05)	☐ A6108 Asset Forfeiture Case	2., 6.
Judicial Review — Petition re Arbitration (11)	☐ A6115 Petition to Compel/Confirm/Vacate Arbitration	2., 5.

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SHORT TITLE:	CASE NUMBER

	A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Judicial Review (Cont'd.)	Writ of Mandate (02)	☐ A6151 Writ - Administrative Mandamus ☐ A6152 Writ - Mandamus on Limited Court Case Matter ☐ A6153 Writ - Other Limited Court Case Review	2., 8. 2. 2.
	Other Judicial Review (39)	☐ A6150 Other Writ /Judicial Review	2., 8.
Provisionally Complex Litigation	Antitrust/Trade Regulation (03)	☐ A6003 Antitrust/Trade Regulation	1., 2., 8.
	Construction Defect (10)	☐ A6007 Construction defect	1., 2., 3.
	Claims Involving Mass Tort (40)	☐ A6006 Claims Involving Mass Tort	1., 2., 8.
	Securities Litigation (28)	☐ A6035 Securities Litigation Case	1., 2., 8.
	Toxic Tort Environmental (30)	☐ A6036 Toxic Tort/Environmental	1., 2., 3., 8.
	Insurance Coverage Claims from Complex Case (41)	☐ A6014 Insurance Coverage/Subrogation (complex case only)	1., 2., 5., 8.
Enforcement of Judgment	Enforcement of Judgment (20)	☐ A6141 Sister State Judgment ☐ A6160 Abstract of Judgment ☐ A6107 Confession of Judgment (non-domestic relations) ☐ A6140 Administrative Agency Award (not unpaid taxes) ☐ A6114 Petition/Certificate for Entry of Judgment on Unpaid Tax ☐ A6112 Other Enforcement of Judgment Case	2., 9. 2., 6. 2., 9. 2., 8. 2., 8. 2., 8., 9.
Miscellaneous Civil Complaints	RICO (27)	☐ A6033 Racketeering (RICO) Case	1., 2., 8.
	Other Complaints (Not Specified Above) (42)	☐ A6030 Declaratory Relief Only ☐ A6040 Injunctive Relief Only (not domestic/harassment) ☐ A6011 Other Commercial Complaint Case (non-tort/non-complex) ☐ A6000 Other Civil Complaint (non-tort/non-complex)	1., 2., 8. 2., 8. 1., 2., 8. 1., 2., 8.
Miscellaneous Civil Petitions	Partnership Corporation Governance(21)	☐ A6113 Partnership and Corporate Governance Case	2., 8.
	Other Petitions (Not Specified Above) (43)	☐ A6121 Civil Harassment ☐ A6123 Workplace Harassment ☐ A6124 Elder/Dependent Adult Abuse Case ☐ A6190 Election Contest ☐ A6110 Petition for Change of Name ☐ A6170 Petition for Relief from Late Claim Law ☐ A6100 Other Civil Petition	2., 3., 9. 2., 3., 9. 2., 3., 9. 2. 2., 7. 2., 3., 4., 8. 2., 9.

Print

SHORT TITLE:	CASE NUMBER

Item III. Statement of Location: Enter the address of the accident, party's residence or place of business, performance, or other circumstance indicated in Item II., Step 3 on Page 1, as the proper reason for filing in the court location you selected.

REASON: CHECK THE NUMBER UNDER COLUMN C WHICH APPLIES IN THIS CASE ☐1. ☐2. ☐3. ☐4. ☐5. ☐6. ☐7. ☐8. ☐9. ☐10.			ADDRESS:
CITY:	STATE:	ZIP CODE:	

Item IV. *Declaration of Assignment*: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the above-entitled matter is properly filed for assignment to the _____courthouse in the _____ District of the Los Angeles Superior Court (Code Civ. Proc., § 392 et seq., and LASC Local Rule 2.0, subds. (b), (c) and (d)).

Dated: _____

_____
(SIGNATURE OF ATTORNEY/FILING PARTY)

PLEASE HAVE THE FOLLOWING ITEMS COMPLETED AND READY TO BE FILED IN ORDER TO PROPERLY COMMENCE YOUR NEW COURT CASE:

1. Original Complaint or Petition.
2. If filing a Complaint, a completed Summons form for issuance by the Clerk.
3. Civil Case Cover Sheet form CM-010.
4. Complete Addendum to Civil Case Cover Sheet form LACIV 109 (Rev. 01/07), LASC Approved 03-04.
5. Payment in full of the filing fee, unless fees have been waived.
6. Signed order appointing the Guardian ad Litem, JC form FL-935, if the plaintiff or petitioner is a minor under 18 years of age, or if required by Court.
7. Additional copies of documents to be conformed by the Clerk. Copies of the cover sheet and this addendum must be served along with the summons and complaint, or other initiating pleading in the case.

Comment: This is the Civil Case Cover Sheet Addendum and Statement of Location (Los Angeles County Form CIV-

109) that is required by Los Angeles County. See Los Angeles Ct R 2.0(d). It should be attached to the mandatory Civil Case Cover Sheet (Judicial Council Form CM-010). See §40.90. The form is available on the court's website at www.lasuperiorcourt.org, under Civil, Forms. On the civil case cover sheet, see §40.18.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.92 C. Form: Case Questionnaire--For Limited Civil Cases (Under $25,000) (Judicial Council Form DISC-010)

§40.92 C. Form: Case Questionnaire—For Limited Civil Cases (Under $25,000) (Judicial Council Form DISC-010)

DO NOT FILE WITH THE COURT

THIS IS NOT AN ANSWER OR RESPONSE TO THE COMPLAINT

DISC-010

SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
PLAINTIFF *(Name)*: DEFENDANT *(Name)*:	CASE NUMBER

CASE QUESTIONNAIRE—FOR LIMITED CIVIL CASES (Under $25,000)

REQUESTING PARTY *(Name)*:

RESPONDING PARTY *(Name)*:

—INSTRUCTIONS—

A. The purpose of the case questionnaire is to help the parties settle their differences without spending a lot of money. This is accomplished by exchanging information about the case early in the lawsuit. The exchange of case questionnaires may be started only by a plaintiff (or cross-complainant) in a limited civil case. The case questionnaire is optional, and if plaintiff (or cross-complainant) exercises the option, only this form may be used.

B. **Instructions for plaintiffs (and cross-complainants)**

1. Under Code of Civil Procedure section 93, a plaintiff (or cross-complainant) may serve a completed case questionnaire and a blank questionnaire with a complaint (or cross-complaint).
2. This is the only way you can require defendants (or cross-defendants) to serve you with a completed case questionnaire.

C. **Instructions for defendants (and cross-defendants)**

1. If you have been served with a completed case questionnaire by a plaintiff (or cross-complainant), then you must fill in the blank case questionnaire. Your completed case questionnaire must be served on that same plaintiff (or cross-complainant) with your answer to the complaint (or cross-complaint).
2. **THIS IS NOT AN ANSWER OR RESPONSE TO THE COMPLAINT.**

D. **Instructions for all parties**

1. **ALL QUESTIONS REFER TO THE INCIDENT OR AGREEMENT IN THIS LAWSUIT ONLY.**
2. Answer each question. If a question is not applicable, answer "NA."
3. Your answers are not limited to your personal knowledge, but you are required to furnish information available to you or to anyone acting on your behalf, whether you are a plaintiff, defendant, cross-complainant, or cross -defendant.
4. Type or legibly print your answer below each question. If you cannot completely answer a question in the space provided on the case questionnaire, check the "attachment" box and put the number of the question and the complete answer on an attached sheet of paper or form MC-025. You should *not* put part of an answer on the case questionnaire and part on the attachment. You may put more than one answer on each attached page.
5. When you have completed the case questionnaire, sign the verification and serve the original.
6. You may compel compliance with these requirements under Code of Civil Procedure section 93.
7. **DO NOT FILE THIS CASE QUESTIONNAIRE WITH THE COURT.**

Form Adopted for Mandatory Use
Judicial Council of California
DISC-010 [Rev. January 1, 2007]

Code of Civil Procedure, § 93
www.courtinfo.ca.gov

Print

DO NOT FILE WITH THE COURT **DISC-010**

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

—QUESTIONS—

1. FOR ALL CASES

   a. State your name and street address.

   b. State your current business name and street address, the type of business entity, and your title.

   c. Describe in detail your claims or defenses and the facts on which they are based, giving relevant dates.

      ☐ See attachment for answer number 1c.

   d. State the name, street address, and telephone number of each person who has knowledge of facts relating to this lawsuit, and specify his or her area of knowledge.

      ☐ See attachment for answer number 1d.

   e. Describe each document or photograph that relates to the issues or facts. You are encouraged to attach a copy of each. For each that you have described but not attached, state the name, street address, and telephone number of each person who has it.

      ☐ See attachment for answer number 1e.

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

1. f. Describe each item of physical evidence that relates to the issues and facts; give its location; and state the name, street address, and telephone number of each person who has it.

☐ See attachment for answer number 1f.

g. State the name and street address of each insurance company and the number of each policy that may cover you in whole or part for the damages claimed.

☐ See attachment for answer number 1g.

2. FOR PERSONAL INJURY OR PROPERTY DAMAGE CASES

a. Describe each injury or illness that you received and your present complaints about each.

☐ See attachment for answer number 2a.

b. State the name, street address, and telephone number of each physician, dentist, or other health care provider who treated or examined you; the type of treatment; the dates of treatment; and the charges by each to date.

☐ See attachment for answer number 2b.

c. Itemize the medical expenses you anticipate in the future.

☐ See attachment for answer number 2c.

d. Itemize your loss of income to date, give the name and street address of each source, and show how the loss is computed.

☐ See attachment for answer number 2d.

Print

DO NOT FILE WITH THE COURT DISC-010

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

2. e. Itemize the loss of income you anticipate in the future, give the name and street address of each source, and show how the loss is computed.

☐ See attachment for answer number 2e.

f. Itemize your property damage, and state the amount or attach an itemized bill or estimate.

☐ See attachment for answer number 2f.

9. Describe each other item of damage or cost that you claim, and state the amount.

☐ See attachment for answer number 2g.

3. FOR CASES BASED ON AGREEMENTS

a. In addition to your answer to 1e, state all the terms and give the date of any part of the agreement that is not in writing.

☐ See attachment for answer number 3a.

b. Describe each item of damage or cost you claim, state the amount, and show how it is computed.

☐ See attachment for answer number 3b.

VERIFICATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

Comment: This is the mandatory form of Case Questionnaire—For Limited Civil Cases (Under $25,000) (Judicial

Council Form DISC-010) for use in limited civil cases (cases under $25,000). The plaintiff must serve a completed version of this form with the complaint. See, *e.g.*, San Francisco Ct R 3.4(B). A fileable version of the Judicial Council form is available on the Judicial Council's website at www.courtinfo.ca.gov.

On the case questionnaire, see §40.19.

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Source: Civil Litigation/California Civil Procedure Before Trial/40 Case Management Conferences/§40.93 D. Form: Case Management Statement (Judicial Council Form CM-110)

§40.93 D. Form: Case Management Statement (Judicial Council Form CM-110)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
CASE MANAGEMENT STATEMENT (*Check one*): ☐ **UNLIMITED CASE** (Amount demanded exceeds $25,000) ☐ **LIMITED CASE** (Amount demanded is $25,000 or less)	CASE NUMBER:

A **CASE MANAGEMENT CONFERENCE** is scheduled as follows:

Date: Time: Dept.: Div.: Room:

Address of court *(if different from the address above)*:

☐ **Notice of Intent to Appear by Telephone, by (*name*):**

INSTRUCTIONS: All applicable boxes must be checked, and the specified information must be provided.

1. **Party or parties** *(answer one)*:
   a. ☐ This statement is submitted by party *(name)*:
   b. ☐ This statement is submitted **jointly** by parties *(names)*:

2. **Complaint and cross-complaint** *(to be answered by plaintiffs and cross-complainants only)*
   a. The complaint was filed on *(date)*:
   b. ☐ The cross-complaint, if any, was filed on *(date)*:

3. **Service** *(to be answered by plaintiffs and cross-complainants only)*
   a. ☐ All parties named in the complaint and cross-complaint have been served, or have appeared, or have been dismissed.
   b. ☐ The following parties named in the complaint or cross-complaint
      (1) ☐ have not been served *(specify names and explain why not)*:
      (2) ☐ have been served but have not appeared and have not been dismissed *(specify names)*:
      (3) ☐ have had a default entered against them *(specify names)*:
   c. ☐ The following additional parties may be added *(specify names, nature of involvement in case, and the date by which they may be served)*:

4. **Description of case**
   a. Type of case in ☐ complaint ☐ cross-complaint *(Describe, including causes of action)*:

Form Adopted for Mandatory Use
Judicial Council of California
CM-110 [Rev. January 1, 2009]

CEB
Cal. Rules of Court, rules 3.720–3.730
www.courtinfo.ca.gov

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

4. b. Provide a brief statement of the case, including any damages. *(If personal injury damages are sought, specify the injury and damages claimed, including medical expenses to date [indicate source and amount], estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, describe the nature of the relief.)*

☐ *(If more space is needed, check this box and attach a page designated as Attachment 4b.)*

5. **Jury or nonjury trial**
The party or parties request ☐ a jury trial ☐ a nonjury trial. *(If more than one party, provide the name of each party requesting a jury trial):*

6. **Trial date**
a. ☐ The trial has been set for *(date):*
b. ☐ No trial date has been set. This case will be ready for trial within 12 months of the date of the filing of the complaint *(if not, explain):*

c. Dates on which parties or attorneys will not be available for trial *(specify dates and explain reasons for unavailability):*

7. **Estimated length of trial**
The party or parties estimate that the trial will take *(check one):*
a. ☐ days *(specify number):*
b. ☐ hours (short causes) *(specify):*

8. **Trial representation** *(to be answered for each party)*
The party or parties will be represented at trial ☐ by the attorney or party listed in the caption ☐ by the following:
a. Attorney:
b. Firm:
c. Address:
d. Telephone number:
e. Fax number:
f. E-mail address:
g. Party represented:
☐ Additional representation is described in Attachment 8.

9. **Preference**
☐ This case is entitled to preference *(specify code section):*

10. **Alternative Dispute Resolution (ADR)**
a. Counsel ☐ has ☐ has not provided the ADR information package identified in rule 3.221 to the client and has reviewed ADR options with the client.
b. ☐ All parties have agreed to a form of ADR. ADR will be completed by *(date):*
c. ☐ The case has gone to an ADR process *(indicate status):*

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

10. d. The party or parties are willing to participate in *(check all that apply):*
    (1) ☐ Mediation
    (2) ☐ Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to close 15 days before arbitration under Cal. Rules of Court, rule 3.822)
    (3) ☐ Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to remain open until 30 days before trial; order required under Cal. Rules of Court, rule 3.822)
    (4) ☐ Binding judicial arbitration
    (5) ☐ Binding private arbitration
    (6) ☐ Neutral case evaluation
    (7) ☐ Other *(specify):*

e. ☐ This matter is subject to mandatory judicial arbitration because the amount in controversy does not exceed the statutory limit.
f. ☐ Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.
g. ☐ This case is exempt from judicial arbitration under rule 3.811 of the California Rules of Court *(specify exemption):*

11. **Settlement conference**
☐ The party or parties are willing to participate in an early settlement conference *(specify when):*

12. **Insurance**
a. ☐ Insurance carrier, if any, for party filing this statement *(name):*
b. Reservation of rights: ☐ Yes ☐ No
c. ☐ Coverage issues will significantly affect resolution of this case *(explain):*

13. **Jurisdiction**
Indicate any matters that may affect the court's jurisdiction or processing of this case, and describe the status.
☐ Bankruptcy ☐ Other *(specify):*
Status:

14. **Related cases, consolidation, and coordination**
a. ☐ There are companion, underlying, or related cases.
    (1) Name of case:
    (2) Name of court:
    (3) Case number:
    (4) Status:
    ☐ Additional cases are described in Attachment 14a.
b. ☐ A motion to ☐ consolidate ☐ coordinate will be filed by *(name party):*

15. **Bifurcation**
☐ The party or parties intend to file a motion for an order bifurcating, severing, or coordinating the following issues or causes of action *(specify moving party, type of motion, and reasons):*

16. **Other motions**
☐ The party or parties expect to file the following motions before trial *(specify moving party, type of motion, and issues):*

Print

CM-110

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

17. **Discovery**
    a. ☐ The party or parties have completed all discovery.
    b. ☐ The following discovery will be completed by the date specified *(describe all anticipated discovery):*

Party	Description	Date

    c. ☐ The following discovery issues are anticipated *(specify):*

18. **Economic litigation**
    a. ☐ This is a limited civil case (i.e., the amount demanded is $25,000 or less) and the economic litigation procedures in Code of Civil Procedure sections 90 through 98 will apply to this case.
    b. ☐ This is a limited civil case and a motion to withdraw the case from the economic litigation procedures or for additional discovery will be filed *(if checked, explain specifically why economic litigation procedures relating to discovery or trial should not apply to this case):*

19. **Other issues**
    ☐ The party or parties request that the following additional matters be considered or determined at the case management conference *(specify):*

20. **Meet and confer**
    a. ☐ The party or parties have met and conferred with all parties on all subjects required by rule 3.724 of the California Rules of Court *(if not, explain):*

    b. After meeting and conferring as required by rule 3.724 of the California Rules of Court, the parties agree on the following *(specify):*

21. Total number of pages attached *(if any):* _____

I am completely familiar with this case and will be fully prepared to discuss the status of discovery and ADR, as well as other issues raised by this statement, and will possess the authority to enter into stipulations on these issues at the time of the case management conference, including the written authority of the party where required.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

☐ Additional signatures are attached.

Comment: This is the mandatory Case Management Statement (Judicial Council Form CM-110). No later than 15

calendar days before the date set for the case management conference or review, each party must file a case management statement and serve it on all other parties in the case. Cal Rules of Ct 3.725(a). On the case management statement, see §§40.60-40.70.

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41

Jury Trial Demands

I. INTRODUCTION
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- B. Governing Law §41.2

II. RIGHT TO JURY
- A. When Mandated; Legal Versus Equitable Actions §41.3
- B. Specific Actions
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- A. Necessity and Time for Demand; Effect §41.9
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I. INTRODUCTION

§41.1 A. Scope of Chapter

To be exercised when available, the right to a jury trial requires a timely demand and the avoidance of waiver. The right to a jury trial is covered in §§41.3-41.8. Other topics discussed include demand procedures (see §§41.9-41.11), waiver (see §§41.12-41.14), and the Judicial Council Official Jury Instructions (CACI) (see §§41.15-41.19). The request for a jury trial apparently should be made on the mandatory form of Case Management Statement (Judicial Council Form CM-110), reprinted in §40.93.

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§41.2 B. Governing Law

The right to a jury trial is governed by Cal Const art I, §16 and CCP §592. The time for requesting a jury trial is governed by CCP §631(d)(4). Waiver of jury trials is governed by CCP §631(a), (d). Demands for jury trials, which are often made at the case management conference, are governed by Cal Rules of Ct 3.727(13). On the case management conference and statement, see chap 40.

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II. RIGHT TO JURY

§41.3 A. When Mandated; Legal Versus Equitable Actions

The right to a jury trial in California civil actions is set forth in Cal Const art I, §16, and CCP §592, which in effect provide that, in certain classes of case, a jury trial on factual issues is a matter of right unless waived. CCP §631(a), (d). See §§41.12-41.14 for discussion of waiver. Actions in which a jury trial is a matter of right under the constitution are those that were triable by a jury at common law, *i.e.,* legal as distinguished from equitable actions. *People v One 1941 Chevrolet Coupe* (1951) 37 C2d 283, 231 P2d 832. It has been said that whether an action is legal or equitable depends on the "gist of the action," as framed by the pleadings and facts, and on the type of relief sought. *Paularena v Superior Court* (1965) 231 CA2d 906, 911, 42 CR 366, cited with approval in *Southern Pac. Transp. Co. v Superior Court* (1976) 58 CA3d 433, 436, 129 CR 912.

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Source: Civil Litigation/California Civil Procedure Before Trial/41 Jury Trial Demands/ B. Specific Actions/§41.4 1. Legal Actions

B. Specific Actions

§41.4 1. Legal Actions

Legal actions, which are the actions in which a jury trial is a matter of right, include actions for (CCP §592):

- Recovery of real or personal property, with or without damages;
- Money due under a contract or as damages for breach of contract; and
- Damages for injuries to person or property.

Legal actions also include cases that superficially appear to be equitable but are more similar to common law actions, *e.g.,* an action to compel a fiduciary to account for money owed. See *Ripling v Superior Court* (1952) 112 CA2d 399, 247 P2d 117.

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§41.5 2. Equitable Actions

Equitable actions, which do not involve a right to a jury trial (see §41.3), include:

- Actions for specific performance (see *Connell v Bowes* (1942) 19 C2d 870, 123 P2d 456);
- Actions for rescission (see *Bank of America v Greenbach* (1950) 98 CA2d 220, 219 P2d 814);
- Quiet title actions (see *Peterson v Peterson* (1946) 74 CA2d 312, 168 P2d 474);
- Actions for cancellation (see *Clyne v Brock* (1947) 82 CA2d 958, 188 P2d 263);
- Actions to declare a constructive trust (see *Bodley v Ferguson* (1866) 30 C 511);
- Shareholders' derivative actions (see *Rankin v Frebank Co.* (1975) 47 CA3d 75, 121 CR 348); and
- Actions to abate public a nuisance (*People v Bhakta* (2008) 162 CA4th 973, 76 CR3d 421).

Equitable actions also include those in which a monetary recovery is sought based on a right cognizable only in equity, *e.g.,* an action for a commission based on an estoppel theory. See *Ford v Palisades Corp.* (1950) 101 CA2d 491, 225 P2d 545.

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§41.6 3. Hybrid Actions

In hybrid actions (*i.e.,* those raising both legal and equitable issues) a jury trial is a right only on the severable legal issues. *Robinson v Puls* (1946) 28 C2d 664, 171 P2d 430. For example, the equitable issue of estoppel to raise a statute of limitations defense is triable by the court. *Moss v Bluemm* (1964) 229 CA2d 70, 40 CR 50. When an action seeks equitable relief to protect a common law right (*e.g.,* an injunction against injury to land) and there is an issue as to the existence or violation of the common law right, that issue must first be litigated (before a jury, if demanded) before the court determines whether to grant the equitable relief. *Pacific W. Oil Co. v Bern Oil Co.* (1939) 13 C2d 60, 87 P2d 1045. When equitable and legal remedies are sought in the same action, the parties are entitled to have a jury decide the legal issues unless the trial court's initial decision on the equitable issues is also dispositive of the legal issues, leaving nothing to be tried by a jury. *American Motorists Ins. Co. v Superior Court* (1998) 68 CA4th 864, 871, 80 CR2d 621.

PRACTICE TIP: The parties may sometimes determine the extent to which their cases will be heard by juries and judges. Although, for example, a plaintiff whose complaint seeks both legal and equitable relief is entitled to a jury only on the legal issues, he or she may ensure a full jury trial by dropping the claim for equitable relief and seeking only damages. *Raedeke v Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 111 CR 693.

Even when a plaintiff seeks monetary damages, there is no right to a jury trial if the action is based on promissory estoppel. *C & K Eng'g Contractors v Amber Steel Co.* (1978) 23 C3d 1, 151 CR 323. An action to enforce a mechanics' lien is equitable in nature. If, however, the property owner raises the issue of compliance with the contract or the lien claimant seeks a personal judgment against the property owner, a jury trial on the legal issues is proper. *Selby Constructors v McCarthy* (1979) 91 CA3d 517, 154 CR 164. Except for a small claims defendant appealing from an unlawful detainer judgment, a party to a small claims action at law is not entitled to a jury trial in the de novo proceeding in superior court on appeal from the small claims court's decision. *Crouchman v Superior Court* (1988) 45 C3d 1167, 248 CR 626. See *Maldonado v Superior Court* (1984) 162 CA3d 1259, 209 CR 199.

For further discussion of the right to a trial by jury, see 7 Witkin, California Procedure, *Trial* §§79-97 (5th ed 2008).

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§41.7 C. Use of Advisory Jury

In actions in which a jury trial is not a matter of right, the factual issues must be tried before the court, subject to its power to order any such issue tried by a jury. CCP §592. See also CCP §1090 (court may order jury trial in mandamus or prohibition proceeding). The jury's verdict is only advisory, however, and does not bind the court. *Cutter Labs. v R. W. Ogle & Co.* (1957) 151 CA2d 410, 311 P2d 627. Because the verdict is simply advisory, no grounds for appeal exist if the jury is instructed erroneously (*Richardson v City of Eureka* (1895) 110 C 441, 42 P 965) or if an attorney's misconduct prejudicially affects the jury (*Cutter Labs. v R. W. Ogle & Co., supra*). The court may dismiss the jury at any time. See *Constantine v City of Sunnyvale* (1949) 91 CA2d 278, 204 P2d 922.

Procedures to obtain a jury trial when it is not a matter of right were governed by former Cal Rules of Ct 377. The Advisory Committee Comment to repealed Rule 377 states that the rule was repealed because it was obsolete and contained unduly burdensome procedures. However, it explained that the repeal of the rule was not intended to prevent a party from requesting an advisory jury. In an appropriate case, a party may request, and the court in its discretion may approve, the use of an advisory jury.

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Source: Civil Litigation/California Civil Procedure Before Trial/41 Jury Trial Demands/§41.8 D. Deciding Whether to Demand or Retain Jury; Factors

§41.8 D. Deciding Whether to Demand or Retain Jury; Factors

The decision on whether to demand a jury in a particular case, or to retain a jury already demanded, can be crucial to the outcome of the litigation. Although many attorneys routinely demand a jury early in all cases (*e.g.,* in the case management statement), a decision must be made later (*e.g.,* at the case management conference) on whether a jury is really desired.

In deciding whether to demand or retain a jury, the attorney should consider whether:

- The judge assigned to the case has shown fairness in similar cases or has tended to be "proplaintiff" or "prodefendant," and whether he or she displays judicial competence and temperament.
- The case, as a whole, has "jury appeal," *i.e.,* whether the strength of the case on the law and facts, the credibility of parties and witnesses, the relative impressions the parties will make, and the nature and extent of damages or injuries make having a jury desirable.
- The size of the probable recovery warrants a jury trial. Many lawyers prefer juries when the probable recovery is substantial, so that the decision will not reflect the judgment of one person (who, even though a capable judge, may occasionally err), but the collective judgment of 12 or fewer jurors (CCP §220). The judge, as the "13th juror," provides some insurance to correct jury errors by his or her authority to set aside a grossly erroneous or excessive verdict on a motion for a new trial. CCP §§656-663.2.
- The case is weak on the law. Many attorneys prefer to submit a weak case (or defense) to jurors on the assumption that the weakness will not be as readily detected by them. The hazard in this reasoning is that jurors frequently demonstrate remarkable insight and ability to detect weakness, distortions, and exaggerations.
- The primary defense is technical, *e.g.,* a statute of limitations defense. Many defense lawyers prefer a court trial in this situation, on the assumption that jurors are less likely than judges to respond to this type of defense, even if clearly presented.
- The case is unusually complex or primarily involves issues of law, in which event a court trial may be indicated. Cases involving many technical details (*e.g.,* antitrust litigation or a suit on a construction contract) are often considered ill-suited for jury evaluation.
- The nature of the jury panel and of the economic and sociological characteristics of the region from which the panel is drawn are favorable, *e.g.,* whether the panel is composed mostly of blue-collar workers (often preferred by plaintiffs' attorneys) or of elderly or retired professional persons (often preferred by defense counsel).

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III. PROCEDURES

§41.9 A. Necessity and Time for Demand; Effect

A jury trial is obtained by making a demand for it; failure to make a timely demand for a jury results in a waiver. CCP §631(d)(4); *Glogau v Hagan* (1951) 107 CA2d 313, 237 P2d 329. A jury trial must be demanded when the case is first set for trial (if set on notice or stipulation) or within 5 days after notice of setting (if, as usually occurs, the matter is set without notice or stipulation). CCP §631(d)(4); *Mutual Bldg. & Loan Ass'n v Corum* (1934) 220 C 282, 30 P2d 509. On waiver, see §§41.12-41.14.

The effect of a demand for a jury trial is continuing. Thus, it is not necessary to repeat the demand in subsequent proceedings (*e.g.,* when the case is set for a second trial after a reversal and the granting of a new trial on appeal) to avoid a waiver under CCP §631(d)(4). *Hoffman v Southern Pac. Co.* (1929) 101 CA 218, 230, 281 P 681.

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§41.10 B. Form of Demand

No particular form for a demand for a jury trial is prescribed by statute or court rule. See CCP §631. A written demand is acceptable. However, an oral demand on the record when the case is first set for trial (*e.g.,* at the case management conference) is sufficient. Cal Rules of Ct 3.727(13); *Union Oil Co. v Hane* (1938) 27 CA2d 106, 80 P2d 516. On the case management conference, see chap 40.

The parties usually indicate in the case management statement whether or not a jury is demanded. Cal Rules of Ct 3.727(13); see Case Management Statement (Judicial Council Form CM-110) at §40.93. A party who disputes a demanding party's right to a jury trial or who wishes to demand a jury after being served with a case management statement that a jury is not demanded may demand a jury in its own case management statement. A party's failure to demand a jury in the formerly used at-issue memorandum (now replaced by the "case management statement") is not a waiver; because a waiver is governed by CCP §631. *Mutual Bldg. & Loan Ass'n v Corum* (1934) 220 C 282, 30 P2d 509. But see *March v Pettis* (1977) 66 CA3d 473, 136 CR 3.

If the case was inadvertently placed on the nonjury calendar, or if a party wishes to demand a jury after having previously waived it, the party should file a noticed motion for a jury trial. On the court's discretion and procedures to excuse a waiver under CCP §631, see §§41.13-41.14.

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§41.11 C. Deposit of Fees and Expenses; Refunds

In addition to making a demand, a party who desires a jury trial must deposit jury fees with the clerk or judge at least 25 days before the trial date. Except in unlawful detainer actions, the fees shall be deposited at least 5 days before the date set for trial. CCP §631(b). That deposit may not exceed $150. CCP §631(b). Parties suing in forma pauperis are excused from payment. After the first day, jury fees are set at $15 per day per juror. CCP §215. Failure to make the required deposit is a waiver of the party's right to a jury trial. CCP §631(d)(5). See §§41.12-41.14 on waiver.

Promptly after the jury has been impaneled, the demanding party must also deposit the accrued mileage or transportation charges—$0.34 per mile, one way, unless a higher rate is set by statute or ordinance. CCP §215. At the beginning of the second and each succeeding day's session, the demanding party must deposit the jury fees and mileage or transportation charges for that day, including the fees and mileage for the trial jury panel if the trial jury has not yet been selected and sworn. If more than one party has demanded a jury, the respective amount to be paid daily by each party demanding a jury shall be determined by stipulation of the parties or by court order. CCP §631(c). Failure to make any of these deposits may result in a waiver of the party's right to a jury trial. CCP §631(d)(6). On the deposit of jury fees and mileage in eminent domain cases, see CCP §631.5.

When a party demands a jury and then waives it during trial after having deposited fees, the adverse party may "pick up" the jury and continue to pay fees. If the adverse party also waives a jury later in the trial, however, the first party cannot withdraw his or her waiver as a matter of right, but must make a motion to seek relief from the waiver. See *Taylor v Union Pac. R.R.* (1976) 16 C3d 893, 130 CR 23. On the court's discretion to allow relief from a waiver, see §41.13-41.14.

When jury fees have been deposited but the case is settled or a continuance is granted on the motion of the depositing party, none of the deposit will be refunded if the court finds that the time was insufficient to notify the jurors that the trial will not proceed. CCP §631.3. Moreover, local rules frequently prescribe the time and manner in which the clerk must be given notice to avoid a forfeiture of fees. See, *e.g.,* San Mateo Ct R 2.7.6 (written notice at least 2 court days before trial date).

For further discussion of fee and expense deposits and refunds, see 7 Witkin, California Procedure, *Trial* §§99-100 (5th ed 2008).

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D. Waiver of Jury Trial

§41.12 1. Acts Resulting in Waiver

The right to a trial by jury as declared by Cal Const art I, §16 shall be preserved. CCP §631(a). In civil cases, a jury may only be waived under CCP §631(d). Under §631(d) a party waives a jury trial by:

- Failing to appear at trial (CCP §631(d)(1));
- Written consent filed with the clerk or judge (CCP §631(d)(2)); see *March v Pettis* (1977) 66 CA3d 473, 136 CR 3;
- Giving oral consent, in open court, entered in the minutes or docket (CCP §631(d)(3));
- Failing to make a timely demand for a jury (CCP §631(d)(4); see discussion in §41.9); or
- Failing to deposit with the clerk or judge the jury fees or mileage charges (CCP §631(d)(5)-(6); see §41.11).

A defendant was held to have waived a jury trial when the plaintiff repeatedly waived a jury trial in the presence of the defense attorney in court and the defendant failed to promptly demand a jury trial after the plaintiff's attorney waived it in the master calendar department. That the defendant never received written notice of the plaintiff's waiver from the court clerk was irrelevant. *McIntosh v Bowman* (1984) 151 CA3d 357, 362, 198 CR 533.

NOTE: In particular, the court singled out the defense attorney's behavior for criticism, referring to his tardiness in demanding a jury and his later raising the issue on appeal as "game playing." Although the attorney was spared sanctions, the appellate court probably could have levied them under CCP §907.

A party may also waive a jury trial by entering into an agreement which provides that any dispute will be resolved by arbitration, even when the arbitration provision does not expressly waive the right to a jury trial. *Madden v Kaiser Found. Hosp.* (1976) 17 C3d 699, 713, 131 CR 882. An attorney has no authority, however, solely by virtue of his or her retention, to bind a client to an arbitration agreement, and thereby waive the right to a jury trial, without the client's consent. *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 212 CR 151. But see *Norcal Mut. Ins. Co. v Newton* (2000) 84 CA4th 64, 100 CR2d 683 (by not promptly repudiating attorney's unauthorized demand for arbitration made on her behalf, client ratified attorney's conduct).

For further discussion of waiver of jury trial, see 7 Witkin, California Procedure, *Trial* §§101-105 (5th ed 2008).

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2. Relief From Waiver

§41.13 a. When Available

The trial court has discretion to allow a jury trial, on such terms as may be just, even though a party previously waived it. CCP §631(e). Because of the constitutional guaranty of a jury, doubt about whether to relieve a jury trial waiver should be resolved in favor of granting a jury trial. *Cowlin v Pringle* (1941) 46 CA2d 472, 116 P2d 109. Relief is generally granted unless it would cause serious hardship to the opposing party. *Boal v Price Waterhouse & Co.* (1985) 165 CA3d 806, 212 CR 42 (denial of relief to party whose attorney mistakenly marked waiver form reversed when relief would cause only minimal hardship to opponent).

Relief will usually be denied, however, when there is no sufficient basis for the exercise of the court's discretionary power, *e.g.,* when the only reason for seeking relief from a waiver appears to be a party's change of mind (*Cloud v Market St. Ry.* (1946) 74 CA2d 92, 168 P2d 191) or when granting the motion will prejudice other parties (see *March v Pettis* (1977) 66 CA3d 473, 480, 136 CR 3). See also *Gonzales v Nork* (1978) 20 C3d 500, 143 CR 240 (no abuse of discretion to deny relief from waiver when attorney apparently sensed that judge would rule against his client and wished to reargue special defenses before a different, and possibly more receptive, trier of fact); *Day v Rosenthal* (1985) 170 CA3d 1125, 1176, 217 CR 89 (no abuse of discretion to deny relief from waiver when timing of request for relief suggested that it was ploy to obtain continuance).

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§41.14 b. Procedures for Relief From Jury Waiver

A party who wishes to be relieved of a jury waiver must seek the relief by motion. See CCP §631(e); *Taylor v Union Pac. R.R.* (1976) 16 C3d 893, 130 CR 23 (waiver cannot be withdrawn as matter of right and counsel objecting to denial of jury trial after waiver must seek relief from it).

PRACTICE TIP: Although no statute or rule requires that the motion be noticed, the motion should be written and noticed if time permits. The motion should state why a jury trial was initially waived (*e.g.,* through mistake, inadvertence, or excusable neglect) and why a jury trial would serve the interests of justice.

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IV. JUDICIAL COUNCIL OFFICIAL JURY INSTRUCTIONS (CACI)

§41.15 A. Purpose

Counsel should note that there are official civil jury instructions approved by the Judicial Council. Cal Rules of Ct 2.1050. They are available on the Judicial Council's website, www.courtinfo.ca.gov; the acronym "CACI" is being used to describe them. The goal of these instructions is to improve the quality of jury decisionmaking by providing standardized instructions that accurately state the law in a way that is understandable to the average juror. Cal Rules of Ct 2.1050(a).

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§41.16 B. Accuracy

The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law. The articulation and interpretation of California law, however, remains within the purview of the legislature and the courts of review. Cal Rules of Ct 2.1050(b).

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§41.17 C. Public Access

The Administrative Office of the Courts must provide copies and updates of the approved jury instructions to the public on its website. For online information about approved jury instructions, see the Administrative Office of the Courts' website at www.courtinfo.ca.gov. The Office may also contract with an official publisher to publish the instructions in both paper and electronic formats. Cal Rules of Ct 2.1050(c).

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§41.18 D. Updating and Amendments

Judicial Council instructions are regularly updated and maintained through its advisory committees on jury instructions. Amendments to these instructions will be circulated for public comment before publication. Trial judges and attorneys may submit for the advisory committees' consideration suggestions for improving or modifying them or creating new instructions, with an explanation of why the change is proposed. Suggestions should be sent to the Administrative Office of the Courts, Office of the General Counsel, 455 Golden Gate Avenue, San Francisco, CA 94102-3688. Cal Rules of Ct 2.1050(d).

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§41.19 E. Use of Instructions

Use of the Judicial Council instructions is strongly encouraged. If the latest edition of the civil jury instructions approved by the Judicial Council contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the Judicial Council instruction unless he or she finds that a different instruction would more accurately state the law and be better understood by jurors. Whenever the latest edition of the Judicial Council civil jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument. Cal Rules of Ct 2.1050(e).

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42

Trial Preference and Continuance Motions

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I. INTRODUCTION

§42.1 A. Scope of Chapter

This chapter discusses motions for preference and for continuance. Motions for preference include motions to advance, specially set, or reset and are discussed in §§42.3-42.15. Motions for continuance are discussed in §§42.16-42.28. Sample forms are provided in §§42.29-42.32.

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§42.2 B. Governing Law

Motions to advance, specially set, or reset the trial are authorized by Cal Rules of Ct 3.1335. Motions for preference in civil actions are governed by CCP §36. An attorney might move to advance the trial date when a mandatory dismissal under CCP §583.360 (failure to bring case to trial within 5 years) is imminent or to obtain a preferential setting, *e.g.,* when a client is elderly or in poor health. See CCP §36. Many statutes grant preference, such as those on declaratory relief actions (CCP §1062.3(a)) and unlawful detainer actions (CCP §1170.5).

Motions or applications for continuances are governed by Cal Rules of Ct 3.1332. Continuances may be granted on many statutory grounds, which are noted in §42.22.

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II. MOTIONS TO ADVANCE, SPECIALLY SET, OR RESET

A. Grounds for Motion for Trial Preference

§42.3 1. Avoiding 5-Year Dismissal

Motions to advance and specially set are most often used to avoid mandatory dismissal under CCP §583.360. These motions are typically brought under CCP §36(e) (court's discretion on any ground; see §42.8). A motion to specially set to avoid the bar of the 5-year statute raises the same issues as a motion for discretionary dismissal based on delay in prosecution. *Biondi, Flemming & Gonzales v Braham* (1990) 218 CA3d 842, 847, 267 CR 365. The court should consider the factors listed in Cal Rules of Ct 3.1342(e) when deciding a motion to specially set under CCP §36(e). *Salinas v Atchison, Topeka & Santa Fe Ry.* (1992) 5 CA4th 1, 10, 6 CR2d 446. Although the approach of the 5-year limit is a "critical consideration," it is "not exclusive"; the court may also consider the plaintiff's lack of diligence, congestion of court calendar, prejudice to the defendant of accelerated trial date, and the likelihood of a mandatory dismissal if an early trial date is denied. *Salas v Sears, Roebuck & Co.* (1986) 42 C3d 342, 346, 228 CR 504. The plaintiff must make "some showing of excusable delay." 42 CR2d at 349; see *Parlen v Golden State Sanwa Bank* (1987) 194 CA3d 906, 911, 240 CR 73. See chap 39 on involuntary dismissal.

NOTE: Counsel should adhere to the court's normal scheduling practice whenever possible and seek special treatment only in unusual cases (*e.g.,* an unavoidable scheduling conflict) that will incline the court sympathetically toward the motion.

Regardless of what the motion requests, the court may set the case directly for trial if circumstances warrant (*e.g.,* when expiration of the 5-year period for bringing the case to trial under CCP §583.310 is imminent). However, the trial court has no duty to compute the last day for trial and to set the case for trial before that date. It is the plaintiff's responsibility to use "reasonable diligence" to calculate the §583.310 mandatory dismissal date and to request a trial date that is before the expiration of the 5-year period. *Lee v Park* (1996) 43 CA4th 305, 309, 50 CR2d 511.

A motion to advance, specially set, or reset does not affect the court's discretion to dismiss the case under CCP §583.410(a) for failure to prosecute if not brought to trial within 2 years after filing (see CCP §583.420(a)(2)(B); Cal Rules of Ct 3.1340). *Parlen v Golden State Sanwa Bank, supra*. Indeed, a court may dismiss sua sponte under CCP §583.410(a) in response to a motion to advance, specially set, or reset to avoid mandatory dismissal under CCP §583.360. *Salas v Sears, Roebuck & Co., supra*.

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§42.4 2. Party Over Age 70

A party to a civil action who is over age 70 may petition the court for a preference, which the court shall grant if the court makes all of the following findings (CCP §36(a)):

- The party has a substantial interest in the action as a whole.
- The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

Before 1991, CCP §36(a) was mandatory, and thus a litigant who qualified under its terms had to be given preferential trial setting irrespective of the circumstances leading to the motion for preference. *Rice v Superior Court* (1982) 136 CA3d 81, 84, 185 CR 853.

On and after January 1, 1991, §36(a) was amended, eliminating the automatic preference for litigants over age 70 and conditioning the grant of preference on the trial court's finding that the health of the party over age 70 is such that a preference is necessary to prevent prejudicing the party's interest in the litigation. *Kline v Superior Court* (1991) 227 CA3d 512, 514, 277 CR 851.

It may even be malpractice if an attorney fails to move for a preferential trial date if counsel is aware that the client is over 70 and in poor health, fails to move for a preferential trial date for over 9 months, and the client dies pending trial. See *Granquist v Sandberg* (1990) 219 CA3d 181, 268 CR 109.

An affidavit submitted in support of a motion for preference under CCP §36(a) (party over age 70) may be signed by the attorney for the party seeking preference based on information and belief as to the medical diagnosis and prognosis of any party. The affidavit is inadmissible for any purpose other than a motion for preference under §36(a). CCP §36.5.

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§42.5 3. Party Under Age 14 in Wrongful Death or Personal Injury Action

A civil action to recover damages for wrongful death or personal injury shall be entitled to preference on the motion of any party to the action who is under age 14 unless the court finds that the party does not have a substantial interest in the case as a whole. A civil action subject to CCP §36(a) (party over age 70) shall be given preference over a case subject to this subdivision. CCP §36(d).

Code of Civil Procedure §36(b) is mandatory. To construe §36(b) as directory or discretionary would, in light of the all encompassing discretion conferred by §36(e), deprive it of meaning and function. *Peters v Superior Court* (1989) 212 CA3d 218, 224, 260 CR 426. Section 36(b) does not violate the separation of powers doctrine; no case has held that the legislature is absolutely precluded from enacting statutes regulating court procedure. To the contrary, Cal Const art VI, §6 directly empowers the Judicial Council to formulate rules for court administration, practice, and procedure that are not inconsistent with any statute. 212 CA3d at 225.

Likewise, CCP §36(b) does not violate equal protection. Ensuring timely court access to children under 14 who have suffered personal injury or parental death is a legitimate legislative purpose, and there is a rational relationship between this purpose and §36(b). 212 CA3d at 226.

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§42.6 4. Illness or Medical Condition

In its discretion, the court may also grant a motion for preference accompanied by clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition that raises substantial medical doubt of survival of that party beyond 6 months and that satisfies the court that the interests of justice will be served by granting the preference. CCP §36(d); see *Heda v Superior Court* (1990) 225 CA3d 525, 527, 275 CR 136. A plaintiff may move for trial preference based on a defendant's medical condition. *Heda v Superior Court, supra*.

Although §36(d) addresses calendar preference for trial setting, the statute's rationale for granting calendar preference to certain litigants may equally apply to appellate proceedings. Thus, one court of appeal found that a litigant, who might not survive the delay of an appellate court backlog, was entitled to appellate preference. The court urged the Judicial Council to adopt appropriate rules to "make explicit that which is currently implicit," *i.e.*, to provide expressly for appellate calendar preference for ailing or elderly litigants. *Warren v Schecter* (1997) 57 CA4th 1189, 1198, 67 CR2d 573.

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§42.7 5. Party Seeking Damages Related to Commission of Felony

A civil action shall be entitled to preference if the action is one in which the plaintiff is seeking damages that were alleged to have been caused by the defendant during the commission of a felony for which the defendant has been criminally convicted. CCP §37(a).

The court shall endeavor to try the action within 120 days after the grant of preference. CCP §37(b).

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§42.8 6. Other Grounds

Despite any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference. CCP §36(e).

Other statutes also grant preference, as do those for declaratory relief actions (CCP §1062.3(a)) and unlawful detainer actions (CCP §1170.5). On declaratory relief, see chap 35.

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§42.9 B. Motions to Reset

Motions to reset are ordinarily made when a case previously set for trial was ordered off calendar. See, *e.g.*, *Levine v Pollack* (1995) 37 CA4th 129, 43 CR2d 491.

PRACTICE TIP: The court will usually deny the motion unless the circumstances that resulted in the case's being dropped have changed. If the case was dropped without fault of the party seeking to reset (*e.g.,* because of a reasonable but mistaken belief that a settlement had been reached), the court will usually grant the motion and assign an early date for trial. If the party seeking to reset was at fault, however, the court may (1) deny the motion and require the party to file a new, at-issue memorandum, (2) grant the motion but set the case for trial later than the date requested, or (3) take other remedial action.

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Source: Civil Litigation/California Civil Procedure Before Trial/42 Trial Preference and Continuance Motions/ C. Procedure/§42.10 1. Noticed Motion or Ex Parte Application

C. Procedure

§42.10 1. Noticed Motion or Ex Parte Application

Under Cal Rules of Ct 3.1335, a party seeking to advance, specially set, or reset a case for trial must make this request by noticed motion or ex parte application under Cal Rules of Ct 3.1200-3.1207. Cal Rules of Ct 3.1335(a).

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§42.11 2. Showing Required

The request may be granted only on the moving party's affirmative showing of good cause based on a declaration served and filed with the motion or application. Cal Rules of Ct 3.1335(b).

See §42.4 on affidavits when the party is over age 70. See §42.6 for showing required based on party's illness.

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Source: Civil Litigation/California Civil Procedure Before Trial/42 Trial Preference and Continuance Motions/§42.12 3. Service

§42.12 3. Service

Unless the court orders otherwise, a party may file and serve a motion for preference, supported by a declaration that all essential parties have appeared or been served with process. CCP §36(c)(1). A party who reaches age 70 may serve a motion for preference at any time. CCP §36(c)(2).

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§42.13 4. Setting Matter for Trial

After granting a motion for preference, the court must set the matter for trial within 120 days and there shall be no continuance beyond 120 days except for physical disability of a party or a party's attorney, or on a showing of good cause stated in the record. The continuance shall be for no more than 15 days, and no more than one continuance for physical disability may be granted to any party. CCP §36(f).

On the granting of a motion for preference under CCP §36(b) (wrongful death or personal injury action with party under age 14), a party in an action based on a health provider's alleged professional negligence, as defined in CCP §364, shall receive a trial date no sooner than 6 months and no later than 9 months after the date the motion is granted. CCP §36(g).

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§42.14 5. To Whom Motion Is Made

Motions to advance, specially set, or reset a case for trial must be made on notice to all parties and, unless the case was previously assigned for all purposes to a specific judge or department, must be presented to the judge supervising the master calendar or, when there is no master calendar, to the judge in whose department the case is pending. If the case has been assigned for all purposes to a specific judge or department, the motion must be made to that judge or department. Local rules should be consulted.

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§42.15 D. Court's Discretion

Motions to advance, specially set, or reset a trial date are subject to the court's discretion. See CCP §36. The court's ruling will not be reversed on appeal unless an abuse of discretion is shown. *Parlen v Golden State Sanwa Bank* (1987) 194 CA3d 906, 240 CR 73.

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III. MOTIONS FOR CONTINUANCE

§42.16 A. Court's Reluctance to Grant Continuances

Even before the advent of the Trial Court Delay Reduction Act (Govt C §§68600-68620), many California courts, especially those in metropolitan counties, had adopted firm no-continuance policies to aid in attacking ever-increasing backlogs of untried civil cases. The Trial Court Delay Reduction Act now expressly directs trial court judges to "[a]dopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation." Govt C §68607(g). In addition, Cal Rules of Ct 3.1332(a) requires that the date set for trial be "firm" and "certain." A continuance cannot be granted without an affirmative showing of good cause. Cal Rules of Ct 3.1332(c). See *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 779, 140 CR 383.

On the delay reduction rules, see chap 40.

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Source: Civil Litigation/California Civil Procedure Before Trial/42 Trial Preference and Continuance Motions/§42.17 B. Grounds

§42.17 B. Grounds

There is no comprehensive statutory scheme relating to trial continuances. The circumstances that may indicate good cause for granting continuances are set out in Cal Rules of Ct 3.1332(c) (see §42.19), local rules or policy (see §42.21), and, in a few situations, by statute (see §42.22). In some instances, a court may exercise its inherent powers to continue a case on its own motion. See §42.24.

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§42.18 1. Basic Requirement of Good Cause

The basic requirement for allowing a continuance of a civil case is set forth in Cal Rules of Ct 3.1332(c), which provides that no continuance may be granted except on an affirmative showing of good cause. Although continuances of trials are disfavored, each continuance request must be considered on its own merits. Cal Rules of Ct 3.1332(c).

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§42.19 2. Examples of Good Cause

Circumstances that may indicate good cause include:

- The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances. Cal Rules of Ct 3.1332(c)(1); *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 488, 54 CR2d 888 (continuance denied when expert witness suffered stroke shortly before trial, but his deposition testimony was available, another witness testified competently on the subject, and the court forbade plaintiff from commenting on expert's absence).
- The unavailability of a party because of death, illness, or other excusable circumstances. Cal Rules of Ct 3.1332(c)(2); *Lewis v Neptune Soc'y* (1987) 195 CA3d 427, 657, 240 CR 656 (illness no basis for grant of continuance if party can attend trial); *Young v Redman* (1976) 55 CA3d 827, 831, 128 CR 86 (no ground for continuance when party has notice of trial but fails to adjust personal plans to attend).
- The unavailability of trial counsel because of death, illness, or other excusable circumstances. Cal Rules of Ct 3.1332(c)(3); see *Hernandez v Superior Court* (2004) 115 CA4th 1242, 9 CR3d 821 (serious illness and death of plaintiff's trial counsel was good cause for granting further continuance of trial date and reopening discovery); *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 16 CR3d 638 (trial court erred in denying defendant's prompt request for continuance due to attorney's unexpected engagement in another trial); *Mahoney v Southland Mental Health Assocs. Med. Group* (1990) 223 CA3d 167, 272 CR 602 (plaintiff's counsel failed to promptly request continuance, even if one counsel departed and another became ill before hearing date); *Vann v Shilleh* (1975) 54 CA3d 192, 194, 126 CR 401 (insufficient time to find substitute counsel).
- The substitution of trial counsel, but only when an affirmative showing is made that the substitution is required in the interests of justice. *Vann v Shilleh* (1975) 54 CA3d 192, 126 CR 401 (abuse of discretion to deny party's motion for continuance, even though made on day of trial, when party's attorney withdrew from case too close to trial, and party lacked sufficient advance warning). Cal Rules of Ct 3.1332(c)(4).

NOTE: A court need not be more liberal than usual in granting continuances when a litigant is representing him- or herself. *Nelson v Gaunt* (1981) 125 CA3d 623, 178 CR 167. In *Nelson,* the trial court's refusal to grant a continuance was upheld when the defendant stated on the day of trial that he lacked funds for an attorney but made no showing of penury and did not explain why he waited until then to declare his predicament.

- The addition of a new party if (Cal Rules of Ct 3.1332(c)(5)):
- The new party has not had a reasonable opportunity to conduct discovery and prepare for trial; or
- The other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case.
- A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts. Cal Rules of Ct 3.1332(c)(6).
- A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial. Cal Rules of Ct 3.1332(c)(7).

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§42.20 3. Other Factors to Consider

In ruling on a motion or an application for continuance, the court must consider all facts and circumstances that are relevant to the outcome. These may include:

- The proximity of the trial date. Cal Rules of Ct 3.1332(d)(1).
- Whether there was any previous continuance, extension of time, or delay of trial due to any party. Cal Rules of Ct 3.1332(d)(2).
- The length of the continuance requested. Cal Rules of Ct 3.1332(d)(3).
- The availability of alternative means to address the problem that gave rise to the motion or application for a continuance. Cal Rules of Ct 3.1332(d)(4).
- The prejudice that parties or witnesses will suffer because of the continuance. Cal Rules of Ct 3.1332(d)(5).
- If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay. Cal Rules of Ct 3.1332(d)(6).
- The court's calendar and the impact of granting a continuance on other pending trials. Cal Rules of Ct 3.1332(d)(7).
- Whether trial counsel is engaged in another trial. Cal Rules of Ct 3.1332(d)(8). See *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 16 CR3d 638 (trial court erred in denying defendant's prompt request for continuance due to attorney's engagement in another trial).
- Whether all parties have stipulated to a continuance. Cal Rules of Ct 3.1332(d)(9).
- Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance. Cal Rules of Ct 3.1332(d)(10).
- Any other fact or circumstance relevant to the fair determination of the motion or application. Cal Rules of Ct 3.1332(d)(11).

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§42.21 4. Local Variations

In reality, there are local variations in the degree to which the policy on continuances set forth in Cal Rules of Ct 3.1332 is followed. Consequently, counsel must determine the specifics of court policy in a particular county. In smaller counties, where court business is less voluminous and is handled more informally, courts may adopt more liberal approaches to continuances.

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§42.22 5. Statutory Grounds

The more common statutory grounds for granting trial continuances are:

- **Amendment of pleadings.** A court may, on its own motion, grant a continuance when an amendment to the pleadings, or the allowance of time to make an amendment or to plead, makes the continuance necessary. CCP §§473, 594a.
- **Membership in legislature.** Any trial must be postponed when any party, attorney, or principal witness is a member of the California legislature and the legislature is in session or in a recess not exceeding 40 days. CCP §595. The language of §595 has been construed as directory and not mandatory, however. See *Thurmond v Superior Court* (1967) 66 C2d 836, 59 CR 273. In response to *Thurmond*, the legislature added the second paragraph of §595, specifying certain instances in which the section is not mandatory. It is unclear whether a court might find the section merely directory in instances beyond those specified.
- **Party in armed forces.** The Servicemembers Civil Relief Act of 2005 (50 USC App §§501-548, 560-591) provides that, in any action or proceeding in which a plaintiff or defendant (not a witness) is in military service, the court may, on its own motion, and must on the motion of the party, grant a continuance, unless the party's ability to prosecute or defend the action is not materially affected by the military service.
- **Court conflict.** The court may, on its own motion, order a continuance when it is engaged in another trial. CCP §594a.
- **Stipulation.** The court must postpone a trial for up to 30 days when all attorneys of record for parties who have appeared agree in writing to the postponement. CCP §595.2. However, it has been held that, despite its mandatory language, §595.2 is only directory. *Pham v Nguyen* (1997) 54 CA4th 11, 62 CR2d 422. Some courts have adopted rules or policies that directly contradict the literal language of §595.2. See, *e.g.,* Santa Clara Ct R 7(D) (affirmative showing of good cause necessary for continuance).
- **Absence of evidence.** A trial may be postponed on the ground of absence of evidence on a showing by affidavit (or declaration; see CCP §2015.5) that the expected evidence is material and that due diligence has been used to procure it. CCP §595.4. When the motion is due to the absence of a material witness, however, the court may require the moving party to state by affidavit (or declaration) what the expected testimony will be. If the adverse party then agrees that the evidence may be considered as having actually been given at the trial or offered and overruled as improper, the trial may not be postponed. CCP §595.4.
- **Summary judgment motion.** If it appears from the affidavits submitted in opposition to a motion for summary judgment that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. CCP §437c(h); *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 576, 88 CR3d 363; *Bahl v Bank of America* (2001) 89 CA4th 389, 395, 107 CR2d 270. On summary judgment, see chap 36.

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§42.23 6. Inherent Power of Court to Continue

In addition to the grounds for trial continuances discussed above, a court may exercise its inherent powers to continue a case on its own motion as long as neither party is prejudiced by the continuance. See, *e.g., People v Hernon* (1951) 106 CA2d 638, 645, 235 P2d 614 (court may order continuance to hear testimony from material witness although neither party so requests). See also *Santandrea v Siltec Corp.* (1976) 56 CA3d 525, 529, 128 CR 629, disapproved on other grounds in *Bauguess v Paine* (1978) 22 C3d 626, 150 CR 461 (every court has inherent power to regulate proceedings of matters before it and to effect orderly disposition of issues presented).

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§42.24 C. Court Discretion; Factors Considered

The court has broad discretion to determine whether good cause exists for granting a motion for a trial continuance; its decision will be reversed on appeal only when there is a clear abuse of discretion resulting in prejudice. *Forthmann v Boyer* (2002) 97 CA4th 977, 118 CR2d 715; *Eastwood v Froehlich* (1976) 60 CA3d 523, 529, 131 CR 577. See *Hernandez v Superior Court* (2004) 115 CA4th 1242, 1247, 9 CR3d 821 (trial court's failure to consider illness and death of trial counsel in setting trial date was abuse of discretion); *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 16 CR3d 638 (trial court's failure to balance all competing interests in ruling on motion to continue trial date due to unavailability of counsel was abuse of discretion).

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D. Procedure

§42.25 1. Noticed Motion, Ex Parte Application, and Declaration

A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under Cal Rules of Ct 3.1200-3.1207, with supporting declarations. The party must make the motion or application as soon as reasonably practical once the need for the continuance is discovered. Cal Rules of Ct 3.1332(b).

Supporting declarations must be filed with the ex parte application or noticed motion. Cal Rules of Ct §3.1332(b). Showings by declaration, even when not mandatory, have been said to reflect the policy of encouraging prompt trial of lawsuits. *Cade v Mid-City Hosp. Corp.* (1975) 45 CA3d 589, 600, 119 CR 571.

Moreover, CCP §595.4 requires that a motion for a continuance on the ground of absence of evidence must be supported by an affidavit (or declaration; see CCP §2015.5) showing the materiality of the evidence and that due diligence has been used to procure it. When the motion is based on the absence of a material witness, the court may require a declaration stating that the expected evidence and the motion must be denied when the adverse party stipulates that the evidence be considered as having been offered at trial. CCP §595.4.

For sample forms of notice of motion and declaration, see §§42.31-42.32.

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§42.26 2. Payment of Expenses as Condition for Granting Motion

When a motion for a trial continuance is made, the court may, as a condition of granting the motion, require the moving party to pay to the adverse party any expenses resulting from the continuance. CCP §1024. Such expenses may include, *e.g.,* jury and witness fees (*Williams v Myer* (1907) 150 C 714, 89 P 972) and parties' transportation bills (*Wilkin v Tadlock* (1952) 110 CA2d 156, 241 P2d 1066). A plaintiff's failure both to pay such costs and to proceed with trial may result in a judgment of dismissal. *Fraser v Fraser* (1919) 39 CA 467, 179 P 427.

The court does not have authority to award attorney fees as a condition of granting a continuance under CCP §1024. *Levine v Pollack* (1995) 37 CA4th 129, 43 CR2d 491. In construing CCP §1024, the court relied on (1) the amendment of §1024 changing the word "costs" to "expenses," (2) other legislative changes recognizing attorney fees as costs rather than as expenses, and (3) the adoption of CCP §128.5, which permits a continuance to be conditioned only on payment of attorney fees in cases of bad faith or frivolous actions. For current sanctions statutes, see CCP §§128.6-128.7.

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§42.27 3. Procedures When Motion Denied; Severance

When a motion for a continuance has been denied and the moving party must either proceed to trial or face a dismissal for failure to prosecute, counsel should consider, as another alternative, moving to sever under CCP §1048(b). When certain issues can be severed from the others and a continuance is not necessary for trial of those issues, then the trial on those issues can proceed.

On severance generally, see chap 43.

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§42.28 E. Appellate Review

An order granting or denying a motion for a continuance is not directly appealable; it is reviewable on an appeal only from a final judgment or order. *Haraszthy v Horton* (1873) 46 C 545; *Estate of McCarthy* (1937) 23 CA2d 395, 73 P2d 913. Although it is virtually impossible to show reversible error in the granting of a continuance, it may be possible for a party to obtain relief, *e.g.,* by writ of prohibition, from an order denying a continuance.

On appeal, the appellate court will not disturb a ruling on a motion for a continuance unless a clear showing is made that the trial court abused its discretion. On court's discretion, see §42.24.

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IV. FORMS

§42.29 A. Form: Notice of Motion to Advance, Specially Set, or Reset Case for Trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO**
	)	_ _[*ADVANCE/SPECIALLY*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*SET/RESET*]_ _ **CASE FOR**
	)	**TRIAL; SUPPORTING**
	)	**MEMORANDUM;**
	)	**DECLARATION(S)**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	_ _[*Estimated length:* _ _]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court under** _ _[*Code of Civil Procedure §36/California Rules of Court 3.1335*]_ _ **for an order** _ _[*advancing/specially setting/resetting*]_ _ **the trial to** _ _[*e.g., a time to be determined by the Court*]_ _**. The grounds for issuance of this order are** _ _[*e.g., plaintiff is 76 years old/that this action will not otherwise be brought to trial within five years after the complaint was filed, as required by Code of Civil Procedure §583.310*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§12.7-12.29 (formal requirements for notices of motion).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§42.30 B. Form: Declaration Supporting Motion to Advance, Specially Set, or Reset Case for Trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _**,** **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION TO**
_ _[*Name(s)*]_ _**,** **Defendant(s)**	)	_ _[*ADVANCE/SPECIALLY SET/RESET*]_ _ **CASE FOR**
	)	**TRIAL**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*e.g., the moving party's attorney of record*]_ _**. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.**

[*Option 1: If advancement is sought*]

2. A trial date of _ _[*specify*]_ _ **has been assigned to this case, but this date is not satisfactory and assignment of an earlier date is necessary because** _ _[*state reasons*]_ _**.**

[*Option 2: If special setting is sought*]

2. A case management statement in this case was filed on _ _[*date*]_ _**, but no date for the trial has been set. It is necessary to specially set this case for trial because** _ _[*state reasons*]_ _**.**

[*Option 3: If resetting is sought*]

2. A trial date of _ _[*specify*]_ _ **was set by the Court, but the matter was dropped from the calendar because** _ _[*state reason*]_ _**. This case should be reset for trial because** _ _[*state reasons*]_ _**.**

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

_ _[*Title if relevant*]_ _

Copies: Original (attach to and file with original of notice of motion); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§12.43-12.53 (formal requirements for declarations).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§42.31 C. Form: Notice of Motion for Continuance of Trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR CONTINUANCE OF TRIAL; SUPPORTING MEMORANDUM; DECLARATION(S)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	_ _[*Estimated length:* _ _]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court under California Rules of Court 3.1332 for an order continuing the trial to** _ _[*e.g., a time to be determined by the Court*]_ _**. The grounds for issuance of this order are** _ _[*e.g., that* _ _[*name of witness*]_ _**, who has been subpoenaed, will be unavailable owing to an unavoidable emergency about which counsel did not know, and could not reasonably have known, at the time of the trial-setting conference**]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §42.25 (noticed motion and declaration), §§12.7-12.29 (formal requirements for notices of motion).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§42.32 D. Form: Declaration Supporting Motion for Continuance of Trial

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S MOTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**CONTINUANCE OF TRIAL**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*e.g., the attorney of record for plaintiff* _ _[*name*]_ _]_ _**. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.**

[*State facts showing good cause, e.g., when witness is unavailable*]

2. _ _[*Name of witness*]_ _ **was subpoenaed on** _ _[*date*]_ _**, to appear on** _ _[*date*]_ _**, but will be unavailable owing to the following unavoidable emergency:** _ _[*Specify*]_ _**. Neither plaintiff nor I knew of the emergency until** _ _[*date*]_ _**.**

3. _ _[*Name of witness*]_ _ **is an essential witness in that** _ _[*e.g., he was the only nonparty who witnessed the event that gave rise to this lawsuit*]_ _**.**

4. _ _[*E.g., Plaintiff*]_ _ **will be ready for trial on any date after** _ _[*date*]_ _**.**

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (attach to and file with original of notice of motion); ___ copies for service (one for each other party); ___ office copies.

Comment: See §42.25 (noticed motion and declaration), §§12.43-12.53 (formal requirements for declarations).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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43

Consolidation and Severance

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I. INTRODUCTION

§43.1 A. Scope of Chapter

This chapter covers consolidation, a procedural device that allows (and in some instances, requires) the court to combine separately filed lawsuits that involve a common question of law or fact for simultaneous preparation or disposition. See §§43.3-43.62 (text) and 43.103-43.105 (forms). This chapter also discusses severance. See §§43.63-43.102 (text) and 43.106-43.108 (forms).

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§43.2 B. Governing Law

The main statute governing consolidation is CCP §1048(b), although special statutes also govern consolidation (see, *e.g.,* §§43.37-43.44). Severance is generally governed by §1048(b), although particular statutes *require* severance (see, *e.g.,* §§43.70-43.75), while other statutes *permit* severance (see, *e.g.,* §§43.77-43.80).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/ II. CONSOLIDATION; GENERAL CONSIDERATIONS/ A. Overview of Procedure/§43.3 1. Consolidation Defined

II. CONSOLIDATION; GENERAL CONSIDERATIONS

A. Overview of Procedure

§43.3 1. Consolidation Defined

The scope of consolidation is broad:

- It applies to all actions, regardless of subject matter or substantive law;
- It may be sought by any party, regardless of status in a lawsuit, or be ordered on the court's own motion;
- The actions may have been brought by one party (who elected not to join all of its claims in the same complaint or cross-complaint), or by different parties; and
- It may be used regardless of whether the actions to be consolidated were separately filed or were separated by a prior severance order.

Consolidation has limitations, however:

- The actions must share at least one common issue of law or fact;
- It cannot be used to combine actions on file with actions not yet pending;
- It cannot combine actions pending in different counties; and
- It cannot be used to combine state and federal proceedings.

EXAMPLE: Consolidation can be used in similar suits, *e.g.,* by the driver and passengers of one car against the driver of another car, or for wrongful death of passengers killed in an airplane crash. Different types of actions may also be consolidated, *e.g.,* suits by shareholders against a corporation for fraudulent misrepresentation, suits by insurers to cancel insurance policies, and suits by insureds to recover on policies.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.4 2. Purposes of Consolidation

§43.4 2. Purposes of Consolidation

Consolidation has two basic purposes:

- To promote efficiency by avoiding unnecessary duplication of proceedings (see *Mueller v J.C. Penney Co.* (1985) 173 CA3d 713, 722, 219 CR 272 (purpose of consolidation is merely to promote trial convenience and economy)); and
- To avoid inconsistent resolution of the same legal or factual issue (see *Garden Grove Community Church v Pittsburgh-Des Moines Steel Co.* (1983) 140 CA3d 251, 262, 191 CR 15 (statute permitting consolidation of contract arbitration proceedings was designed to promote "efficient settling of private disputes, judicial economy, and the avoidance of contrary results")).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.5 3. Tactical Considerations in Seeking or Opposing Consolidation

§43.5 3. Tactical Considerations in Seeking or Opposing Consolidation

In addition to improving the administration of justice, consolidation has tactical implications. Many tactical considerations apply whether the moving party is a plaintiff or a defendant.

EXAMPLE: Assuming that one party is suing or has been sued by several other parties on similar claims, consolidation may:

- Help counsel protect the client (whether plaintiff or defendant) by ensuring that the client's deposition is taken on one occasion by all parties, rather than in piecemeal fashion by different parties in different cases;
- Facilitate preparation of internally consistent discovery responses; and
- Reduce litigation costs by reducing the number of trials in which counsel must participate.

NOTE: Litigation costs include not only court costs and attorney fees but may also include the opportunity cost of a client's time allocated to depositions, trial, and related preparation, instead of to business tasks or leisure activities. Consolidation, when it requires a party involved in only a narrow portion of the case to participate in the entire proceeding, raises the litigation expense to that party.

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§43.6 a. Settlement

Consolidation also may enhance the prospects of a settlement by making it possible to achieve a "global" settlement that is more equitable to both plaintiffs and defendants, especially when a defendant is sued by several plaintiffs. By forcing the plaintiffs who are competing for the defendants' limited resources to allocate those resources among themselves, a global settlement not only allows the defendant to avoid the risk of settling too high in one case and having insufficient funds left to settle others, but also allows plaintiffs to share the defendants' resources equitably among themselves, instead of leaving later or nonsettling plaintiffs with nothing. When both plaintiffs and defendants are sensitive to these dangers, settlement may be encouraged.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.7 b. Effect on Trial Date

§43.7 b. Effect on Trial Date

Consolidation may affect the time at which an action is tried. Because the later-filed suit is consolidated into the earlier-filed suit when consolidation is ordered, the later-filed suit may go to trial sooner than it otherwise would have without consolidation. In contrast, consolidation may increase the complexity of the case to the point that the earlier-filed action will be tried later than it would have been if consolidation had not been ordered.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.8 c. Plaintiff's Considerations

§43.8 c. Plaintiff's Considerations

Some tactical consequences of consolidation divide along party lines. On one hand, a plaintiff might oppose consolidation for reasons such as the following:

- The probability that a single case can be tried to judgment more quickly than can a consolidated action;
- The likelihood that plaintiffs pursuing independent actions will obtain larger judgments than they would if the actions were consolidated;
- The danger of being forced to settle for a prorata share of a limited fund along with plaintiffs in later-filed actions;
- The likelihood that plaintiff's counsel will lose at least some measure of control that he or she otherwise would exercise over the proceedings;
- The danger that consolidation with an action filed by a plaintiff with a weaker claim will reduce the prospects of victory or a large judgment;
- The risk that plaintiff's counsel will receive a lower fee if not selected to serve as lead counsel; and
- The possibility that plaintiff's counsel will be forced to participate in hearings or depositions unrelated to his or her client's claims.

On the other hand, consolidation may further a plaintiff's interests if the action can be combined with those of other plaintiffs, and all can then cooperate in sharing expenses and putting on the strongest possible case against their common adversary. The added strength in numbers may make the relative loss of control less problematic.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.9 d. Defendant's Considerations

§43.9 d. Defendant's Considerations

A defendant might oppose consolidation for reasons such as the following:

- The possibility that the plaintiff's actions considered in the aggregate may be tried more quickly if consolidation is ordered;
- The likelihood that, if consolidation is defeated, at least some plaintiffs may be discouraged from pursuing their claims independently;
- The danger that harmful evidence will be admitted during a consolidated trial that would not have been revealed to the finder of fact in some of the actions if they had been tried separately;
- The possibility that defendant's counsel will be forced to participate in hearings or depositions unrelated to his or her client's defenses; and
- The risk that the sheer number of claims asserted against the defendant may cause the jury to infer that the defendant did something wrong; or
- The risk that the jury might be inflamed by the fact that the defendant caused harm to so many and award a large amount of punitive damages.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.10 B. Related Procedures

§43.10 B. Related Procedures

Related or similar claims may have been made in separate lawsuits for a variety of reasons. In addition to consolidation, several other procedural devices, also designed to promote efficiency and consistency by reducing the repetitive litigation of dispersed claims, allow those claims to be addressed in the same proceeding.

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§43.11 1. Cross-Complaint

Filing a cross-complaint allows a defendant or a cross-defendant to assert in the same lawsuit any claims it has against a plaintiff, a cross-complainant, or a nonparty. See CCP §§422.10, 426.10-426.70. In effect, it "consolidates" the claims of a defendant or cross-complainant with the claims previously filed in the same action. See chap 26 on cross-complaints. However, the cross-complaint device does not allow several plaintiffs to simultaneously resolve their individual but essentially identical claims against a common defendant.

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§43.12 2. Joinder

The court has discretion to join a nonparty as a coplaintiff or as a codefendant. The added party must have a claim to, right in, or interest in the property or controversy that is the subject of the original action, or must assert or have asserted against him- or herself a right to relief arising from the same event. The same or common questions of law or fact with respect to all these persons must arise in the action. See CCP §378.

The court must join as a party anyone whose absence prevents complete relief from being accorded to existing parties, or anyone who claims an interest in the subject matter of the action, which might be impaired or which might subject the existing parties to inconsistent obligations if the person were not joined. CCP §389. See chap 14 on joinder.

NOTE: Before 1927, CCP §1048 provided that actions could be consolidated only if they "might have been joined." That statute was modified in 1927 to broaden the scope of consolidation and to indicate that the availability of consolidation was not to be limited by the criteria for joinder.

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§43.13 3. Interpleader

Interpleader permits a party subject to conflicting claims to force all claimants to litigate their claims among themselves in a single proceeding. CCP §386. In effect, a party that files a complaint in interpleader "consolidates" all possible actions relating to a particular subject that might be brought separately against it. See chap 28. Interpleaded claims need not be based on the same transaction, and no commonality of issues need be shown. Nor is there a requirement that the claims be either identical or mutually exclusive. Even a partial conflict among the claims is sufficient.

NOTE: The purpose of interpleader is to protect the stakeholder from an intolerable dilemma created by inconsistent decisions, rather than efficiency. Other mechanisms that can protect against inconsistent decisions include the "limited fund" class action under Fed R Civ P 23(b)(1)(B) and the federal laws on bankruptcy.

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§43.14 4. Class Action

The class action device extends the concept of joinder to situations in which the number of similarly situated plaintiffs or defendants is so large that joinder is impracticable. See CCP §382. The claims or defenses of the class members must involve common issues of law or fact that predominate over individual issues. If the amount of each individual class member's claim is relatively large, and if the number of class members is not too great, consolidation or joinder may be preferable because they allow a greater degree of participation by claimants in the litigation. See, *e.g., Rose v Medtronics, Inc.* (1980) 107 CA3d 150, 155, 166 CR 16 (denying class action certification in mass tort case to allow each claimant to participate in litigation of own claim).

The Consumers Legal Remedies Act (CC §§1750-1784) provides a modified form of class action, which is subject to special requirements and is available only to consumers.

NOTE: Because the absent class members are typically too numerous to participate meaningfully, counsel may need to take elaborate steps to protect their interests, such as "best notice practicable" and judicial approval of settlement. Consolidation can often achieve the same economies of joint disposition without the cost of notice or the loss of party control over settlements.

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§43.15 5. Intervention

Intervention allows a person with an interest in a lawsuit to enter the action as a party to protect that interest despite not having been brought in by the existing litigants. CCP §387. See chap 31. Intervention is mandatory if a statute grants a right to intervene, or if the nonparty is a person who should have been joined under CCP §389. Permission to intervene may be granted if a nonparty has a direct interest in the outcome and would not enlarge the issues in the case, and if need to participate outweighs any opposition by the existing parties. *California Physicians' Serv. v Superior Court* (1980) 102 CA3d 91, 95, 162 CR 266.

NOTE: Intervention is intended to protect the rights of nonparties, rather than efficiency or avoidance of inconsistent adjudications. It may be invoked only by a nonparty, not by existing parties or the court.

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§43.16 6. Coordination

Coordination is the procedural device most like consolidation. Its purposes are essentially identical to those of consolidation, but its scope is greater. Coordination allows actions that share common questions of law or fact, but that are pending in different counties, to be combined for simultaneous disposition. Consolidation is restricted to actions that are pending in the same county. CCP §§403-404.9 On coordination, see chap 44.

NOTE: Because consolidation and coordination are so similar, the detailed statutory criteria for coordination are a source of guidance to a court contemplating consolidation.

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§43.17 7. Equitable Bill of Peace

The equitable bill of peace allowed relief from the burdens of a multiplicity of actions in an era when coordination did not exist and consolidation was subject to restrictive conditions. It is an injunction staying numerous pending or anticipated lawsuits while allowing one action to proceed to trial in order to decide issues common to all. See Chafee, *Bills of Peace With Multiple Parties*, 45 Harv L Rev 1297 (1932). This procedural device has gradually been displaced by consolidation and coordination, except when some actions have been filed while others are merely threatened, or when actions are pending in different jurisdictions. It also retains utility when the separate actions involve one or more common issues that do not predominate over the individual issues. The current trend, however, is to deal with such situations by using consolidation and severance in tandem.

An equitable bill of peace is proper only if consolidation is not available. See *Bartholomew v Bartholomew* (1942) 56 CA2d 216, 233, 132 P2d 297 ("[t]here is no difference in the end to be reached, namely, the saving of expense, time and inconvenience").

NOTE: The bill of peace device is not available when numerous individual claimants sue a single defendant (or when one claimant sues numerous defendants) on separate causes of action. See *Southern Cal. Edison Co. v State Farm Mut. Ins. Co.* (1969) 271 CA2d 744, 748, 76 CR 909.

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§43.18 8. Stay or Abatement

Under the doctrine of priority of jurisdiction, a court may abate, dismiss, or transfer an action involving the same subject matter as another action filed earlier in the same or a different California court. See, *e.g.,* §23.31 (demurrer) on ground of another action pending. The doctrine applies only if the parties' roles in the two suits are the same and the claims are so similar that resolution of the first action would bar the second. *Lord v Garland* (1946) 27 C2d 840, 848, 168 P2d 5.

NOTE: *Gregg v Superior Court* (1987) 194 CA3d 134, 136, 239 CR 380, illustrates one of the limits of the usefulness of abatement as a device for avoiding parallel disposition of similar or overlapping claims by different courts. In *Gregg,* which involved an in personam claim, the court held that it was an abuse of discretion to stay the plaintiff's later-filed California action even though 50 other plaintiffs were suing the same defendant on similar claims in 11 federal court actions. 194 CA3d at 138.

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§43.19 9. Res Judicata and Issue Preclusion

The doctrines of res judicata and issue preclusion offer other ways to prevent repetitive litigation of the same or related issues. Res judicata prohibits the relitigation of the same issues already decided between the same parties in an earlier lawsuit. Claim preclusion bars any litigation of matters that both could and should have been advanced in an earlier lawsuit involving the same claim but only one party. Res judicata has effect only as between the parties who were present, or in privity to a party, in the prior action. On res judicata, see California Trial Practice: Civil Procedure During Trial, chap 23 (3d ed Cal CEB 1995).

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C. Constitutionality

§43.20 1. Trial by Jury

Consolidation under federal law has been ruled constitutional and not violative of the right to trial by jury. *Cecil v Missouri Pub. Serv. Corp.* (WD Mo 1939) 28 F Supp 649, 650 (consolidation under Fed R Civ P 42(a) of four cases brought by different plaintiffs against one defendant does not violate Seventh Amendment right to trial by jury). Presumably, the result under Cal Const art I, §16 (which contains language similar to that of US Const amend VII) would be the same.

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§43.21 2. Due Process

There are constitutional limits on the court's power to order consolidation. If consolidation would result in a trial that would be too complex for a jury to comprehend, it would violate the litigants' due process rights. See, *e.g., In re Japanese Elec. Prods. Antitrust Litig.* (3d Cir 1980) 631 F2d 1069, 1084 (noting that "due process guarantees a comprehending factfinder"); *Gwathmey v U.S.* (5th Cir 1954) 215 F2d 148, 152 (allowing single jury to determine value of 236 separate tracts in eminent domain proceeding constituted denial of due process).

PRACTICE TIP: Sometimes due process problems can be avoided by consolidation followed by separate trials of selected issues or claims. Because of the importance of the constitutional right to a jury trial, a court should deny consolidation or order severance rather than deny a party a jury trial. *Japanese Elec. Prods. Antitrust Litig.,* 631 F2d at 1088 ("district court should not deny a trial by jury if by severance … or other methods the court can enhance a jury's capabilities or can reduce the complexity of a suit sufficiently").

Another constitutional limitation on consolidation arises from the fundamental procedural due process right to be heard at a meaningful time and in a meaningful manner. See *Fuentes v Shevin* (1972) 407 US 67, 80, 32 L Ed 2d 556, 92 S Ct 1983. Accordingly, in exercising its power under CCP §1048(a) to regulate consolidated actions, courts must be careful to preserve each party's ability to participate directly in the litigation. See, *e.g., McCarthy v Mobile Cranes, Inc.* (1962) 199 CA2d 500, 507, 18 CR 750 (denial of due process to deny one party opportunity to cross-examine witness during trial of three consolidated actions).

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§43.22 III. MANDATORY CONSOLIDATION

Consolidation, normally discretionary, may be made mandatory by certain statutes. These statutes reflect legislative determinations that separate actions would almost invariably result in inefficiency or create an unacceptable risk of inconsistent adjudications. See, *e.g., General Motors Corp. v Superior Court* (1966) 65 C2d 88, 92, 52 CR 460 (regarding wrongful death actions, legislature has determined that danger of prejudice is outweighed by advantages of consolidation).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.23 A. Actions to Recover for Child's Injury and Death

§43.23 A. Actions to Recover for Child's Injury and Death

Under CCP §376, on the motion of any interested party, an action by parents to recover for injuries sustained by their child may be consolidated with an action under CCP §377.60 to recover for the wrongful death of the child. Consolidation was required under former CCP §377 if both actions arose from the same negligent or wrongful act.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.24 B. Wrongful Death Actions and Survival Actions

§43.24 B. Wrongful Death Actions and Survival Actions

A wrongful death action under CCP §377.60 and a survival action under CCP §§377.20, 377.40-377.43 arising from the same wrongful act or neglect are separate and distinct. Nonetheless, CCP §377.62 permits them to be consolidated.

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§43.25 C. Actions for Injuries to Employee

Labor Code §3853 provides for the consolidation of separate actions that may be brought by an employee to recover personal injury damages from a third party tortfeasor and by the employee's employer against the same tortfeasor to recover reimbursement for workers' compensation benefits furnished to the employee. Both the employer and employee may intervene in an action filed by the other. *Buell v CBS, Inc.* (1982) 136 CA3d 823, 186 CR 455. "[T]he Legislature intended the actions to be so closely parallel to each other that '[s]ubstantively as well as procedurally, employer and employee actions are interchangeable: regardless of who brings the action, it is essentially the same lawsuit.'" 136 CA3d at 826, quoting *County of San Diego v Sanfax Corp.* (1977) 19 C3d 862, 874, 140 CR 638. In *Buell*, the court allowed an injured plaintiff, whose action against the tortfeasor was dismissed for failure to timely serve the tortfeasor, to intervene in the workers' compensation carrier's action.

The court declined to follow *Buell* in *Bishop v Silva* (1991) 234 CA3d 1317, 285 CR 910, refusing to permit an employee who had failed to serve summons within 3 years to avoid the penalty for not complying with mandatory service requirements simply by intervening back into the employer's intervention action. The court noted that since the *Buell* decision, the service statutes had been amended to provide limited exceptions to the time requirements for service and to exclude entirely "plaintiff's diligence from the equation." 234 CA3d at 1325. See also *Fairmont Ins. Co. v Frank* (1996) 42 CA4th 457, 49 CR2d 670 (employee whose personal injury action dismissed for failure to prosecute may not intervene into insurer's subrogation action under Lab C §3853). For extended discussion of the interplay between these actions, see California Workers' Damages Practice (2d ed Cal CEB 2001).

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IV. PERMISSIVE CONSOLIDATION

§43.26 A. Principal Statute (CCP §1048(a))

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning the proceedings as may tend to avoid unnecessary costs or delay. CCP §1048(a). Before its enactment in 1872, California courts refused to consolidate separate lawsuits alleging distinct causes of action. See, *e.g., Wallace v Eldredge* (1865) 27 C 498, 500.

As originally enacted, CCP §1048 restricted consolidation to situations when "two or more actions [were] pending at one time between the same parties … in the same court, upon causes of action which might have been joined." The criteria for joinder in the 1872 version of §1048 are very different from, and much more restrictive than, the current criteria for consolidation. Compare *Wolters v Rossi* (1899) 126 C 644, 650, 59 P 143 (order consolidating actions amounts to determination that claims could have been joined), with *Marriage of McNeill* (1984) 160 CA3d 548, 557, 206 CR 641, disapproved on other grounds in *Marriage of Fabian* (1986) 41 C3d 440, 224 CR 333 (affirming consolidation of claims that could not have been joined). In 1927, §1048 was liberalized to allow consolidation "in the discretion of the court, whenever it can be done without prejudice to a substantial right." Although the language of the 1927 version of §1048 differs from the language in the current version, it appears that the courts applied criteria similar to those used today.

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§43.27 B. Actions Pending in Same Court

Code of Civil Procedure §1048(a) gives a court the power to consolidate related actions "pending before the court." *Daly v White* (1950) 100 CA2d 22, 26, 222 P2d 950 (affirming consolidation of two related superior court actions filed in same county). This authority permits the court to consolidate related cases even when one of them is pending in a department or division of the court that handles specialized matters. See, *e.g.*, *Marriage of McNeill* (1984) 160 CA3d 548, 557, 206 CR 641, disapproved on other grounds in *Marriage of Fabian* (1986) 41 C3d 440, 224 CR 333; *Estate of Baker* (1982) 131 CA3d 471, 485, 182 CR 550 (probate court properly consolidated action to set aside deed with will contest).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.28 C. Effect of Trial Court Unification

§43.28 C. Effect of Trial Court Unification

Code of Civil Procedure §1048 and Cal Rules of Ct 3.520(a) authorize the consolidation of civil cases pending in superior court. Although there are no special rules on consolidation of limited civil cases with cases within the general jurisdiction of the superior court, it appears that, under CCP §1048(a), the trial courts are able to consolidate limited civil matters with other pending matters that involve "a common question of law or fact."

NOTE: Before trial court unification, when superior and municipal courts were separate courts, CCP §1048(a) by its own terms did not authorize consolidation of municipal and superior court cases. See, *e.g., Cochrane v Superior Court* (1968) 261 CA2d 201, 203, 67 CR 675 (municipal court could not transfer case to superior court for consolidation with case pending there); *Caballero v Richardson* (1959) 173 CA2d 459, 462, 343 P2d 302 (superior court could not transfer action pending in municipal court to itself for consolidation with superior court case).

Actions pending in different counties are not eligible for consolidation, but they may be coordinated (for some or all purposes) under CCP §§403-404.9.

PRACTICE TIP: Although limited civil cases are tried under special procedures intended to help keep the costs of litigation within the grasp of litigants whose damages are $25,000 or less (see CCP §§90-100), the California Rules of Court do not differentiate between limited and unlimited jurisdiction for purposes of the consolidation and coordination rules. However, counsel should keep apprised of statutory developments and changes to the California Rules of Court as a result of trial court unification and should check local rules for any amendments adopted by individual trial courts to implement unification. On trial court unification, see chap 6.

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D. Factors Favoring Permissive Consolidation

§43.29 1. Judicial Attitude

The judiciary may take an active role in shaping the contours of litigation. See *In re Air Crash Disaster at Fla. Everglades* (5th Cir 1977) 549 F2d 1006, 1012 ("[m]anagerial power is not merely desirable. It is a critical necessity"). See also Resnik, *Managerial Judges*, 96 Harv L Rev 376 (1982) (describing, and then criticizing, this trend). One result is that the perceived utility of devices like consolidation has been heightened. Most courts, especially those with busy calendars, favor consolidation.

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§43.30 2. Trial Court Discretion

The extent of permissive consolidation rests within the discretion of the trial courts. *Todd-Stenberg v Dalkon Shield Claimants Trust* (1996) 48 CA4th 976, 56 CR2d 16; *Estate of Baker* (1982) 131 CA3d 471, 485, 182 CR 550; *Fellner v Steinbaum* (1955) 132 CA2d 509, 282 P2d 584. Such trial court discretion is appropriate because flexibility should be retained. The attractiveness of consolidation varies widely, depending on the characteristics of the actions involved. Accordingly, there are no fixed rules on when permissive consolidation is desirable.

It is sometimes said that the burden of persuading the court that consolidation is desirable is on the moving party. See, *e.g., Prudential Ins. Co. v Marine Nat'l Exch. Bank* (ED Wis 1972) 55 FRD 436, 437. Although this may be true as a practical matter, its effect should not be exaggerated. Consolidation was designed in part to allow the court to second-guess the scope and configuration of the litigation selected by the parties. Any tendency to assume that the parties, each acting selfishly in its own perceived tactical best interest, picked the most efficient configuration, should be resisted.

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§43.31 3. Basic Factor: Common Question of Law or Fact

The principal statute regulating permissive consolidation, CCP §1048(a), specifies only one factor to be considered: whether the actions proposed to be consolidated involve "a common question of law or fact." Therefore, in determining whether permissive consolidation should be ordered, the first question a court must address is whether that condition is satisfied. Actions that do not share a common question of law or fact may not be consolidated. See CCP §1048(a); *Molever v Levenson* (4th Cir 1976) 539 F2d 996, 1003. Cases with common questions of law and fact should not be consolidated, however, when doing so would deprive a party of the right to challenge the trial judge under CCP §170.6. *Nissan Motor Corp. v Superior Court* (1992) 6 CA4th 150, 7 CR2d 801.

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§43.32 4. Other Factors

If the actions share a common issue of law or fact, the court must decide whether the benefits of avoiding dispersed, repetitive proceedings outweigh the costs of implementing consolidation and the hardships that may result for particular litigants. Many efforts have been made to identify the factors that should be considered. See, *e.g., Arnold v Eastern Air Lines, Inc.* (4th Cir 1982) 681 F2d 186 (listing 6 factors); see CCP §404.1 (listing seven factors applicable to coordination and "vertical" consolidation under CCP §404). Regardless of the formulation adopted, the relevant factors can be divided into three categories. See §§43.33-43.35.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.33 a. Promote Efficiency, Accuracy, and Consistency

§43.33 a. Promote Efficiency, Accuracy, and Consistency

In determining whether consolidation will further efficiency, the court may consider:

- Whether common issues of law or fact predominate over individual issues;
- Whether a party will be burdened by being required to participate in extensive proceedings unrelated to its claims or defenses;
- Whether the trier of fact would be confused by the added complexity resulting from consolidation (especially if a jury trial has been requested);
- Whether the duration and cost of a single, consolidated proceeding will be less than the duration and cost of multiple proceedings; and
- Whether inconsistent results are likely if consolidation is denied.

Two relevant types of commonality are:

- Similarity of the underlying facts or applicable substantive law and
- Similarity of the litigation process. Procedural dissimilarities, however, such as if one action must be tried to a jury but the other may be tried to the court, do not necessarily defeat consolidation. See *Blake v Farrell Lines, Inc.* (3d Cir 1969) 417 F2d 264, 266.

The presence of a common question of law or fact alone does not always justify consolidation. If one or more common issues are present, but individual issues predominate, consolidation may be unwise. See *Hasman v G.D. Searle & Co.* (ED Mich 1985) 106 FRD 459, 461.

Common questions of fact ordinarily present a more compelling case for consolidation than do common questions of law. Factual issues typically are more complicated and time consuming to resolve, and the risk of inconsistency is generally higher. When the legal issues involved are novel or complex, however, consolidation may save considerable time and prevent inconsistent results.

WARNING: When determining whether consolidation would enhance efficiency, it should be remembered that the logistics of a large consolidated action can place an enormous burden on the court. The court may be called on to decide numerous collateral issues that arise only in multiparty actions, such as which of several plaintiffs should proceed first or to what extent each of several defendants should be allowed to cross-examine the same witness. Consolidation may also create a risk of excessive litigation of issues collateral to the merits because it is generally true that the larger a case, the more resources will be devoted to the litigation of each substantive and procedural aspect of it. For these and other reasons, consolidation is likely to increase the amount of judicial time and energy required for the court to manage the action effectively.

While it is true that consolidation may result in an action that is too large to be handled efficiently, in most cases serial or parallel disposition of the same legal or factual issues would be even less desirable. See *Schneider v Vennard* (1986) 183 CA3d 1340, 1350, 228 CR 800 (duplicative litigation of same issue does not serve public interest).

EXAMPLE: Cases in which consolidation has been ordered, as likely to further the goals of efficiency and consistency, include:

- Two eminent domain actions against the same defendants and relating to the same highway project, one initiated by the state and one by the city (*People v Chevalier* (1959) 52 C2d 299, 307, 340 P2d 598);
- Action to annul a marriage and a guardianship proceeding when the mental deterioration of the alleged incompetent was the crux of both actions (*McClure v Donovan* (1949) 33 C2d 717, 722, 205 P2d 17);
- Individual and corporate actions against the same defendants for misappropriations occurring over different but contiguous periods of time (*Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 866, 245 P2d 608);
- Personal injury and wrongful death actions arising from the same accident and involving the same witnesses and same testimony (*Johnson v Western Air Express Corp.* (1941) 45 CA2d 614, 621, 114 P2d 688); and

- Actions to enjoin interference with shareholders' voting rights and nullify election (*Kauffman v Meyberg* (1943) 59 CA2d 730, 742, 140 P2d 210).

Such decisions should be contrasted with those declining to order consolidation when the predominance of individual issues would make joint proceedings inefficient or confusing. See, *e.g., Hasman v G.D. Searle & Co.* (ED Mich 1985) 106 FRD 459, 460 (declining to consolidate three products liability cases against same defendant by different plaintiffs because each case involved different medical histories, different physicians, different warnings and warranties, and different alleged defects).

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§43.34 b. Avoid Prejudice

Consolidation may result in three principal types of prejudice that could make consolidation inappropriate.

First, consolidation may require a party to argue inconsistent positions before the same finder of fact. Consolidation in such situations may force a party to choose between a loss of credibility and the abandonment of a strong argument on the merits, a dilemma that would not have been posed in the absence of consolidation. See, *e.g., State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 430, 304 P2d 13 (reversing consolidation of declaratory relief action involving coverage dispute between insurance company and its policyholder and personal injury actions in which insurer was defending its insured, because it forced insurer to argue inconsistent theories to same finder of fact).

Second, consolidation can sometimes result in the admission of evidence in the consolidated proceeding, albeit subject to a cautionary instruction, that would not have been revealed to the trier of fact had the cases been tried separately. For example, consolidation of suits by different plaintiffs against the manufacturer of an allegedly defective machine might prejudice the manufacturer by suggesting that its machine has failed on numerous other occasions. Similarly, consolidation of multiple suits by the same plaintiff against the same defendant might invite skepticism if the plaintiff is viewed as a malcontent. In some cases, the possibility of such prejudice has been held to justify denial of consolidation, while in other cases it has not. Compare *Hasman v G.D. Searle & Co.* (ED Mich 1985) 106 FRD 459, 461 (denying consolidation), with *Hendrix v Raybestos-Manhattan, Inc.* (11th Cir 1985) 776 F2d 1492, 1495 (affirming order granting consolidation). The key to reconciling such decisions appears to be that in cases in which consolidation was affirmed on appeal, the trial court had made a serious effort to minimize the prejudice by a cautionary instruction or other means.

Third, consolidation may delay resolution of a case in which the actions to be consolidated are not equally mature. Relatively minor differences in the extent of discovery or pretrial preparation that has been completed may not defeat consolidation, but courts are reluctant to consolidate a well-developed case nearly ready for trial with a case still in the early stages.

NOTE: In *U.S. v City of Chicago* (ND Ill 1974) 385 F Supp 540, 543, consolidation was allowed when discovery was begun in each of three cases, discovery in one case would duplicate most of the discovery in the least developed case, and the relative lack of discovery in the least developed case would not delay further proceedings. In *Monzo v American Airlines, Inc.* (SD NY 1982) 94 FRD 672, 673 consolidation was allowed when cases were at different stages of discovery but were filed only 5 months apart and were not scheduled for immediate trial. However, in *La Chemise Lacoste v Alligator Co.* (D Del 1973) 60 FRD 164, 176, consolidation was denied when one action had been pending for 3 years and was close to trial, and another action had just been filed. In *Schacht v Javits* (SD NY 1971) 53 FRD 321, 324, consolidation was denied when one case had been pending for 4 years and was virtually ready for trial, and the other case had just been filed and no answers had been served.

Consolidation can be used—instead of relying solely on res judicata (see §43.19)—to prevent litigants from dispersing related claims over time. Even actions at different stages of maturity can be consolidated. But see Cal Rules of Ct 3.521(d) ("[t]he imminence of a trial in any action otherwise appropriate for coordination may be a ground for summary denial of a petition for coordination in whole or in part").

WARNING: Some plaintiffs may delay filing suit or fail to prosecute an action aggressively, hoping to obtain a "free ride" on the efforts of others by using a favorable result in another case through offensive application of the collateral estoppel doctrine. Similarly, a plaintiff may wait and take advantage of evidence obtained in an earlier-filed suit. Although such tactics may be circumscribed by statutes of limitations and the equitable bill of peace (see §43.17), their use gives the court a reason to consolidate actions that are at different stages of maturity. Such tactics can be unfair to the plaintiff in the first filed suit and to the defendant required to bear the burden of repetitive litigation in a setting in which a loss by the first plaintiff is not necessarily binding on the second.

Not every type of prejudice weighs against consolidation, even if consolidation might affect the outcome of the

litigation. See, *e.g.*, *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 867, 245 P2d 608, in which the defendants argued that consolidation would be prejudicial because it would make it easier for the plaintiffs to prove that money stolen by the defendants could be traced. The court concluded that the so-called prejudice weighed in favor of, rather than against, consolidation.

Finally, many factors that work against consolidation for trial (*e.g.,* the risk of confusing the factfinder) would not create problems if the actions were consolidated only for pretrial purposes. A court that denies complete consolidation or consolidation for trial could still order consolidation of more limited scope that would enhance efficiency.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.35 c. Respect Legislative Policy

§43.35 c. Respect Legislative Policy

Some statutes specifically require, permit, or forbid consolidation. See, *e.g.*, §§43.22-43.25. Policy considerations reflected in other statutes may weigh for or against consolidation.

EXAMPLE: A legislative policy in favor of simplifying and expediting the resolution of small claims weighs against consolidation. In *Sales Dimensions v Superior Court* (1979) 90 CA3d 757, 153 CR 690, the court affirmed an order denying consolidation of an employer's civil action against a former employee with the employer's appeal from the Labor Commissioner's award of unpaid wages, under the trial de novo standard of review specified by Lab C §98.2. The court reasoned that the legislative policy of encouraging the expeditious resolution of small wage claims made consolidation of the two types of actions inappropriate. 90 CA3d at 764.

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§43.36 5. Coordination Standards

When coordination of actions pending in different courts is sought under CCP §403 or §404, the actions must share "a common question of fact or law" and meet the standards for coordination specified in CCP §404.1. Factors the court must consider under §404.1 are:

> [1] the ends of justice …; [2] the convenience of parties, witnesses, and counsel; [3] the relative development of the actions and the work product of counsel; [4] the efficient utilization of judicial facilities and manpower; [5] the calendar of the courts; [6] the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, [7] the likelihood of settlement of the actions without further litigation should coordination be denied.

These factors reflect the same basic concern for efficiency and consistency that is at the heart of CCP §1048(a). These factors, as well as cases decided under CCP §404.1, may be persuasive in arguing for or against consolidation under CCP §1048(a).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.37 E. Special Statutes Permitting Consolidation

§43.37 E. Special Statutes Permitting Consolidation

In addition to the general discretionary authority conferred by CCP §1048(a), several statutes explicitly permit the court, in its discretion, to order consolidation in specified situations. See §§43.39-43.44. In some instances, a term other than "consolidation" is used, but the intended result appears to be the same.

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§43.38 1. Relationship Between CCP §1048(a) and Special Statutes

Given the expansive reach of CCP §1048(a), the special permissive consolidation statutes, apart from CCP §1281.3 (contract arbitration; see §43.39), seem unnecessary.

NOTE: The Legislative Committee Comment to the 1972 Amendment to CCP §1048 does not address, as it does for severance, the relationship between CCP §1048(a) and other statutes permitting consolidation.

Could these special statutes be viewed as creating a freely rebuttable presumption that consolidation should usually be ordered in the specified situations? See generally *County of Los Angeles v Frisbie* (1942) 19 C2d 634, 641, 122 P2d 526 ("[a] statute should always be construed, if reasonably possible, as to give force and effect to every expression used by the legislature"); *Morro Hills Community Serv. Dist. v Board of Supervisors* (1978) 78 CA3d 765, 773, 144 CR 778 (referring to "cardinal rule of statutory construction that a construction making some words surplusage is to be avoided"). However, because the permissive statutes were obviously not intended to displace judicial discretion, perhaps the court should consider the same factors under them that it would consider if consolidation were sought under CCP §1048(a).

Inconsistency between §1048(a) and other statutes, such as the same court and same county restriction—which is present in §1048(a), but absent from the specific mandatory and permissive consolidation statutes—is another source of uncertainty.

EXAMPLE: It is quite clear that, under CCP §1048, actions may be consolidated only if they are pending in the same county. Does the same principle apply when actions that by specific statute may or must be consolidated are pending in different counties? It can be argued that CCP §1048(a) establishes the limits on the use of consolidation in the absence of a more specific explicit statutory directive. See Leg Comm Comment to 1971 Amendment to CCP §1048 (noting that other, more specific statutes permitting severance have been retained "because they include useful procedural details which continue to apply"). The creation of the coordination device, after most of the specific consolidation statutes were enacted, suggests that the legislature intended that the historical restriction on the application of consolidation to cases pending in the same county would be preserved. The device of coordination is available to ensure that the purposes of the specific mandatory or permissive consolidation statutes will not be disserved by geographic dispersion of claims.

Special permissive consolidation statutes have not been construed as preempting CCP §1048(a). Thus, when the actions are of a type covered by a specific consolidation statute, but the requirements of that statute are not satisfied, consolidation may nevertheless be possible under §1048(a). *City of Los Angeles v Klinker* (1933) 219 C 198, 211, 25 P2d 826 (separately filed eminent domain proceedings could properly be consolidated under §1048(a) even though they could not have been consolidated under former CCP §1244(5), the predecessor of CCP §1250.240).

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§43.39 2. Contract Arbitration

A party may petition the court to consolidate separate contract arbitration proceedings if the disputes arose from the same transaction or a series of related transactions, and if they involve common issues of law or fact creating the risk of conflicting arbitration awards. CCP §1281.3. Although §1281.3 does not require consolidation, it manifests a "strong policy favoring consolidating arbitrations involving common issues of law or fact." *Garden Grove Community Church v Pittsburgh-Des Moines Steel Co.* (1983) 140 CA3d 251, 262, 191 CR 15.

NOTE: The legislature enacted CCP §1281.3 in response to *Atlas Plastering, Inc. v Superior Court* (1977) 72 CA3d 63, 140 CR 59, which held that California courts lacked the power to consolidate contract arbitrations.

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§43.40 3. Lien Foreclosure

Several statutes provide that "the court may consolidate" separate actions filed by persons claiming liens on the same property. Such statutes include CC §3065a (loggers' liens), CC §3149 (mechanics' liens), and Food & A C §55653 (producers' liens).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.41 4. Enforcement of Payment of Claims After Stop Notices

§43.41 4. Enforcement of Payment of Claims After Stop Notices

Two statutes allow "the court first acquiring jurisdiction" to consolidate separate actions filed by any number of persons who have given stop notices relating to the same construction project. Civil Code §3175 concerns private works of improvement, and CC §3214 concerns public works of improvement.

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§43.42 5. Condemnation Proceedings

A plaintiff may "join" in one complaint all property located in the same county that is sought to be acquired for the same project. CCP §1250.240. Although the statute uses the term "join" rather than "consolidate," its predecessor (former CCP §1244(5)) has been cited as providing a basis for permissive consolidation. See, *e.g., Los Angeles City High Sch. Dist. v Swensen* (1964) 226 CA2d 574, 583, 38 CR 214 (consolidation appropriate if it would reduce time needed for trial, expert witnesses and counsel would be identical in separate trials, and parcels at issue were close to each other).

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§43.43 6. Recovery of Assessments

Separate actions brought to recover assessments for public works undertaken pursuant to the Improvement Act of 1911 may be consolidated "by order of the court." Str & H C §5414.

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§43.44 7. Challenging Contractor's Performance

A proceeding to suspend or revoke a contractor's license pursued by the registrar of contractors "may also be embraced in any action otherwise proper in any court involving the licensee's performance of his legal obligation as a contractor." Bus & P C §7106. The somewhat ambiguous phrase, "may also be embraced in," might be construed as authorizing either permissive consolidation or joinder.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.45 F. Relationship Between California Statutes and Fed R Civ P 42(a)

§43.45 F. Relationship Between California Statutes and Fed R Civ P 42(a)

Code of Civil Procedure §1048(a) and Fed R Civ P 42(a) are closely related.

NOTE: The portion of the 1927 version of CCP §1048 dealing with consolidation was cited in the Advisory Committee Note to the original version of Fed R Civ P 42(a) as one of the "comparable statutes dealing with consolidation." Thereafter, in response to a proposal by the California Law Revision Commission in 1970, CCP §1048(a) was revised in 1971 "to conform in substance" to Fed R Civ P 42(a). As a result, since July 1, 1972, the language of Fed R Civ P 42(a) and CCP §1048(a) has been identical.

In view of the overlapping history and identical wording of CCP §1048(a) and Fed R Civ P 42(a), federal decisions interpreting Rule 42(a) should be persuasive authority in California. See *City of San Jose v Superior Court* (1974) 12 C3d 447, 453, 115 CR 797 ("[t]his court has urged trial courts to be procedurally innovative, encouraging them to incorporate procedures from outside sources in determining whether to allow the maintenance of a particular class suit. More specifically, we have directed them to" Fed R Civ P 23 (class actions)); *Vasquez v Superior Court* (1971) 4 C3d 800, 821, 94 CR 796 ("[i]n the event of a hiatus, [Rule 23] prescribes procedural devices which a trial court may find useful").

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V. PROCEDURE FOR CONSOLIDATION

§43.46 A. Timing

The possibility of consolidation should be considered early in the litigation, and the subject might be raised by the court at any time.

PRACTICE TIP: Some attorneys move for consolidation as soon as they can marshal a convincing argument that it would be appropriate. A principal reason for consolidating actions is efficiency. Early consolidation minimizes duplication, and the benefits of consolidation may diminish as the separate lawsuits mature. The timing of the motion is less relevant if consolidation is sought in order to reduce the risk of inconsistent decision, as long as consolidation is achieved before decisions on the merits occur. Delay in moving for consolidation, however, runs the risk that the actions will mature at different rates, thus reducing the likelihood that the motion will be granted in the future.

The mere passage of time, or the dilatory conduct of the moving party (such as delay in seeking consolidation), may not be appropriate reasons for denial of consolidation, unless its purposes would no longer be served by granting the motion.

WARNING: Typically, it is better to seek consolidation too early rather than too late, although an early motion does run the risk of being denied as premature. See *Duval v Bathrick* (D Minn 1940) 31 F Supp 510, 511 (consolidation was premature when no answer had been filed and the case was not at issue); *In re Caesars Palace Sec. Litig.* (SD NY 1973) 360 F Supp 366, 375 (consolidation premature until completion of further discovery and clarification of true issues). But see *Shultz v Manufacturers & Traders Trust Co.* (WD NY 1939) 29 F Supp 37, 38 (fact that no answer had been filed did not defeat consolidation). Of course, a motion to consolidate two actions ordinarily should be made before the trial of either action has begun. See *Elbert, Ltd. v Hall* (1950) 101 CA2d 208, 211, 225 P2d 590 (denying motion for consolidation after commencement of trial); *Shooters Island Shipyard Co. v Standard Shipbldg. Corp.* (3d Cir 1925) 4 F2d 101, 102.

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§43.47 B. Consolidation on Court's Own Motion

Consolidation may be ordered on the court's own motion. See CCP §1048(a); Str & H C §5414; *In re Air Crash Disaster at Fla. Everglades* (5th Cir 1977) 549 F2d 1006, 1013. The court may order consolidation despite a previous order of severance, and may even vacate a prior order severing the cases for trial and order consolidation, if, based on the facts after the pleadings have closed, consolidation seems appropriate. See *Vegetable Oil Prods. Co. v Superior Court* (1963) 213 CA2d 252, 259, 28 CR 555. Consolidation also may be ordered over the opposition of some, or even all, of the parties. See also *In re Air Crash Disaster at Fla. Everglades* (5th Cir 1977) 549 F2d 1006, 1014 (consolidation "and its policy against waste of judicial resources can take precedence over individual counsel's desires that litigation follow its normal and full-blown course"); *Midwest Community Council v Chicago Park Dist.* (ND Ill 1983) 98 FRD 491, 499.

PRACTICE TIP: Certain mandatory consolidation statutes state that consolidation shall be ordered "on the motion of any interested party" and do not expressly authorize the court to order consolidation on its own motion. Were these statutes intended to preclude consolidation on the court's motion? Would it not be inconsistent with the legislative purpose of the mandatory consolidation statutes (to ensure that the enumerated actions be consolidated), to permit them always to proceed separately only because no party took the initiative to request consolidation? At least such statutes should not be construed as depriving the court of the power to order consolidation on its own motion.

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§43.48 C. Stipulation for Consolidation

Code of Civil Procedure §1048(a) does not describe the procedures for seeking consolidation. Nor, for the most part, do the specific statutes allowing or requiring consolidation.

Consolidation may be ordered on an oral or written agreement of the parties. *Didier v American Cas. Co.* (1968) 261 CA2d 742, 752, 68 CR 217; *Phillips v Beilsten* (1958) 164 CA2d 450, 454, 330 P2d 912. See *McClure v Donovan* (1949) 33 C2d 717, 722, 205 P2d 17 (consolidation at court's "suggestion" with counsels' acquiescence). If all parties agree that certain actions should be consolidated, they may prepare a combined stipulation and proposed order to that effect and present it to the court. See form in §43.105. The proposed order should describe the manner in which the lawsuit will be configured if consolidation is ordered.

WARNING: Care should be taken in drafting the stipulation and proposed order because the provisions will be difficult to set aside. *Cohn v Bugas* (1974) 42 CA3d 381, 392, 116 CR 810, quoting *Bemer v Bemer* (1957) 152 CA2d 766, 771, 314 P2d 114 ("[i]t is up to the parties to state a stipulation clearly and properly … and a party will not be heard to complain if later it is determined that by his own carelessness in the choice of words he did not state what he now says he really meant to say").

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§43.49 D. Noticed Motion for Consolidation

Attorneys commonly seek consolidation by means of a noticed motion. See CCP §1281.3 (permissive); CCP §376 (mandatory). Most courts do not favor informal oral motions for consolidation. See, *e.g.,* Sacramento Ct R 2.02(B), which requires that motions for consolidation be made in writing except for good cause.

The attorney who moves for consolidation should follow the normal notice of motion procedures outlined in Cal Rules of Ct 3.1112-3.1113. See chap 12.

The notice of motion for consolidation must include (Cal Rules of Ct 3.350(a)):

- All named parties in each case;
- The names of the parties that have appeared;
- The names of their attorneys of record; and
- The captions of all the cases to be consolidated, with the lowest numbered case listed first.

The motion must be accompanied by a memorandum in support of the motion. Cal Rules of Ct 3.1112(a), 3.1113. One copy of the notice of motion must be filed in each case to be consolidated, but the memorandum and other supporting papers need be filed only in the lowest-numbered case. Cal Rules of Ct 3.350(a).

The motion must be served on all attorneys of record and unrepresented parties in all cases sought to be consolidated, and a proof of service must be filed as part of the motion. For purposes of determining the appropriate filing fee, a motion to consolidate is deemed a single motion. Cal Rules of Ct 3.350(a).

PRACTICE TIP: The motion should contain a detailed statement of the reasons consolidation will promote efficiency and avoid inconsistency. Submitting declarations that show in appropriate detail the facts that support consolidation may ensure that the court feels sufficiently informed to make a decision at an early stage that has important implications for the future conduct of the litigation. Examples of useful information include facts showing that common legal or factual issues predominate over unique issues, that the moving party will be prejudiced by piecemeal litigation, or that the other parties will not be prejudiced by consolidation. Because the degree of similarity between two actions may be difficult to assess, lists of objective elements, such as the identities of the parties, witnesses, events, or requested relief common to the actions, may be persuasive. For general discussion of factors supporting consolidation, see §§43.29-43.36.

The moving party should give careful thought to drafting a proposed order. In view of the potentially far-reaching consequences of consolidation, the proponent should be prepared to explain to the court how the litigation should be structured after the proposed consolidation. A coordinated discovery plan, special jury instructions, lead counsel, and special verdicts are some of the matters to consider. The moving party should also consider submitting a proposed order that describes these matters in detail, because doing so can assist the court in assessing the desirability of consolidation and ensure that nothing is overlooked.

Counsel should consult local rules specifically pertaining to consolidation. Such rules may specify the department in which the motion should be heard or contain other directives on motions for consolidation. See, *e.g.,* Los Angeles Ct R 2.6 (encouraging consolidation of custody proceedings), 7.3(g) (provisions for consolidation motions that would result in transfer of a case to or from any judge).

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§43.50 E. Opposing Consolidation

A party opposing a motion to consolidate must file a memorandum in opposition to the motion and must serve copies on counsel for all other parties. Consideration also should be given to filing one or more declarations in opposition to the motion, in order to provide a factual basis for arguments that consolidation will result in prejudice, jury confusion, or inefficiency. See *Popejoy v Fladung* (WD Mo 1953) 14 FRD 450 (unsupported opinion of plaintiff's counsel that jury would be confused was insufficient basis for denying consolidation). Lists or charts emphasizing the differences between the actions may help to persuade the court that common issues do not predominate.

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§43.51 F. Order for Consolidation

The court's order granting or denying the motion for consolidation must be filed in each case sought to be consolidated. If the motion is granted for all purposes, including trial, any subsequent documents are filed only in the lead case (see §43.52). Cal Rules of Ct 3.350(c).

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§43.52 G. Lead Case

Unless the court orders otherwise, the lowest numbered case in the consolidated action is the lead case. Cal Rules of Ct 3.350(b). All documents filed in the consolidated case must include the caption and case number of the lead case, followed by the case numbers of the other consolidated cases. Cal Rules of Ct 3.350(d).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.53 H. Diagnostic Questions

§43.53 H. Diagnostic Questions

Answers to the following questions may assist counsel in deciding whether to seek consolidation:

1. Is consolidation desirable?

2. What are the tactical advantages and disadvantages of consolidation?

3. Would a related device (*e.g.,* interpleader, intervention) be more advantageous than consolidation?

4. Does the court have power to consolidate?

5. Are the cases pending in the same court in the same county (see CCP §1048(a))?

6. Are the cases pending in different courts in the same county (see CCP §404)?

7. What consolidation statute applies?

- **A mandatory statute (CCP §376 or §377(a) or Lab C §3853)**
- **CCP §1048(a) (the general permissive consolidation statute for cases pending in the same court in the same county)**
- **CCP §404 (the general permissive consolidation statute for cases pending in different courts in the same county)**
- **Specific permissive consolidation statutes (Bus & P C §7106; CC §§3065a, 3149, 3175, 3214; CCP §1250.240; Food & A C §55653; Str & H C §5414)**

8. If consolidation is not mandatory, would it be appropriate?

9. Do the cases have common questions of law or fact?

10. Do the common questions of law or fact predominate over individual issues?

11. Would a single proceeding be more efficient than multiple proceedings?

12. Is there a risk of inconsistent results unless consolidation occurs?

13. Would the complexity of a consolidated trial confuse the jury?

14. Would consolidation prejudice any party?

15. Is one action ready for trial and are others just beginning?

16. Would consolidation force a party to take inconsistent positions before the same finder of fact?

17. Would consolidation result in admission of evidence not otherwise admissible?

18. Would consolidation be consistent with legislative policy?

19. Would consolidation be premature because the issues are not sufficiently defined, or is it too late to be useful?

20. What would be the most appropriate scope of consolidation?

- **Complete consolidation (merging the actions for all purposes)**
- **Consolidation for joint trial or hearing**
- **More limited consolidation for discovery or selected pretrial proceedings**

21. Should consolidation be sought by?

- **Stipulation and proposed order**
- **Noticed motion**

22. What provisions should the court order contain in order to?

- **Accomplish the consolidation**
- **Avoid unnecessary costs or delay**

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VI. CONSEQUENCES OF CONSOLIDATION

§43.54 A. Distinction Between Complete and Partial Consolidation

Although CCP §1048(a) uses the terms "joint hearing or trial," the extent of consolidation can vary. Cases may be consolidated for all purposes, only for trial, or only for selected pretrial proceedings. Entire actions may be consolidated, or only particular issues or claims. Care should be taken to ensure that the court's order makes clear the extent of the intended consolidation.

NOTE: It is theoretically true that "no increase, diminution, or change in the litigants' rights can occur" as a result of consolidation. *Mueller v J.C. Penney Co.* (1985) 173 CA3d 713, 722, 219 CR 272. See also *Wouldridge v Burns* (1968) 265 CA2d 82, 86, 71 CR 394 (consolidation of actions does not affect parties' rights). As a practical matter, however, consolidation inevitably affects discovery and trial in the consolidated actions, even if the consolidation is not complete.

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§43.55 1. Complete Consolidation

Complete consolidation may be ordered when the actions involve the same, or substantially the same, parties and all claims could have been joined at the outset. *Kropp v Sterling Sav. & Loan Ass'n* (1970) 9 CA3d 1033, 1047, 88 CR 878 (complete consolidation of joinable causes of action involving same parties); *Jaffe v Albertson Co.* (1966) 243 CA2d 592, 606, 53 CR 25 (complete consolidation when separate plaintiff sought same relief against same defendant and could have originally been joined as party-plaintiff in consolidated action).

EXAMPLE: Complete consolidation may be ordered when the same plaintiffs bring separate actions against the same defendants or two parties sue each other for the same or reciprocal relief. See *McFarland v Booker* (1967) 250 CA2d 402, 416, 58 CR 417. Similarly, complete consolidation may, and probably should, be ordered when a statute requiring consolidation applies.

Complete consolidation unites the separate actions so that the separate complaints are treated as one pleading (*McClure v Donovan* (1949) 33 C2d 717, 721, 205 P2d 17), and allegations in one complaint can correct defects or omissions in another (*Staub v Muller* (1936) 7 C2d 221, 225, 60 P2d 283).

NOTE: Sometimes the court may order the parties to agree on and file consolidated pleadings containing all the claims and defenses asserted in the consolidated actions. See, *e.g., Garber v Randell* (2d Cir 1973) 477 F2d 711, 717 n4. This practice is common in securities litigation in which separate class actions asserting essentially the same claims and seeking essentially the same relief are filed against the same or overlapping groups of defendants. If the claims or defenses differ materially, however, consolidated pleadings may be unduly prejudicial to some parties. *Garber,* 477 F2d at 716.

Actions consolidated for all purposes are treated as though they had been united originally, and may be resolved by one judgment, with one statement of reasons for the decision. *McClure v Donovan, supra*; *Didier v American Cas. Co.* (1968) 261 CA2d 742, 752, 68 CR 217; *Jaffe v Albertson Co., supra*. Indeed, if separate statements of reasons for decision or separate judgments are prepared, they will be treated as one. *Bechtold v Bishop & Co.* (1940) 16 C2d 285, 287, 105 P2d 984; *Bank of Cal. v Connolly* (1973) 36 CA3d 350, 363, 111 CR 468; *Wolfson v Beatty* (1953) 118 CA2d 392, 398, 257 P2d 1017; *Clinton v Hogan* (1947) 80 CA2d 815, 821, 183 P2d 50. Similarly, unless otherwise indicated, orders that nominally pertain to one case will apply to all of the consolidated actions. For example, in *Wolfson,* an order granting a new trial in one action operated to grant a new trial in the action consolidated with it as well. *Wolfson,* 118 CA2d at 398. Conversely, even if a complete consolidation has been ordered, the court retains its power to grant a motion for summary judgment or to direct a verdict disposing of less than all of the consolidated actions. See, *e.g., Aufdemkamp v Pierce* (1935) 4 CA2d 276, 281, 40 P2d 599.

NOTE: A complete merger of separate actions may be improper without the consent of all parties. *Sanchez v Superior Court* (1988) 203 CA3d 1391, 1396, 250 CR 787.

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§43.56 2. Consolidation of Related Issues for Trial

The court may consolidate actions for the limited purpose of a joint trial or a joint hearing of common issues, even if the parties are not the same and the causes of action could not have been joined. *McClure v Donovan* (1949) 33 C2d 717, 722, 205 P2d 17; *McFarland v Booker* (1967) 250 CA2d 402, 416, 58 CR 417. The actions retain their separate character and must be independently resolved. *McClure v Donovan, supra*; *McFarland v Booker, supra*; *Johnson v Marr* (1935) 8 CA2d 312, 313, 47 P2d 489. But see *Jaffe v Albertson Co.* (1966) 243 CA2d 592, 606, 53 CR 25 (suggesting, on unusual facts, that actions consolidated only "for trial" "became united for all purposes").

The evidence received in one case is deemed admissible in others only to the extent that it is relevant, and separate verdicts, reasons for decision, and judgments are required. *McClure v Donovan, supra; McFarland v Booker, supra.* There may be instances in which the evidence received is deemed applicable in its entirety to each case, unless it is expressly limited or is immaterial or irrelevant to the issues in a particular case. See *McCarthy v Mobile Cranes, Inc.* (1962) 199 CA2d 500, 508, 18 CR 750. Again, care should be taken to ensure that the consolidation order clearly describes the scope of the consolidation.

Finally, if consolidation is only partial, each action is subject to separate posttrial proceedings. See, *e.g., Harmon v San Francisco & San Rafael R.R.* (1890) 86 C 617, 25 P 124 (actions consolidated for trial on consent of parties not consolidated for appeal when each appellant moved separately for new trial, grounds for each motion were peculiar to each case, separate bills of exception were filed, separate appeals were taken, and separate records were prepared for court of appeal). See also *McFarland,* 250 CA2d at 416 (in two actions consolidated for trial of related issue, judgment in one action affirmed; order granting new trial in other affirmed).

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§43.57 3. Consolidation for Pretrial Proceedings

Consolidation may also be ordered solely or primarily for pretrial purposes. An orderly and expeditious disposition at trial depends largely on the manner in which pretrial proceedings are conducted. If one of the purposes of consolidation for trial is to expedite the proceedings and avoid needless time and expense to the litigants and to the court, such objectives are as desirable and as attainable in the period utilized in preparing for the trial. *MacAlister v Guterma* (2d Cir 1958) 263 F2d 65, 68.

PRACTICE TIP: Consolidation for pretrial proceedings might be advisable when common issues exist but do not predominate, when actions share a common legal issue, or when other factors would make a joint trial unwieldy or unduly prejudicial for some parties. For example, when consolidation would be unfair because it would force a party to make inconsistent arguments to the same jury, consolidation for pretrial purposes might only promote efficiency without creating undue prejudice. In addition, the extent of the commonality of issues may initially be unclear. After consolidation for pretrial proceedings, the advisability of complete consolidation or consolidation for trial can be resolved as the actions mature. See *Meeder v Superior Tube Co.* (WD Pa 1976) 72 FRD 633. It is often preferable, however, to resolve the question promptly, rather than to encourage repeated litigation on matters collateral to the merits.

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B. Orders Regulating Consequences of Consolidation

§43.58 1. Avoiding Unnecessary Cost, Delay, or Prejudice

Courts may make such orders concerning proceedings after consolidation "as may tend to avoid unnecessary costs or delay." CCP §1048(a). Such matters might include:

- Requiring parties sharing common interests to coordinate their written discovery requests; or
- Insisting that a witness be deposed on only one occasion with his or her testimony to be available for use in any of the actions.

The court also possesses the power to protect some or all parties from prejudice by making rulings ancillary to the order of consolidation. For example, where two parties each sue the other for claims arising out of the same occurrence or transaction, the court may protect the more diligent plaintiff, whose complaint was served first, by conferring on it the benefits of making the first opening statement and the last closing argument. See, *e.g., Daly v White* (1950) 100 CA2d 22, 26, 222 P2d 950.

If consolidation is desirable but the possibility of prejudice exists, a variety of measures may be used to reduce the risk of confusion or unfairness. For example, in *Johnson v Western Air Express Corp.* (1941) 45 CA2d 614, 622, 114 P2d 688, consolidation was ordered for trial with special instructions to the jury on the applicability of the evidence to the two actions. See also *Hendrix v Raybestos-Manhattan, Inc.* (11th Cir 1985) 776 F2d 1492, 1496 (jurors given notebooks tabbed for each party and provided with opportunities to take notes throughout trial); *Arnold v Eastern Air Lines, Inc.* (4th Cir 1982) 681 F2d 186 (elaborate cautionary instructions). It may be an abuse of discretion for a court not to consider, or even adopt, such measures when a real danger of prejudice exists.

Consolidation may be appropriate for two actions that are closely related even though one must be tried to a jury and the other to the court. *Blake v Farrell Lines, Inc.* (3d Cir 1969) 417 F2d 264, 266. Although the risk of inconsistent adjudications is apparent in such a consolidation, that risk would exist anyway. Sealing the jury's verdict until the judge has ruled prevents either factfinder from being influenced by the other's decision. Alternatively, the court could order that all of the actions be tried to a jury. Although the court could not order that all of the actions be tried by a judge, there is no constitutional right to a nonjury trial. See Note, *The Right to* a *Non-Jury Trial*, 74 Harv L Rev 1176 (1961).

JUDICIAL PERSPECTIVE: The flexibility of CCP §1048(a) enables the court to respond creatively to unique situations. For example, in some instances it may be desirable to use consolidation and severance together by first consolidating several lawsuits filed against the same defendant, and then severing the issues of liability and damages or reserving cross-claims for a separate trial. See, *e.g., Wilson v Johns-Manville Sales Corp.* (SD Tex 1985) 107 FRD 250 (consolidating 150 asbestos cases into three groups of 50 cases each for purpose of jointly trying common issues regarding product defectiveness and punitive damages, and severing the individual issues of exposure and compensatory damages for later trial in groups of 5 cases each).

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§43.59 2. Appointment of Lead Counsel

Court appointment of lead counsel for one or more groups of parties may increase efficiency. Such a step could "tend to reduce unnecessary cost or delay." CCP §1048(a). (Note that lead counsel are frequently appointed in federal cases under Fed R Civ P 42(a); see, *e.g., In re Air Crash Disaster at Fla. Everglades* (5th Cir 1977) 549 F2d 1006, 1014. Further, lead counsel may be appointed in coordinated cases under Cal Rules of Ct 3.506.)

JUDICIAL PERSPECTIVE: The value of consolidation may depend in large part on the court's ability to identify effective lead counsel and willingness to confer power on that attorney. Criteria for selecting lead counsel include:

- Experience in cases involving the same substantive law area;
- Experience in complex litigation;
- Resources;
- Ability;
- Respect of colleagues; and
- Ability to avoid bias owing to idiosyncratic position of client.

A wise choice in this regard can reduce the amount of judicial time required to manage coordinated proceedings effectively. It may also help to minimize the aggregate amount of attorney fees and other costs incurred by the parties. Note that, although one goal of consolidation is to reduce litigation costs, if an award of attorney fees is an element of recovery by statute, the right to such an award is neither defeated nor diminished by consolidation. *Realty Constr. & Mortgage Co. v Superior Court* (1913) 165 C 543, 548, 132 P 1048.

In federal cases, lead counsel have been appointed to coordinate and structure litigation activities so that duplication and confusion are minimized. See, *e.g., MacAlister v Guterma* (2d Cir 1958) 263 F2d 65, 68; *Feldman v Hanley* (SD NY 1969) 49 FRD 48, 50. Most of lead counsel's functions are relatively mundane, such as arranging for the scheduling of hearings and depositions at times convenient for all. But sometimes their powers are significant. In, *e.g.*, *Farber v Riker-Maxson Corp.* (2d Cir 1971) 442 F2d 457, an order providing that only lead counsel could file papers on behalf of any plaintiff was held to justify the trial court's refusal to consider a summary judgment motion filed by other counsel after lead counsel declined to do so. 442 F2d at 459.

WARNING: When lead counsel are in a position to allocate tasks among themselves and other counsel, their substantial control of the quantity and quality of the tasks performed by other counsel may essentially dictate any allocation of the amount of attorney fees.

Lead counsel are not appointed automatically. Courts consider (see *Dupont v Southern Pac. Co.* (5th Cir 1966) 366 F2d 193, 196; *MacAlister v Guterma* (2d Cir 1958) 263 F2d 65, 70):

- Whether lead counsel will help to avoid duplication, confusion, or conflict;
- Whether other alternatives are more appropriate (such as the appointment of a special master); and
- Whether the appointment of lead counsel would prejudice the rights of any party (when, *e.g.*, lead counsel would have a conflict of interest regarding its duties to each plaintiff).

Even if lead counsel is appointed, individual counsel can still present their own cases, examine witnesses, and give opening and closing statements. See *Mueller v J.C. Penney Co.* (1985) 173 CA3d 713, 722, 219 CR 272 (in consolidated action, court cannot completely deny party's right to examine witness); *McCarthy v Mobile Cranes, Inc.* (1962) 199 CA2d 500, 507, 18 CR 750 (denial of due process not to allow one party to cross-examine witness during trial of three consolidated actions).

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VII. APPELLATE REVIEW OF ORDERS REGARDING CONSOLIDATION

§43.60 A. Method of Review

An order granting or denying a motion to consolidate is an interlocutory order that cannot be directly appealed. Such an order can be reviewed on appeal only from a final judgment. *State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 432, 304 P2d 13; see CCP §§904.1-904.2. Postjudgment challenges to consolidation orders are seldom successful. Courts of appeal are reluctant to overturn a decision on the merits simply because the ruling granting (or, especially, refusing) consolidation was wrong. In contrast to the general rule, an order granting or denying a petition for consolidated arbitration is immediately appealable. *Garden Grove Community Church v Pittsburgh-Des Moines Steel Co.* (1983) 140 CA3d 251, 256, 191 CR 15; *Conejo Valley Unified Sch. Dist. v William Blurock & Partners* (1980) 111 CA3d 983, 985, 169 CR 102.

An aggrieved party may seek interlocutory review by a petition for writ of mandate, but a writ of mandate only "lies to control judicial discretion when that discretion has been abused." *State Farm Mut. Auto. Ins. Co. v Superior Court, supra*. Presumably, a writ of prohibition would also lie to prevent a court from consolidating actions in excess of its statutory authority. Even though a writ petition is likely to provide a more effective means of review than will an appeal from a subsequent judgment, neither method of review provides the aggrieved party with much chance of success.

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§43.61 B. Scope of Review

Because of the practical nature of the decision required, the trial court is generally in a better position to assess the situation than is an appellate court. *National Elec. Supply Co. v Mount Diablo Unified Sch. Dist.* (1960) 187 CA2d 418, 421, 9 CR 864. Not surprisingly, then, consolidation rests within the trial court's discretion, and a reviewing court will disturb the trial court's decision only on a showing of abuse of discretion. *Todd-Stenberg v Dalkon Shield Claimants Trust* (1996) 48 CA4th 976, 56 CR2d 16; *Estate of Baker* (1982) 131 CA3d 471, 485, 182 CR 550; *Fellner v Steinbaum* (1955) 132 CA2d 509, 282 P2d 584; *Fisher v Nash Bldg. Co.* (1952) 113 CA2d 397, 402, 248 P2d 466 (consolidation is not matter of right). In other words, the trial court's decision will be reversed only if it "exceeds the bounds of reason" in view of all the circumstances. *State Farm Mut. Auto. Ins. Co.,* 47 C2d at 432.

PRACTICE TIP: Reversals are rare, generally occurring only when consolidation was ordered and resulted in severe prejudice. Attacks on orders granting or denying consolidation on the ground that the decision caused inefficiency are seldom successful. If the merits have been tried, efficiency will not be promoted by reversal. Moreover, since denial of consolidation theoretically should not affect the outcome on the merits, an incorrect refusal to consolidate is likely to be viewed as harmless error. Presumably, this lenient standard of review would not apply when mandatory consolidation was denied.

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§43.62 C. Consolidation on Appeal

Consolidation on appeal is governed by the same general principles as consolidation at the trial court level. To begin with, the consolidation of separate appeals is discretionary with the reviewing court, and each situation will turn on its own merits. *Sampson v Sapoznik* (1953) 117 CA2d 607, 609, 256 P2d 346; *Silver v Bank of America* (1941) 43 CA2d 835, 838, 111 P2d 666. That two actions have been consolidated to try a related issue does not mean that the parties are entitled to consolidation on appeal. See *Harmon v San Francisco & San Rafael R.R.* (1890) 86 C 617, 25 P 124. To the contrary, in any given situation, the court may consider "whether the questions presented are so related as to make it advisable to consolidate" and whether consolidation will expedite the appeals (*Sampson v Sapoznik, supra*), promote efficiency (*Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 165 n3, 188 CR 104), or prejudice any party (*General Elec. Co. v Federal Employees' Distrib. Co.* (1954) 122 CA2d 509, 511, 265 P2d 19).

Like consolidation by the trial court, consolidation in a reviewing court may be ordered on stipulation by the parties (*Sharick v Galloway* (1936) 12 CA2d 733, 738, 55 P2d 1196), on the court's own motion, or on a motion noticed by one of the parties (see *General Elec. Co. v Federal Employees' Distrib. Co., supra* (motion granted); *Sampson v Sapoznik, supra* (motion denied); *Silver v Bank of America, supra* (motion denied)).

Finally, just as in the trial court, the extent of consolidation may vary in the reviewing court. Actions may be consolidated for briefing and argument (see *Silver v Bank of America* (1941) 43 CA2d 835, 838, 111 P2d 666) or for all purposes, including the preparation of a single record (see *General Elec. Co. v Federal Employees' Distrib. Co.* (1954) 122 CA2d 509, 510, 265 P2d 19).

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VIII. SEVERANCE; GENERAL CONSIDERATIONS

A. Definition and Purpose of Severance

1. Definition of Severance

§43.63 a. Severance Separates Claims, Issues, or Parties

Like consolidation (discussed at §§43.3-43.62), severance is a procedural device that enables the court to second-guess the parties' tactical decisions as to the most appropriate scope and configuration of their lawsuit. Although consolidation permits the court to enlarge a lawsuit by adding new claims, issues, or parties, severance allows (and, in some instances, requires) the court to divide a lawsuit into one or more parts, to resolve the parts separately, and to determine the order in which they will be resolved. Severance balances procedural devices allowing the parties to broaden the scope of a lawsuit, *e.g.,* the liberal joinder provisions of CCP §§378-379 and the consolidation statutes, by allowing or requiring the court to reduce the size and scope of a lawsuit as appropriate to facilitate the most accurate and economical resolution of the controversy.

NOTE: The scope of severance is broad. Severance may be sought by any party, regardless of its status in the litigation. It is available without regard to the subject matter or substantive law involved in the action. It may be obtained regardless of whether the claims or issues were originally joined in the same lawsuit or were brought together through a prior order of consolidation or coordination.

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§43.64 b. Terms: Severance, Separate Trial, and Bifurcation

Traditionally, a distinction was made between "severance," which creates entirely separate actions and requires the entry of independent judgments, and "separate trial," which does not. Under federal law, this distinction is maintained. Compare Fed R Civ P 42(b) (separate trial) and Fed R Civ P 20(b) (separate trial) with Fed R Civ P 21 (severance). Although the principal California statute on severance, CCP §1048(b), uses the term "separate trial," that term is essentially indistinguishable from the term "severance" under California law. The determination of what is a final judgment for purposes of appeal and motions for new trial notwithstanding the verdict is made on a case-by-case basis. See §§43.98, 43.102. The term "bifurcation" is generally used to refer to a particular type of severance, *i.e.*, the procedure of holding separate trials on the issues of liability and damages. Of course, in highly complex cases, it might be desirable to have more than two separate trials, a prospect not strictly within the contemplation of the term "bifurcation." See, *e.g., In re Bendectin Litig.* (6th Cir 1988) 857 F2d 290 (affirming trifurcation of issues in consolidated action consisting of 840 products liability cases).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.65 2. Purposes of Severance

§43.65 2. Purposes of Severance

The purpose of severance is to promote the accuracy, fairness, and efficiency of adjudication. See, *e.g., Foreman & Clark Corp. v Fallon* (1971) 3 C3d 875, 888 n8, 92 CR 162 (legislature considered bifurcation of liability and damages desirable to avoid wasting court time when plaintiff loses on issue of liability, to promote settlements when plaintiff wins on liability issue, and to afford a more logical presentation of evidence, thus simplifying issues for jury); *Bedolla v Logan & Frazer* (1975) 52 CA3d 118, 135, 125 CR 59 (objective of bifurcation of issues is avoidance of waste of time and money caused by trial of issues that may be rendered moot).

PRACTICE TIP: Severance may be ordered to accomplish any or all of those objectives. Although severance is advisable in many situations, it is especially useful when the resolution of a particular claim or issue might dispose of the entire case or eliminate a party. Severance is also valuable when evidence admissible on one issue might unfairly prejudice the jury on another issue, or when a case is simply too complex to be digested in one sitting.

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§43.66 3. Constitutional Limits on Severance

There is no doubt about the constitutionality of severance or separate trials as a theoretical matter. Indeed, CCP §1048(b) expressly provides, perhaps unnecessarily, that the court's power to sever claims or issues is conditioned on "preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States."

As a practical matter, there seem to be two constitutional limits on the court's power to order severance. First, every litigant has the right to have only one factfinder decide each question of fact. *Alabama v Blue Bird Body Co.* (5th Cir 1978) 573 F2d 309, 318 (applying US Const amend VII). When separate trials are held before different juries, they may violate this right by making conflicting determinations as to particular facts. The prohibition is not against having two juries review the same evidence, but rather against having two juries decide the same essential issues. *Paine, Webber, Jackson & Curtis, Inc. v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (D Del 1984) 587 F Supp 1112, 1117.

A second constitutional limit on the power to order severance is that separate trials may amount to a denial of a fair trial if the claim or issue to be tried first overlaps with other claims or issues to such an extent that the failure to try all claims or issues together would confuse the jury. *Franchi Constr. Co. v Combined Ins. of Am.* (1st Cir 1978) 580 F2d 1, 7. Accordingly, from a constitutional standpoint, courts may only sever claims or issues when the claims or issues to be tried first are so distinct and separable from the others that trying them alone may be had without injustice. *Gasoline Prods. Co. v Champlin Ref. Co.* (1931) 283 US 494, 500, 75 L Ed 1188, 1191, 51 S Ct 513 (partial new trial before different jury was constitutionally permissible when error infected only part of original verdict).

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B. Alternative Procedural Devices

§43.67 1. Demurrer

A demurrer may be used to obtain the dismissal from an action of parties who have been misjoined. CCP §430.10(d). This option is an alternative to requesting that claims or issues involving improperly joined parties be tried separately. Another ground for demurrer is the existence of a prior action pending among the same parties on the same cause of action. CCP §430.10(c). This situation is a basis for dismissal or abatement of the later-filed action that, if it raises factual issues, may be tried separately as a special defense under CCP §597.

In both instances, use of a demurrer appears preferable to severance, and it should generally be attempted first. If the joinder was improper, dismissal should be available, at least when prejudice can be shown. But if the joinder was proper and the demurrer is overruled, a motion for severance under CCP §379.5 may be made to mitigate the deleterious effects of a technically proper but improvident joinder. *Anaya v Superior Court* (1984) 160 CA3d 228, 234, 206 CR 520 (reversing orders sustaining demurrers for misjoinder of plaintiffs and observing that legitimate practical concerns about feasibility of trial with 200 plaintiffs may be addressed by recourse to CCP §379.5).

NOTE: A trial of an "another action pending" issue is seldom necessary because the court may take judicial notice of the parties and causes of action involved in the prior proceeding under Evid C §452(d).

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§43.68 2. Regulation of Order of Proof

Except as otherwise provided by law, the court in its discretion shall regulate the order of proof. Evid C §320. See also CCP §607(8), which authorizes the court to determine the relative order in which several defendants will present their evidence and argument. This function of the court, while falling short of severance, allows some of the same goals to be achieved.

EXAMPLE: The court can require that one defendant present its evidence before another defendant's evidence when that sequence will assist the jury in understanding a complex and technical case. *Diamond Springs Lime Co. v American River Constructors* (1971) 16 CA3d 581, 603, 94 CR 200.

Similarly, in a highly complex case, all evidence—and even opening statements and closing arguments—might be presented on an issue-by-issue basis. Manual for Complex Litigation §22.34 (3d ed Federal Judicial Center 1995). As the court noted in *Meyer Koulish Co. v Cannon* (1963) 213 CA2d 419, 430, 28 CR 757, a special severance statute such as CCP §597 or §598 "does not add a great deal to this power."

PRACTICE TIP: The attorney should consider alternative methods of achieving at least some of the aims of severance if severance is unavailable: for example, Evid C §320 and CCP §607(8) may apply.

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IX. MANDATORY SEVERANCE

§43.69 A. Distinction Between Mandatory and Permissive Severance

Although severance is usually within the trial court's discretion (see, *e.g., Carpenson v Najarian* (1967) 254 CA2d 856, 862, 62 CR 687), special statutes make severance mandatory in some circumstances. When these statutes apply, the court has no discretion to exercise. *County of Kern v Superior Court* (1978) 82 CA3d 396, 400, 147 CR 248 (trial judge has no alternative but to grant motion). Moreover, the general permissive severance statute, CCP §1048(b), "does not affect any statute that requires a particular issue be severed for trial." Leg Comm Comment to 1971 Amendment to CCP §1048.

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B. Particular Statutes That Require Severance

§43.70 1. Limitations Defense in Medical Malpractice Actions (CCP §597.5)

The court must, on the motion of any party or on the court's own motion, sever and try any limitations defense before any other issue in a medical malpractice action. CCP §597.5. The term "limitations" has been narrowly construed. For example, it has been held that §597.5 does not apply to the arguably similar defense of failure to file a timely claim under Govt C §§910-935.7 (Government Claims Act (formerly known as the Tort Claims Act)). *County of Kern v Superior Court* (1978) 82 CA3d 396, 401, 147 CR 248.

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§43.71 2. Right to Recover Punitive Damages (CC §§3294-3295)

If a defendant so requests, a plaintiff's right to recover punitive damages must be established (*i.e.,* the jury must find clear and convincing evidence of malice, oppression, or fraud) before the jury can consider evidence of the defendant's finances to determine the amount of punitive damages. CC §§3294, 3295(d). Civil Code §3295 was enacted in 1979 to protect defendants against premature disclosure of their finances to the jury when the plaintiff seeks an award of punitive damages. *Cobb v Superior Court* (1979) 99 CA3d 543, 550, 160 CR 561.

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§43.72 3. Issues of Law in Certain Cases (CCP §592)

In actions to recover real or personal property or money claimed as due on a contract, or to recover damages for breach of contract or for personal injuries, issues of fact must be tried to a jury. When issues of law are also involved, those issues must be tried before issues of fact are tried. CCP §592.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.73 4. Unconscionability of Contract (CC §1670.5)

§43.73 4. Unconscionability of Contract (CC §1670.5)

When it is claimed that all or any part of a contract may be unconscionable, the parties shall be afforded an opportunity to present evidence to assist the court in determining whether the challenged portion of the contract is unconscionable. CC §1670.5(b). In 1979, the legislature enacted UCC §2-302 (which had been omitted when California adopted most of the UCC) as CC §1670.5. The 1979 Leg Comm Comment to CC §1670.5 makes it clear that §1670.5 is addressed to the court, which should make the decision. The evidence referred to in §1670.5(b) is for the court's consideration, not the jury's.

EXAMPLE: If a warranty disclaimer is alleged to be unconscionable, that issue must be tried to the court before a jury trial on the remainder of the case commences.

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§43.74 5. Compatibility of Public Uses in Consolidated Eminent Domain Proceedings (CCP §1260.020)

If proceedings to acquire the same property by eminent domain are consolidated, the court must decide the compatibility of the several public uses first, leaving other issues to be resolved later. CCP §1260.020(a). If the court decides that the public uses are compatible, then the action continues with all plaintiffs acting jointly. CCP §1260.020(a). If the court rules that the public uses are incompatible, then it must decide which of the public uses is the more necessary. CCP §1260.020(b). The plaintiff alleging the most necessary public use, and any other plaintiff alleging a compatible possible use, should be allowed to proceed, and all other plaintiffs' claims should be dismissed. CCP §1260.020(b).

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.75 6. Child Custody and Support Issues (CC §4600.6)

§43.75 6. Child Custody and Support Issues (CC §4600.6)

The statutes governing the order in which child custody and support provisions should be resolved require separate trial of some issues and permit separate trial of others. If one of several contested issues is the custody of a minor child, the court must try that issue separately before trying the remaining issues. Fam C §3023(b). A separate, early trial *may* be ordered, on a showing of good cause, on the support of a minor child if that is one of several contested issues. Fam C §4003.

If separate trials of both custody and support have been ordered, then the court must try those two issues together. Fam C §4003.

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X. PERMISSIVE SEVERANCE

§43.76 A. Principal Statute (CCP §1048(b))

The court, in furtherance of convenience and to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues. CCP §1048(b). When no statute requiring severance applies, the court has the discretionary power to order severance. See, *e.g., McArthur v Shaffer* (1943) 59 CA2d 724, 727, 139 P2d 959 (whether there shall be severance and separate trials of issues in single action is within trial court's discretion).

NOTE: Before the amendment of CCP §1048 in 1971, the statute provided merely that actions may be severed, thus creating uncertainty as to whether an issue could be tried separately. The 1971 amendment resolved the question by making it clear that issues or portions of a case could be severed even though they did not amount to an "action." Leg Comm Comment to 1971 Amendment to CCP §1048. Because of this and other changes in the language of the statute, some cases denying severance that were decided before 1972 were unduly restrictive and may no longer be good authority.

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§43.77 B. Other Statutes That Permit Severance

The legislature has also enacted statutes expressly permitting the courts to sever certain claims or issues. These statutes were not intended to preempt the court's exercise of discretion; rather, they "duplicate" the authority existing under CCP §1048. Leg Comm Comment to 1971 Amendment to CCP §1048.

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§43.78 1. Any Issue May Be Tried Before Any Other Issue (CCP §598)

Any party may request severance, or the court on its own motion may order severance, of any issue before any other issue except special defenses. CCP §598. Section 598 applies both to court and to jury trials.

As originally enacted in 1963, CCP §598 allowed courts to order that "the trial of the issue of liability shall precede the trial of any other issue in the case, except for special defenses." Until 1971, courts held that they possessed broad "inherent authority" under former CCP §2042 (superseded by Evid C §320 in 1965) to determine the sequence in which issues would be tried. See, *e.g., Donovan v Security-First Nat'l Bank* (1945) 67 CA2d 845, 852, 155 P2d 856, overruled on other grounds in *Rader v Thrasher* (1962) 57 C2d 244, 251, 18 CR 736. In *Cook v Superior Court* (1971) 19 CA3d 832, 834, 97 CR 189, however, it was held that a court should not order that all or any part of the damages issue be tried before any part of the liability issue. The soundness of such a restrictive reading of §598 seemed questionable.

Doubts about the validity of *Cook* were confirmed in 1977 when CCP §598 was substantially broadened to permit courts to order that "the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case, except for special defenses." CCP §598. This change suggests a legislative intention to provide courts with greater latitude in ordering severance.

Other aspects of the 1977 amendment, *e.g.,* the extension of the court's power to order severance in jury trials as well as nonjury trials, confirm the view that the amendments were meant to encourage more frequent and creative use of severance.

Before CCP §598 was liberalized in 1979 to permit the court to act on its own motion as well as on the motion of any party, courts lacked the authority to order bifurcation under §598 on their own motion in a case to be tried before a jury. *Hilliard v A.H. Robins Co.* (1983) 148 CA3d 374, 196 CR 117. In *Hilliard,* the trial court had ordered bifurcation on its own motion, with both liability and compensatory damages issues to be tried before punitive damages issues because it was "somewhat skeptical and uncertain that the plaintiff had established a factual basis for punitive damages." 148 CA3d at 393. On appeal, this basis was held to be appropriate for bifurcation on the court's own motion. Since 1987, CC §3295(d) requires such bifurcation. See §43.71.

JUDICIAL PERSPECTIVE: The liberalization of CCP §598 in 1979 had the salutary effect of making the court less dependent on tactical decisions made by the parties.

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§43.79 2. Special Defenses Not Involving Merits (CCP §597)

The court may try special defenses pleaded in the defendant's answer "not involving the merits" before the trial of the underlying claim. CCP §597. For purposes of §597, the term "answer" includes the term "demurrer." *Lord v Garland* (1946) 27 C2d 840, 850, 168 P2d 5. The term "answer" also includes answers to cross-complaints. CCP §597.

The goal of §597 is to protect a defendant possessing a potentially dispositive affirmative defense against a needless trial of the merits of the plaintiff's claim. *People v Rath Packing Co.* (1978) 85 CA3d 308, 337, 149 CR 431. These special defenses include, *e.g.,* personal jurisdiction, limitations, res judicata, another action pending, and release. See, *e.g., Leonard v Flynn* (1891) 89 C 535, 540, 26 P 1097 (another action pending on same claim); *Bedolla v Logan & Frazer* (1975) 52 CA3d 118, 135, 125 CR 59 (limitations); *Boucher v Kriehn* (1947) 80 CA2d 437, 441, 182 P2d 218 (res judicata and limitations); *Booth v Bond* (1942) 56 CA2d 153, 156, 132 P2d 520 (release). See also *Gregory v Hamilton* (1978) 77 CA3d 213, 217, 142 CR 563 (release).

If the issue proposed to be tried separately is actually an attack on an element of the plaintiff's claim rather than a special defense, then CCP §597 is inapplicable. See, *e.g., Meyer Koulish Co. v Cannon* (1963) 213 CA2d 419, 430, 28 CR 757. Of course, severance under other statutes, such as CCP §1048(b) or §598, may nonetheless be attainable.

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§43.80 3. Proper But Improvident Joinder of Parties (CCP §379.5)

When parties have been joined under CCP §378 (permissive joinder of plaintiffs) or CCP §379 (permissive joinder of defendants), CCP §379.5 authorizes the court to make such orders as may appear just to "prevent any party from being embarrassed, delayed, or put to undue expense," including an order providing for separate trials. See *Landau v Salam* (1971) 4 C3d 901, 908, 95 CR 46; *Anaya v Superior Court* (1984) 160 CA3d 228, 233, 206 CR 520. See generally Fed R Civ P 20(b).

The purpose of CCP §379.5 is to avoid the confusion and prejudice that may result when a proper joinder would lead to the joint trial of claims involving highly complex issues or issues that are predominantly dissimilar. See *Westphal v Westphal* (1943) 61 CA2d 544, 548, 143 P2d 405.

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§43.81 C. Relationship Between CCP §§1048(b) and 598

At this time, the relationship between CCP §§1048(b) and 598 is uncertain. Although CCP §598 was retained in 1971, when CCP §1048 was amended, because it included useful procedural details (Leg Comm Comment to 1971 Amendment to CCP §1048), it then merely allowed liability to be tried before certain other issues (principally damages). It is unclear whether, when §598 was broadened in 1977, the desirability of extending certain of its provisions (such as its timing requirements) to virtually all situations covered by §1048(b) was considered. Because there no longer appears to be any meaningful distinction between the "separate trials" mentioned in §1048(b) and the successive trials discussed in §598, the statutes seem to overlap substantially.

PRACTICE TIP: To be safe, until the situation is clarified, a party moving for severance under CCP §1048(b) should comply with the special timing requirements of CCP §598.

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§43.82 D. Relationship Between California Statutes and Federal Rules

The portion of the 1972 version of CCP §1048 dealing with severance was cited in the Advisory Committee Note to the original version of Fed R Civ P 42 as an example of state statutes or rules authorizing severance. The current version of CCP §1048(b) was modeled after Fed R Civ P 42(b) and contains much of the same language. The only difference is that, where Rule 42(b) uses the words "any claim, cross-claim, counter claim, or third party claim," CCP §1048(b) uses the words "any cause of action, including a cause of action asserted in a cross-complaint." There is no reason to believe that this distinction in nomenclature makes a difference. Moreover, one purpose of the 1971 amendment of §1048 was to make it conform more closely to the substance of Rule 42. Leg Comm Comment to 1971 Amendment to CCP §1048. Therefore, federal decisions interpreting Fed R Civ P 42(b) should be highly persuasive authority in the absence of preexisting contrary California case authority. In addition, the large body of published federal trial court decisions is a rich source of experience and analysis that should not be overlooked.

In the federal courts, separate trials ordered under Fed R Civ P 42(b) or 20(b) must be distinguished from the complete severance of actions authorized by Fed R Civ P 21. The former are still considered to be one action and to result in one final judgment, even when they are separated for pretrial proceedings as well as for trial. Claims severed under Rule 21, by contrast, become independent actions that result in separate judgments. See 9 Wright & Miller, Federal Practice and Procedure §2387 (3d ed 1998).

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E. Judicial Attitude Toward Severance

§43.83 1. General Considerations

Courts may be reluctant to order severance unless the movant demonstrates that severance will reduce expense, confusion, or prejudice. See, *e.g., Alabama v Blue Bird Body Co.* (5th Cir 1978) 573 F2d 309, 318 (separation of issues is not usual course that should be followed). Some courts feel that, as a rule, a single trial of all claims and issues is more efficient. See, *e.g., McCrae v Pittsburgh Corning Corp.* (ED Pa 1983) 97 FRD 490, 492 (referring to general principle that single trial tends to lessen delay, expense, and inconvenience to all parties). There is a willingness, both in California and elsewhere, to experiment with procedures in the hope of improving the speed and efficiency of adjudication without sacrificing fairness or accuracy. See, *e.g.,* Govt C §§68600-68620 (Trial Court Delay Reduction Act).

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§43.84 2. Other Factors Affecting Severance

Because the proper size, configuration, and sequence of a lawsuit requires the exercise of practical judgment, flexibility should be encouraged, and the formulation of rigid criteria for the exercise of that discretionary power should be resisted. Courts should be allowed to retain the latitude to consider each case based on its individual characteristics. Nevertheless, with the benefit of experience it is possible to identify certain situations in which severance typically will or will not be useful and to identify certain factors that weigh for or against severance.

The principal statutes regulating permissive severance, CCP §§1048(b) and 598, specify the factors that the court should consider. The listed factors are whether severance will

- Further the convenience of parties and witnesses;
- Avoid prejudice;
- Encourage expedition;
- Promote economy; and
- Serve the ends of justice.

See also *Martin v Bell Helicopter Co.* (D Colo 1980) 85 FRD 654, 658 (listing 10 factors to consider under Fed R Civ P 42(b)). Although the factors listed in §§1048(b) and 598 differ in some respects and overlap in others, as a practical matter the same factors will be considered regardless of whether severance is sought under §1048(b) or §598.

The factors identified in CCP §§1048(b) and 598 are disjunctive and need not all be present to justify severance; any one factor may suffice. See *In re Paris Air Crash of Mar. 3, 1974* (CD Cal 1975) 69 FRD 310, 319. For example, severance may be ordered to avoid prejudice even if efficiency is sacrificed. Because of the overlap among the factors listed in §§1048(b) and 598, they may be grouped as shown in §§43.85-43.87.

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§43.85 a. Promote Efficiency

Efficiency probably is the most influential factor. Even when severance is ordered primarily for other reasons, courts typically ask whether the proposed severance will result in more efficient use of both private and judicial resources. Experience shows that severance tends to promote efficiency in the following situations, among others:

- Resolution of one issue (such as a special defense) is likely to dispose of the entire case, at least for one or more parties. See *Bedolla v Logan & Frazer* (1975) 52 CA3d 118, 135, 125 CR 59.
- Adjudication of a hotly disputed claim or issue is likely to facilitate settlement of the remainder of the controversy.
- One claim or issue may be quickly resolved, while the others will require lengthy discovery and trial. See, *e.g., Gionis v Superior Court* (1988) 202 CA3d 786, 248 CR 741.
- One of several coplaintiffs or codefendants wishes to pursue a different strategy from that of the other plaintiffs or defendants. See *City of Oakland v Darbee* (1951) 102 CA2d 493, 496, 227 P2d 909.
- Some parties are deeply involved in certain claims, but not at all involved in others. See *Bratton & Moretti v Finerman & Son* (1959) 171 CA2d 430, 435, 340 P2d 673.
- Early trial of certain claims or issues is likely to result in dismissal of one or more parties.
- Severance of cross-complaints among defendants for indemnity would eliminate any need for a trial on those issues because the plaintiff is unlikely to prevail.

Severance may also be used to minimize the delay or disruption of a multiparty action by automatic stay of prosecution of claims against a bankrupt or debtor in possession. See 11 USC §362. In this situation, the claims against the insolvent party may be severed and stayed, while all other claims may be allowed to proceed.

Of course, severance is not always the most efficient course. When separate trials would necessarily involve significant duplication of evidence or recalling numerous witnesses, it may be inadvisable. Gains in efficiency that might result from severance must be balanced against the inconvenience and additional expense that would be incurred if the parties were required to present the same evidence twice or recall witnesses twice. See, *e.g., Lowe v Philadelphia Newspapers, Inc.* (ED Pa 1984) 594 F Supp 123, 125 (denying motion to sever because numerous witnesses, including medical experts, would be called twice).

EXAMPLE: Even though separate trials of liability and damages are fairly routine, it was held to be an abuse of discretion to sever liability from damages when the plaintiff claimed that there was inadequate consideration for a release because she would need to show the extent of her injuries to establish the invalidity of the release. *Cohn v Bugas* (1974) 42 CA3d 381, 385, 116 CR 810. Similarly, it may be inappropriate to order severance when a cause of action is based on allegations of conspiracy, partnership, or joint venture. See *Adams Mfg. & Eng'g Co. v Coast Centerless Grinding Co.* (1960) 184 CA2d 649, 655, 7 CR 761.

Sometimes, severance alone is not enough to maximize efficiency, and a more creative solution must be sought. See, *e.g., Martin v Bell Helicopter Co.* (D Colo 1980) 85 FRD 654 (innovative use of consolidation, severance, and multiple juries to resolve numerous actions to which different states' laws were applicable).

Finally, there are limits on the use of severance to promote efficiency. For example, severance of an issue that has been decided may not be ordered simply to facilitate immediate appellate review. *Armstrong Petroleum Corp. v Superior Court* (1981) 114 CA3d 732, 170 CR 767. Nor may severance be ordered in the name of efficiency if it would cause prejudice or materially reduce the accuracy of adjudication. *Baker v Waterman S.S. Corp.* (SD NY 1951) 11 FRD 440, 441 ("[a] paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience of witnesses must yield thereto").

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§43.86 b. Avoid Prejudice

Prejudice under CCP §1048(b) refers primarily to the type of evidence that might unfairly persuade a jury to decide against a party.

NOTE: The kind of prejudice contemplated by §1048(b) generally does not come into play when the action is tried by the court. See *In re Paris Air Crash of Mar. 3, 1974* (CD Cal 1975) 69 FRD 310, 319.

Cognizable prejudice might result when a party tries to use its strength on one issue as a "lever" in order to obtain a favorable verdict on another.

EXAMPLE: In personal injury cases, liability and damages often are bifurcated so that a plaintiff with especially serious injuries cannot persuade a sympathetic jury to overlook a weak case on liability. See 18th Biennial Report, Judicial Council of California, p 57 (1961) (citing this as reason for adopting rule providing for separate trials of liability and damages).

In a trial against multiple defendants, some defendants may ask for severance so that a strong case against an unsympathetic defendant does not taint the other defendants. *Tri-R Sys., Ltd. v Friedman & Son, Inc.* (D Colo 1982) 94 FRD 726, 728 ("spillover effect" weighed in favor of separate trials).

Prejudice might arise when evidence that is admissible on one issue or against one party, but not another, might unfairly influence the jury's verdict. Severance may be used to address this problem. See, *e.g., Larsen v Powell* (D Colo 1954) 16 FRD 322, 323 (ordering separate trials on validity of release because evidence relating to defendant's liability insurance, which was relevant to issues relating to release, might improperly influence jury's verdict on liability and damages).

Prejudice might also occur when the difference in the value of two claims could skew the jury's decision. See *Stencel Aero Eng'g Corp. v Superior Court* (1976) 56 CA3d 978, 988, 128 CR 691 (prejudice that might result when $200 compensatory damage claim is tried with $10,000,000 punitive damage claim could be avoided by severing claims).

Another variety of prejudice that may be obviated by severance, regardless of whether the action will be tried to the court or to a jury, arises when one codefendant has delayed in filing a cross-complaint against another codefendant. In this situation, the interests of justice may dictate that the cross-complaint be severed and tried after the trial of the plaintiff's claim. See *American Home Prods. Corp. v Johnson & Johnson* (SD NY 1986) 111 FRD 448, 454. Doing so may be especially appropriate when a very late-filed cross-complaint threatens to delay an impending trial. Otherwise, the codefendants might prevent the plaintiff from bringing the action to trial within the 5-year period prescribed by CCP §583.310 because the cross-complaint rendered the action no longer at issue, and require that the at-issue memorandum be stricken and that the trial date be vacated. In *Roylance v Doelger* (1962) 57 C2d 255, 261, 19 CR 7, the court endorsed the severance of a cross-complaint under these conditions.

Similarly, when discovery relating to one portion of the action, *e.g.,* the plaintiff's claims, has been completed, but discovery relating to other aspects of the case, *e.g.,* cross-complaints, has not been finished, severance may be advisable to avoid delay in trying the plaintiff's claims. See, *e.g., Davis & Cox v Summa Corp.* (9th Cir 1985) 751 F2d 1507, 1517 (affirming severance when discovery related to complaint, but not cross-complaint, had been completed and noting that "without the severance order, the trial of the complaint issues would needlessly have been delayed for a substantial period").

Opponents of severance, usually plaintiffs, sometimes argue that separate trials will create a sterile or laboratory atmosphere in which the issues being litigated are separated from the reality of the defendants' conduct and resulting harm. That argument was rejected in *In re Bendectin Litig.* (6th Cir 1988) 857 F2d 290, in which the court observed that prejudicial sterility may result not because the jury hears evidence relating to only one part of a case, but because the jury may view the trial as an academic exercise and fail to recognize that "an important, lively human controversy" is involved. Because the trial court had instructed the jury on the importance of its duties and the human interests

involved, the appellate court concluded that trifurcation had not resulted in prejudicial sterility. 857 F2d at 316.

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§43.87 c. Simplify Case

If a case is "so complicated that a jury may be unable to assimilate all the required information," the court may attempt to simplify the jury's task by severing issues or causes of action. *Organic Chems., Inc. v Carroll Prods., Inc.* (DC Mich 1980) 86 FRD 468, 471. Such confusion can, in its extreme form, amount to a denial of due process. See, *e.g., Gwathmey v U.S.* (5th Cir 1954) 215 F2d 148, 156 (holding it was denial of due process to allow single jury to determine value of 238 separate tracts of land in eminent domain proceeding).

There are no standards as to what level of complexity will confuse a jury. Courts generally treat the likelihood of confusion as intuitively obvious. See, *e.g., In re Paris Air Crash of Mar. 3, 1974* (CD Cal 1975) 69 FRD 310, 317 ("[t]he mere statement of the foregoing number of issues, claims, third party complaints, cross claims, counterclaims, special defenses, and the number of witnesses, and the like, cannot help but lead to the conclusion that this, if ever, is a case in which the Federal Rules of Civil Procedure for separate trials … should be used to the utmost").

Severance may also enhance the accuracy of adjudication in a bench trial. Particularly in complex multiparty cases, relatively short, separate trials may assist the decision maker, whether judge or jury, to avoid fatigue and to understand more readily the evidence presented.

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XI. PROCEDURE FOR SEVERANCE

§43.88 A. Timing

Theoretically, a motion for a separate trial under CCP §1048(b) may be made at any time—even during trial. See *McLellan v McLellan* (1972) 23 CA3d 343, 354, 100 CR 258. It can be argued that delay in and of itself should not result in the denial of severance if severance would accomplish the purposes of CCP §1048(b) or other statutes, especially when other parties to the litigation were not unfairly prejudiced by the delay. As a practical matter, requesting severance as soon as possible will improve the motion's chances for success. Depending on the reasons severance is attractive, the advantages of severance may diminish with time. In addition, there are sometimes statutory and local rule deadlines that must be met.

Code of Civil Procedure §598 permits the court to order that trial of some issues precede the trial of other issues (bifurcation). The order may be made on noticed motion or on the court's own motion. If made in response to a motion, an order under §598 must be made "no later than the close of the pretrial conference in cases in which such pretrial conference is to be held, or, in other cases no later than 30 days before the trial date."

PRACTICE TIP: To meet the CCP §598 deadline, a party must file its motion at least 16 court days before that date, and earlier if the moving papers are served by mail, Express Mail, or facsimile transmission. See CCP §1005(b). Prudence dictates that the motion be made earlier, however, to allow for the possibility that the motion might be taken under submission, because §598 requires a ruling (not merely a hearing) by the close of the pretrial conference or 30 days before trial.

In *Shade Foods, Inc. v Innovative Prods. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 911, 93 CR2d 364, the court ruled that defendant insurer's in limine motion to bifurcate the trial of issues relating to its liability was timely under CCP §1048(b) despite the fact that a motion under CCP §598 would have been untimely. Note, however, that the party urging waiver on appeal had not argued in the trial court that the bifurcation motion was untimely. 78 CA4th at 911. See also *Grappo v Coventry Fin. Corp.* (1991) 235 CA3d 496, 286 CR 714 (trial court did not err under CCP §598 in acceding to party's in limine suggestion that trial be bifurcated, because CCP §1048 permits trial court to bifurcate issues on its on motion at any time).

WARNING: Note that both cases involved trial courts that had acted on a motion to bifurcate made after the CCP §598 deadline. Neither addressed the question of whether CCP §1048(b) *requires* a trial court to hear a motion to bifurcate made after the deadline. Consequently, to ensure that the motion is heard, it is safest to seek severance within the time specified by §598.

Local rules also may limit the time allowed for bringing a motion for severance. For example, the Los Angeles Superior Court requires the parties to be prepared to discuss bifurcation at the first case management conference. Los Angeles Ct R 7.9(b)(1). See Sacramento Ct R 2.02(B) (motion for severance shall be made promptly).

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§43.89 B. Motion Made by Party or on Court's Own Motion

Severance may be ordered on the motion of a party or on the court's own motion. See, *e.g.,* CCP §§597-598 (permissive severance), 597.5 (mandatory severance).

Severance may be ordered despite an earlier order of consolidation. *Seidell v Tuxedo Land Co.* (1934) 1 CA2d 406, 409, 36 P2d 1102. In addition, the court may order severance despite the objections of some, or even all, of the parties. When all parties oppose severance, however, the court should proceed with caution.

PRACTICE TIP: If severance is identified by a party as being either highly desirable or highly undesirable, care should be taken to ensure that the reasons for or against severance can be described in detail on every occasion when the subject may be raised, *e.g.,* a trial-setting conference, disposition, or pretrial conference. If counsel is not prepared to make a persuasive showing, an adverse decision might be rendered that could prove difficult to change. When severance is ordered at a trial-setting conference or at the hearing of an unrelated matter on the court's own motion, a party opposing severance should be careful to make an adequate record of its objection in order to preserve the issue for appeal.

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§43.90 C. Stipulation to Severance and Proposed Order

If all parties agree that certain claims or issues should be severed, they may prepare a combined stipulation and proposed order to that effect and present it to the court. See *Plaza Tulare v Tradewell Stores, Inc.* (1989) 207 CA3d 522, 254 CR 792 (parties agreed to separate trials on liability and damages during settlement conference). Because court approval is required, the parties generally file a joint motion or one party files a motion in which the others join.

The stipulation and proposed order should specify the claims or issues to be severed, explain the sequence in which the claims or issues will be tried, state whether there will be a partial stay of discovery, and clarify whether the issues will be tried before the same jury or separate juries.

WARNING: Care should be taken in drafting the stipulation and proposed order because the provisions will be difficult to set aside. *Cohn v Bugas* (1974) 42 CA3d 381, 392, 116 CR 810 ("[i]t is up to the parties to state a stipulation clearly and properly … and a party will not be heard to complain later if it is determined that by his own carelessness in the choice of words he did not state what he now says he really meant to say"), quoting *Bemer v Bemer* (1957) 152 CA2d 766, 771, 314 P2d 114.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.91 D. Preparing Motion for Severance

§43.91 D. Preparing Motion for Severance

Although none of the severance statutes explicitly requires it, severance should usually be sought by a noticed motion. Sometimes severance is ordered on the court's own motion or on the basis of an informal oral motion, but most courts do not favor informal oral motions for severance, so that approach is not recommended.

A party seeking severance by a written motion must file a notice of motion identifying the issues or claims to be severed and stating the reasons severance will promote efficiency, fairness, and accuracy. The notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order. The first page must specify immediately below the case number the date, time, and location, if ascertainable, of the hearing, the name of the hearing judge, if ascertainable, the nature or title of any attached or concurrently filed document, the date of filing of the action, and the trial date, if set. Cal Rules of Ct 3.1110(a)-(b).

The notice of motion must be accompanied by a memorandum in support of the motion. Cal Rules of Ct 3.1112(a), 3.1113(a). See chap 12 on memorandums. It is essential that a party seeking severance define with precision in the memorandum the claims or issues to be tried in each of the separate trials. Opponents of severance invariably argue that the claims or issues are hopelessly intertwined, and that severance will result in unfairness, discovery disputes, or duplication.

In seeking severance, consideration should be given to submitting, along with the notice of motion and supporting memorandum, declarations that establish the relevant facts. For example, in arguing in favor of severance on the ground that a preliminary trial on a claim or issue is likely to obviate the need for a subsequent trial of more complex issues, it is important to demonstrate to the court through declarations that the movant is likely to prevail on the issue to be tried first. Similarly, if the avoidance of prejudice or confusion is the reason for seeking severance, detailed declarations that demonstrate a real danger of prejudice or confusion should be submitted. *Tri-R Sys., Ltd. v Friedman & Son, Inc.* (D Colo 1982) 94 FRD 726, 728 (denying severance and stating that mere possibility of some prejudice does not justify separate trials when such prejudice is not substantial and there are strong countervailing considerations of economy).

PRACTICE TIP: The attorney should offer an explanation in the memorandum on why other measures, *e.g.,* cautionary instructions, would not suffice.

Finally, in seeking severance, submission of a stipulation or proposed order describing in detail the nature of the severance, the sequence of the separate trials, and the like, is advisable. For one thing, it will assist the court in assessing exactly what the consequences of severance will be. For another, it will give the court confidence that the consequences of severance have been carefully considered and that the matter will proceed smoothly if severance is ordered.

The original of the notice of motion, declaration, memorandum, and proposed order must be filed with the court and copies must be served on counsel for each party. For further discussion, see chap 12 (format of papers), chap 18 (service). Sample forms are in §§43.106-43.108.

The motion may be set for a hearing as described in CCP §§1005 and 1010-1013(a) (which generally require that notice be given at least 16 court before the hearing, with additional time if the notice is served by mail), or it may be heard at the pretrial or trial-setting conference. Local rules should be consulted to learn the procedures for obtaining a hearing date and to identify the department in which the motion will be heard.

NOTE: In deciding whether to move to sever one part of an action (or to oppose severance, if the motion is made by another party), counsel should keep in mind that severance may affect the jurisdictional classification of the case if the amount in controversy of the severed claim is $25,000 or less. See *Omni Aviation Managers, Inc. v Municipal Court* (1976) 60 CA3d 682, 684, 131 CR 758 (under former law, severance of cross-complaint required transfer of remaining claim to municipal court, because it was below threshold for superior court jurisdiction). For discussion of trial court unification and limited civil cases, see chap 6.

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§43.92 E. Opposing Severance

In deciding whether to oppose severance, the practical implications should be thought through carefully. For example, plaintiffs often move to sever the complaint from any cross-complaints to expedite trial of their claims. But if the defendant's cross-claim is more valuable than the plaintiff's claim, severance might also benefit the defendant by enabling it to present its case first during a separate trial on its cross-claim. Similarly, plaintiffs usually oppose motions for the separate trial of special defenses. But it might be advantageous to all parties to resolve a relatively narrow, potentially dispositive issue first.

A party opposing a motion for severance must file a memorandum in opposition to the motion and must serve copies on counsel for all other parties. On opposing motions, see chap 12.

Consideration should be given to filing one or more declarations in opposition to the motion, together with the memorandum in opposition, to supply the factual basis for arguments that severance will result in prejudice or inefficiency.

A party opposing severance should be prepared to show either in the memorandum in opposition, or in declarations, that severance will produce no affirmative benefits, and will in fact actually hinder an orderly resolution of the lawsuit. Facts should be presented to demonstrate that the claims or issues are so interrelated that they cannot be clearly separated, that separate trials will cause undue delay or involve duplicative presentation of evidence, or that the jury will be confused if the "story" behind the lawsuit is presented piecemeal instead of all at once. An opponent of severance might offer alternatives (*e.g.,* cautionary instructions to the jury) designed to obviate any prejudice or confusion that might otherwise result if severance were denied.

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§43.93 F. Diagnostic Questions

Answers to the following questions may assist counsel in evaluating whether to seek severance in a particular case:

1. Is severance desirable?

2. What are the tactical advantages and disadvantages of severance?

3. Would a related device (*e.g.,* demurrer, order regulating the order of proof) be more advantageous?

4. Does a mandatory severance statute apply?

- **Statute of limitations defense in a medical malpractice action (CCP §597.5)**
- **Punitive damages claims (CC §3295(d))**
- **Separable issues of law (CCP §592)**
- **Unconscionability (CC §1670.5)**
- **Consolidated eminent domain proceedings (CCP §1260.020)**
- **Custody of a minor child (Fam C §3023(b))**

5. Does the general permissive severance statute (CCP §1048(b)) apply?

6. Does a specific permissive severance statute apply?

- **Special defense (CCP §597)**
- **Liability and damages (CCP §598)**
- **Improvident joinder (CCP §379.5)**

7. If severance is not mandatory, would it be appropriate?

- **To promote efficiency**
- **To avoid prejudice**
- **To improve the accuracy of adjudication**

8. How should the proceeding be structured?

9. Which claims or issues should be tried first?

10. Should there be a partial stay of discovery?

11. Should the separate trials take place before the same jury or different juries?

12. What would be the most appropriate scope of severance?

- **Complete severance**
- **Separate trials**

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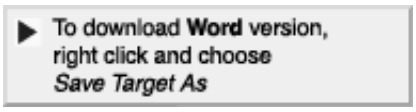
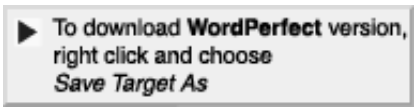
Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.94 G. Checklist: Procedure for Motion for Severance

§43.94 G. Checklist: Procedure for Motion for Severance





Moving Party

- Decide whether motion to sever is desirable and preferable to available alternatives (see §§43.63-43.68)
- Determine whether to seek stipulation (see §43.90)
- Prepare motion, if stipulation not obtained (see §43.91)
- Notice of motion
- Supporting memorandum
- Declaration(s)
- Proposed order
- Serve and file motion; set it for hearing

Opposing Party

- Decide whether to oppose severance (see §43.92)
- Prepare opposing papers
- Memorandum in opposition
- Declaration(s)
- Serve and file opposing papers

Posthearing Procedure

Losing Party

- Seek writ before trial (see §43.99)
- After trial:
- Motion for new trial
- Motion for judgment notwithstanding the verdict
- Appeal (see §43.100)

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XII. CONSEQUENCES OF SEVERANCE

§43.95 A. Priority of Severed Actions, Claims, or Issues

Generally, statutes requiring severance prescribe the order in which claims or issues must be tried. See, *e.g.,* CCP §§592, 597.5. In addition, CCP §598 requires that, if a separate trial is to be held on more than one issue, any separately tried special defenses must be tried first. Similarly, certain mixed questions of law and fact regarding liability must be decided by the court before damages issues may be submitted to the jury. See, *e.g., Orpheum Bldg. Co. v San Francisco Bay Area Rapid Transit Dist.* (1978) 80 CA3d 863, 869, 146 CR 5 (issue of substantial impairment of access in inverse condemnation action).

A court ordering permissive severance usually has latitude to decide which claims or issues will be tried first. See CCP §598. The sequence of the separate trials is often a key element in deciding whether to have separate trials at all. Sometimes the answer is obvious, *e.g.,* when the reason for severance is that resolution of a narrow issue may eliminate a party or the need for a lengthy trial on other, more complex issues. Similarly, when a case in which a jury has been demanded presents both legal and equitable claims or defenses, the court may try the equitable issues first (either without the jury, or with an advisory jury). If the determination of the equitable claims or defenses is dispositive of the nonequitable issues, then the parties and the court are spared the added burden and expense of a jury trial. *Raedeke v Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 671, 111 CR 693.

NOTE: Federal decisions say that the Seventh Amendment right to trial by jury may require legal issues to be tried first, with the jury's factual findings being binding on the court when it later determines equitable claims. See *Dairy Queen, Inc. v Wood* (1962) 369 US 469, 8 L Ed 2d 44, 82 S Ct 894; *Beacon Theatres, Inc. v Westover* (1959) 359 US 500, 3 L Ed 2d 988, 79 S Ct 948.

Because California courts have sometimes interpreted Cal Const art I, §7 differently from federal courts' interpretation of US Const amend VII, the precedential value of federal decisions is uncertain. See *Rankin v Frebank Co.* (1975) 47 CA3d 75, 91, 121 CR 348.

Given a choice, courts generally attempt to try the less complex issue first, especially if there is a chance that the simpler issue will dispose of the remaining claims or that the parties will settle after the simpler issue is resolved. This method has sometimes appropriately has led to a defendant's cross-claim being tried before the plaintiff's claim is tried. Other matters that might be reserved for subsequent disposition include claims or issues that would involve disclosure of confidential or embarrassing information and claims or issues that would require the resolution of constitutional questions.

Sometimes special circumstances make an expeditious resolution of part of the controversy particularly important for one of the parties, which may increase the desirability of severance or suggest that the issues should be tried in one sequence rather than another. There is no reason the court should be precluded from taking such special circumstances into account if they are properly substantiated. Good sense dictates that, when a case involves questions vital to the public interest, those questions should be severed and resolved first when reasonably possible.

"Reverse" bifurcation should also be considered. It is easy to imagine cases in which the damages issue could be tried quickly and would likely dispose of the litigation (*e.g.,* when there is substantial doubt as to whether the plaintiff could prove any damages), but the liability issues would require a lengthy trial. In such instances, an early separate trial on damages makes sense.

Although the court's discretion to determine the sequence in which issues will be resolved is broad, it is not boundless. For example, in *Home Sav. & Loan Ass'n v Superior Court* (1974) 42 CA3d 1006, 117 CR 485, the court held that it was an abuse of discretion for the trial court to sever and try the issue of liability before certifying a class and notifying the absent class members. Although severance might otherwise have been appropriate, the sequence made it possible for potential class members to decide whether to join the class after liability issues had been determined, thus subjecting the defendant to an adjudication that would bind it if it lost, but that would have no preclusive effect against potential class members if it won. 42 CA3d at 1011.

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§43.96 B. Stay of Discovery

In its discretion, a court may order a stay of discovery on claims or issues to be tried later. In some cases, a stay of discovery will benefit the parties by allowing the first issue or claim to proceed to trial more rapidly and by eliminating the need to respond to potentially burdensome discovery requests relating to issues that will never be tried. See *Technitrol, Inc. v Digital Equip. Corp.* (ND Ill 1973) 62 FRD 91, 92. But in other cases, an order staying discovery would lead only to inefficient discovery requests, undue delay between the first and second trials, and increased judicial involvement in motions for protective orders and motions to compel discovery. See *White Chem. Corp. v Walsh Chem. Corp.* (WD NC 1987) 116 FRD 580, 582 (denying bifurcated discovery despite bifurcating trial); *Tillery v Lynn* (SD NY 1985) 607 F Supp 399, 402 (refusing to stay discovery because it would unduly delay second trial). Moreover, if the resolution of the claims or issues to be tried first would be a lengthy process, a stay of discovery might reduce the quality of justice if documents are lost or memories fade.

An additional consideration is that staying discovery on issues or claims to be tried later renders it impracticable to have the same jury participate in both trials. Although use of the same jury is seldom necessary, it is often viewed as desirable. See, *e.g., Naxon Telesign Corp. v GTE Info. Sys.* (ND Ill 1980) 89 FRD 333, 341 (refusing to stay discovery because allowing time for discovery between first and second trials would make it impossible for same jury to consider both issues). When, however, the issue to be tried first is narrow, a stay of discovery on other matters can spare the parties enormous effort and expense. Similarly, if one purpose of ordering severance is to achieve prompt disposition of a hotly contested claim or issue to facilitate the settlement of the other claims or issues, it may be desirable to allow a lapse of time between the two trials so that renewed negotiations can be undertaken. This too may render use of the same jury impracticable.

In deciding whether to stay discovery, the court should consider whether a second trial is likely, whether postponing discovery would substantially delay the second trial, and whether there are too many common or overlapping facts to make a stay of discovery manageable. If discovery on deferred issues or claims is to be stayed, the court should make certain that the discovery permitted to proceed is not so truncated as to prevent one or more parties from obtaining information necessary for a full presentation of the issue or claim to be tried first.

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§43.97 C. Same Jury or Different Juries

When severance is ordered in a case to be tried to a jury, CCP §598 gives the court discretion to hold the second trial "before the same or another jury." Similarly, CCP §§597 and 597.5 do not require that special defenses, *e.g.,* limitations, be tried by different juries. *Gonzales v Nork* (1978) 20 C3d 500, 506 n4, 143 CR 240. Although CCP §1048(b) is silent on the question, the Leg Comm Comment to the 1971 Amendment to CCP §1048 says that §598 contains "useful procedural details" that continue to apply. Accordingly, if a special defense is rejected, the same jury may proceed to decide the remaining issues. Consistent with this principle, it has been held that a trial on special defenses is not a "previous trial" under former CCP §602(5) (providing that jurors participating in a previous trial between the same parties on the same cause of action are subject to challenge or cause) because the trial of an action is not complete until all issues in the action have been resolved. *Gonzales v Nork, supra.*

NOTE: A different rule applies, however, when bifurcated trials are held under CC §3295(d). In 1987, §3295(d) was amended to require that evidence of a defendant's financial condition be presented for a decision on punitive damages to "the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression or fraud" when issues of liability and punitive damages are bifurcated. *Medo v Superior Court* (1988) 205 CA3d 64, 251 CR 924 (held that §3295(d) prohibits bifurcation that would result in different juries trying issues of liability and punitive damages when jury improperly discharged prematurely, but also held that defendant had waived right to object so plaintiff not required to retry liability and compensatory damages). Section 3295(d) does not require a retrial on all issues when only the punitive damages portion of a judgment is reversed. *Torres v Automobile Club of S. Cal.* (1997) 15 C4th 771, 63 CR2d 859.

Holding all trials before the same jury minimizes the duplicative presentation of evidence, saves the time that would be consumed by conducting two voir dires, and eliminates the risk that different juries would make inconsistent factual findings. See 9 Wright & Miller, Federal Practice and Procedure §2391 (3d ed 1998). Use of the same jury can create problems, though. For example, some jurors may recognize that, if they find for the defendant on a special defense or against the plaintiff on liability, their task will be completed. Moreover, if discovery on issues to be tried later is stayed, it will rarely be possible to keep the jury while the parties prepare for the second trial. The longer the delay between successive trials, the greater the risk that the jurors will either forget what evidence was presented at the first trial or become unavailable.

Use of different juries may also be more efficient. If different juries are used, the court may commence trial in another action while the jury is deliberating. When the jury reaches a verdict, the rest of the case can be set for trial, if necessary, at a time convenient for all parties and the court. Therefore, the court must balance the advantages of trying the case before the same jury, including any possible constitutional problems (discussed in §43.66), against the advantages to be gained by staying discovery.

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§43.98 D. When Posttrial Motions May Be Made on Severed Actions and Issues

Generally, a court may not issue a final decision for the purposes of posttrial motions and appeal until all issues and causes of action have been resolved. See *Bank of America v Superior Court* (1942) 20 C2d 697, 701, 128 P2d 357 ("there can be but one judgment in an action no matter how many counts the complaint contains"). Thus, a party generally may not move for a new trial or a judgment notwithstanding the verdict until the entire controversy is resolved. When separate trials have been held, however, these principles are modified. See CCP §§578-579, which explicitly recognize that either one or more judgments are possible, and see CCP §§597-598. See also Leg Comm Comment to 1971 Amendment to CCP §1048: "Section 1048 does not deal with the authority of a court to enter a separate final judgment on fewer than all the causes of action or issues involved in an action or trial.… This question is determined primarily by case law, and Section 1048 leaves the question to case law development."

If an early trial of a special defense disposes of all claims between one plaintiff and one defendant, a separate judgment should be entered reflecting that decision, even if the plaintiff has claims against other defendants that will proceed to trial. *People v Rath Packing Co.* (1978) 85 CA3d 308, 337, 149 CR 431. Similarly, CCP §579 permits the court presiding over an action against several defendants to enter judgment against one or more while allowing the action to proceed against the others. See generally *Westphal v Westphal* (1943) 61 CA2d 544, 549, 143 P2d 405 (construing statute not to authorize entry of separate judgments against fewer than all plaintiffs). This rule is limited to situations in which all claims or issues involving a particular party have been resolved. See Cal Rules of Ct 3.1591, which notes that when "a factual issue raised by the pleadings is tried by the court separately … no proposed judgment shall be prepared until the other issues are tried.… Any motion for a new trial following a bifurcated trial shall be made after all of the issues are tried." See also *Evans v Horton* (1953) 115 CA2d 281, 287, 251 P2d 1013 (judgment may be entered for defendant only when all claims against defendant have been resolved on basis of special defense).

Of course, when a special defense or an essential element of a claim is tried first, and the plaintiff loses, none of the remaining issues should be tried, and judgment should be entered for the defendant. See, *e.g.,* CCP §§597-598; *Rath Packing Co.,* 85 CA3d at 337. In such instances, the initial trial concludes the action, at least pending the outcome of any appeal. Accordingly, the court may entertain the plaintiff's motion for judgment notwithstanding the verdict even though, if the defendant had lost, the court could not entertain such a motion by the defendant. *Meyser v American Bldg. Maintenance, Inc.* (1978) 85 CA3d 933, 936, 149 CR 808. These special rules established by CCP §§597-598 apply only when separate trials are held. *Zisk v City of Roseville* (1976) 56 CA3d 41, 48, 127 CR 896.

For further discussion of when a judgment is considered to have occurred for purposes of bringing posttrial motions, see California Trial Practice: Civil Procedure During Trial §§25.7 (judgment notwithstanding the verdict), 25.25 (new trial) (3d ed Cal CEB 1995).

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XIII. APPELLATE REVIEW OF SEVERANCE ORDERS

A. Review of Orders Granting or Denying Severance

§43.99 1. Prejudgment (Writ)

An order granting or denying a motion to sever is not directly appealable. CCP §§904.1-904.2. An appellate court may, however, issue a writ of mandate compelling the trial court to sever a claim or issue in appropriate circumstances. *Gionis v Superior Court* (1988) 202 CA3d 786, 248 CR 741. Similarly, a writ of prohibition may issue to restrain a court from severing an issue or claim in excess of its statutory authority. *Cook v Superior Court* (1971) 19 CA3d 832, 834, 97 CR 189; *Home Sav. & Loan Ass'n v Superior Court* (1974) 42 CA3d 1006, 1015, 117 CR 485.

For further discussion of writs of mandate and prohibition, see California Civil Writ Practice (4th ed Cal CEB 2008).

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§43.100 2. Postjudgment (Appeal)

An order granting or denying severance may be appealed along with other issues in a case after a judgment has been entered. To the extent that such an appeal is based on an argument that the ruling resulted in inefficiency, it probably is doomed to failure. Any inefficiency that resulted from the ruling would most likely be overshadowed by the expense and inconvenience of a retrial. Accordingly, postjudgment appeals of rulings regarding severance must typically be based on a persuasive showing of prejudice or factfinder confusion.

For discussion of when a judgment has occurred for purposes of taking an appeal, see §43.102.

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§43.101 3. Scope of Review

Because of the practical, fact-oriented character of severance, the discretionary power to order severance is necessarily broad, and orders granting or denying severance will not be set aside except for an abuse of discretion. See, *e.g., National Elec. Supply Co. v Mount Diablo Unified Sch. Dist.* (1960) 187 CA2d 418, 421, 9 CR 864. Regardless of the method of review, the scope of review is the same. As a practical matter, however, if the merits have been tried, a strong showing of prejudice probably will be necessary to obtain a reversal.

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§43.102 B. Appeal of Judgment on Merits of Less Than All Claims

Obviously, if the claims or issues tried first dispose of the entire action, a final judgment may be entered and an appeal may be taken immediately. A more interesting question is presented when the first trial did not dispose of the entire action, but one or more judgments were entered for particular parties or claims. This situation has been aptly described as involving "the most difficult problems in the field of appellate procedure." *National Elec. Supply Co. v Mount Diablo Unified Sch. Dist.* (1960) 187 CA2d 418, 421, 9 CR 864. See California Civil Appellate Practice §§3.20-3.21, 3.24 (3d ed Cal CEB 1996). Accordingly, its mysteries can be only briefly addressed here.

A judgment in a case with more than one party that resolves all issues as to one or more parties may be treated as a final judgment even when issues remain to be resolved between the other parties. *Johnson v Hayes Cal. Builders, Inc.* (1963) 60 C2d 572, 35 CR 618. Similarly, an order that may be amended so that it is converted into a judgment that encompasses all controverted issues may be treated as a valid premature appeal from that judgment. *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 740, 29 CR2d 804; *Shepardson v McLellan* (1963) 59 C2d 83, 27 CR 884. However, an appeal may not be taken from a judgment that does not dispose of all causes of action between the parties, even if the causes of action disposed of by the judgment "have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." *Morehart,* 7 C4th at 743, disapproving *Schonfeld v City of Vallejo* (1975) 50 CA3d 401, 123 CR 669. See also *Nerhan v Stinson Beach County Water Dist.* (1994) 27 CA4th 536, 33 CR2d 10 (applying *Morehart* to dismiss appeal of dismissal of writ of mandate when action for damages between parties still pending).

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XIV. FORMS

A. Consolidation

§43.103 1. Form: Notice of Motion to Consolidate Actions or Issues

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO CONSOLIDATE**
	)	_ _[*ACTIONS/ISSUES*]_ _;
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*SUPPORTING MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S);*]_ _
	)	_ _[*PROPOSED ORDER*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §1048 for an order consolidating these actions for** _ _[*all purposes/trial of the following issues:* _ _[*List issues*]_ _]_ _**. The grounds for issuance of this order are:**

1. The actions to be consolidated, the named parties, the parties who have appeared, and attorneys of record for each action are as follows: _ _[*List captions of cases, with lowest caption number listed first, named parties, parties who have appeared, and attorneys of record for each case*]_ _**.**

2. _ _[*Both/All*]_ _ **these actions are pending before this Court;**

3. _ _[*Both/All*]_ _ **involve common issues of law and fact in that** _ _[*briefly specify*]_ _**; and**

4. Consolidation will avoid unnecessary cost and delay.

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ duplicate originals (one for each affected action); ___ copies for service (one for each party in all actions); ___ office copies.

Comment: See §43.49 (motion to consolidate), chap 12 (formal requirements for notices of motion). This form may be adapted for use when consolidation is based on a statute other than CCP §1048(a).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.104 2. Form: Declaration Supporting Motion to Consolidate Actions or Issues

§43.104 2. Form: Declaration Supporting Motion to Consolidate Actions or Issues

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**MOTION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**TO CONSOLIDATE**
	)	_ _[*ACTIONS/ISSUES*]_ _
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am _ _[*e.g., an attorney licensed to practice law in the State of California and am an* _ _[*associate/member*]_ _ *of the firm of* _ _[*specify*]_ _*, counsel of record for* _ _[*name*]_ _]_ _**.**

2. I have personal knowledge of the following facts and am competent to testify on their truth if called as a witness.

[*Set forth facts showing that consolidation is proper, e.g.*]

3. Plaintiffs in actions numbered _ _ **and** _ _ **were passengers in the automobile that collided with defendant's automobile on** _ _[*date*]_ _**, in** _ _ _ _ _ _ _ _**, California, and the primary issue in each action is liability for the collision.**

4. Defendant in each action is the same person, and consolidation will avoid unnecessary delay and costs in that the same witnesses will be called in each action to testify on the issue of liability.

5. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

Copies: Original (file with court clerk); ___ duplicate originals (one for each affected action); ___ copies for service (one for each party in all actions); ___ office copies.

Comment: See chap 12 (formal requirements for declarations). Declarations filed in support of (or in opposition to) the motion should contain sufficient facts for the court to understand and assess the following: the common issues of law or fact, the relationship of the common issues to other issues, whether consolidation will promote the efficient use of resources, whether consolidation will prejudice any party, whether consolidation is too early or too late to be of any benefit, and any other facts that might be pertinent to the court's decision in any particular case.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.105 3. Form: Order Consolidating Actions or Issues

§43.105 3. Form: Order Consolidating Actions or Issues

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER CONSOLIDATING**
vs	)	_ _[*ACTIONS/ISSUES*]_ _
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, for consolidation was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

Satisfactory proof having been made, and good cause appearing,

IT IS ORDERED that:

[*Option 1*]

1. Action No. _ _ is consolidated with Action No. _ _ for all purposes so that only one set of findings of fact and conclusions of law (if any) will be filed, and only one judgment (if any) will be entered.

[*Option 2*]

1. Action No. _ _ is consolidated with Action No. _ _ for the purpose of trying the issue(s) of _ _[*specify*]_ _ so that each action will retain its separate nature and will require the filing of separate findings of fact and conclusions of law (if any) and the entry of separate judgments (if any).

[*Option 3*]

1. Action No. _ _ is consolidated with Action No. _ _ for the purpose of discovery and pretrial motions only. _ _[*The question of whether the action should be consolidated for trial is not decided and will be addressed at a later time (if necessary)*]_ _.

[*Continue with additional provisions to implement consolidation, e.g.*]

2. A copy of this order will be filed in both actions, but all further pleadings and papers will be filed only in Action No. _ _[*insert action with lowest case number*]_ _, which will be titled _ _[*name*]_ _ vs. _ _[*name*]_ _. Each further pleading or paper filed will bear Action No. _ _[*insert master case file number*]_ _ and include cross-references to the other case numbers.

[*Add if desired to clarify effects of consolidation, e.g.*]

3. In lieu of filing an answer to the complaint in Action No. _ _, defendant considers each allegation of that complaint to be denied.

[*Continue*]

[4.]_ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party in all affected actions); ___ office copies.

Comment: See §§43.58-43.59 (orders regulating consequences of consolidation), chap 12 (use of proposed orders; formal requirements). Under CCP §1048(a), the court may make orders to avoid unnecessary costs or delay. Hence, the consolidation order should be drafted carefully to implement the consolidation.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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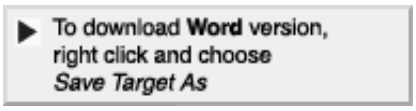
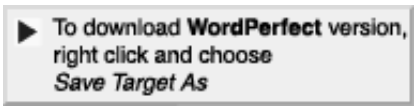
Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/ B. Severance/§43.106 1. Form: Stipulation to Sever; Order

B. Severance

§43.106 1. Form: Stipulation to Sever; Order





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**STIPULATION TO SEVER AND**
vs	)	**TRY SEPARATELY**
	)	_ _[*E.G., COLLATERAL*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*ESTOPPEL DEFENSE*]_ _; **ORDER**
_____	)	

The parties, through their respective counsel, hereby stipulate and agree _ _[*e.g., that the special defense of collateral estoppel be severed from and tried before all other causes of action or issues*]_ _**, and hereby apply to the Court for an order to that effect.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

ORDER

IT IS ORDERED that _ _[*e.g., the special defense of collateral estoppel be severed from and tried before all other causes of action or issues*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §43.90 (stipulation to severance and proposed order).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.107 2. Form: Notice of Motion to Sever Actions or Issues

§43.107 2. Form: Notice of Motion to Sever Actions or Issues

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION TO SEVER AND TRY SEPARATELY** _ _[*SPECIFY ACTIONS OR ISSUES TO BE SEVERED*]_ _ _ _[*e.g., (CCP §597)*]_ _; _ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court under** _ _[*e.g., Code of Civil Procedure §597*]_ _ **for an order** _ _[*e.g., that the special defense of statute of limitations be severed from and tried before all other issues*]_ _**. The grounds for issuance of this order are** _ _[*e.g., that the statute of limitations defense may be tried on facts that are totally different from the facts underlying the other issues in the case*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _[*date*]_ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §43.91 (motion to sever).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/43 Consolidation and Severance/§43.108 3. Form: Order Severing Actions or Issues

§43.108 3. Form: Order Severing Actions or Issues

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER SEVERING**
vs	)	_ _[*ACTIONS/ISSUES*]_ _
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _**,** _ _[*name*]_ _**, for an order** _ _[*e.g., that the issue of liability be severed from and tried before the issue of damages*]_ _ **was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

Satisfactory proof having been made that severance will _ _[*e.g., further convenience, avoid prejudice, be expeditious and economical, promote the ends of justice*]_ _**, and good cause appearing,**

IT IS ORDERED that:

1. _ _[*E.g., The issue of liability be severed from and tried before the issue of damages*]_ _**.**

2. _ _[*State any additional orders*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§43.91-43.92.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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44

Coordination

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I. INTRODUCTION

§44.1 A. Scope of Chapter

This chapter covers the coordination and rules of procedure for separate civil actions that share a common question of law or fact. On motion to transfer in noncomplex cases, see §§44.11-44.13. On petition for coordination in complex cases, see §§44.14-44.40. See checklist in §44.41 and forms in §§44.42-44.55.

NOTE: The coordination statute and rules of court use the title "Chairperson of the Judicial Council," which was a title given to the Chief Justice by Cal Const art VI, §6 as it read when the statute and rules were adopted. However, because §6 was subsequently amended and now refers solely to the "Chief Justice" (see *Keenan v Superior Court* (1980) 111 CA3d 336, 339 n1, 168 CR 561), that title is used throughout this chapter.

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B. Governing Law

§44.2 1. Coordination Statutes

The original coordination statutes (CCP §§404-404.9) became effective January 1, 1974. In adopting the statutes the legislature was inspired at least in part by the federal statute designed to control multidistrict, multiaction litigation. See 28 USC §1407. However, California procedure, unsuited to the disparate design of the federal court system and its unique mix of business, has developed along its own lines.

The coordination statute has been revised, effective September 23, 1996, to add a motion procedure for noncomplex actions permitting a judge to transfer an action or actions from another court to that judge's court for coordination with an action involving a common question of law or fact. CCP §403. The motion procedure greatly simplifies the process for coordinating noncomplex matters (see §44.10) that share a common question of law or fact.

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§44.3 2. California Rules of Court

California Rules of Court 3.500-3.550, adopted to implement the coordination statutes, are effective regardless of any other provision of law. CCP §404.7. The coordination rules expressly state that, to the extent that they conflict with laws applicable to civil actions generally, the rules prevail. Cal Rules of Ct 3.504(b).

As necessary, a coordination trial judge may establish any manner of proceeding that appears to conform to the statutes and rules. Cal Rules of Ct 3.504(c).

The rules defining complex cases and their designation are Cal Rules of Ct 3.400-3.403 and 3.751.

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§44.4 3. Local Rules

The local rules of court that are designated in the order appointing the trial judge apply unless otherwise provided in the California Rules of Court or by the judge. Cal Rules of Ct 3.504(d).

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§44.5 II. OVERVIEW

Civil actions pending in different courts that share a common question of law or fact may be coordinated by (1) a "motion to transfer" in noncomplex cases (CCP §403) or (2) a "petition for coordination" in complex cases (CCP §404).

A motion to transfer an action from another court for coordination must be supported by a declaration showing that the actions meet the standards for coordination of CCP §404.1 (see §44.9) and are not complex as defined by Cal Rules of Ct 3.400-3.403 and 3.751 (see §44.10), and that the moving party has made a good faith effort to get all the parties to each action to agree to the transfer. CCP §403. If the motion is granted, the court to which the action is transferred may order the cases consolidated under CCP §1048 without any other motion or hearing. CCP §403.

Typically, a petition for coordination is submitted by all plaintiffs or all defendants in an action to the Chief Justice, whom the coordination statute refers to as the "Chairperson of the Judicial Council" (see Note in §44.1). Alternatively, the presiding judge, or any party after obtaining permission from the presiding judge, may submit a petition for coordination to the Chief Justice. CCP §404. See §44.15.

The petition must be supported by a declaration showing that the actions are complex as defined by Cal Rules of Ct 3.400-3.403 and 3.751 (see §44.10) and meet the standards for coordination as specified in CCP §404.1 (see §44.9). CCP §404.

The Chief Justice may assign a "coordination motion judge" (see Cal Rules of Ct 3.501(3), (7)) to determine whether the actions are complex and, if so, whether coordination of the "included actions" (see Cal Rules of Ct 3.501(11)) in the petition is appropriate. Alternatively, the Chief Justice may authorize the presiding judge of a court to assign the matter in the same manner as in other civil actions. CCP §404. If the judge assigned under §404 decides that coordination is appropriate, the Chief Justice must assign a "coordination trial judge" (see Cal Rules of Ct 3.501(9)) to hear and rule on the "coordinated actions" (see Cal Rules of Ct 3.501(5)) at the site that the coordination trial judge finds appropriate or authorize the presiding judge of a court to assign the matter in the same manner that assignments are made in other civil cases. CCP §404.3; Cal Rules of Ct 3.541(b)(2). The coordination procedure, when applicable, is intended to govern subsequent activities without interference by any judge other than the coordination motion judge and the coordination trial judge. *Keenan v Superior Court* (1980) 111 CA3d 336, 342, 168 CR 561.

NOTE: A coordination attorney in the San Francisco office of the Administrative Office of the Courts performs administrative functions under the coordination rules at the direction of the Chief Justice. Cal Rules of Ct 3.550(a).

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§44.6 A. Cases That Have Been Coordinated

The annual reports of the Judicial Council set out in a general way the classes of litigation that have been the subject of coordination proceedings, along with related statistics. There have been some very big proceedings, *e.g.,* the "Technical Equities Cases" (Judicial Council No. 1991), involving about 600 actions, 1000 plaintiffs, and 100 attorneys and tried in a specially built courtroom in a convention center. Most proceedings, however, include only two or three actions. 1988 Annual Report, Judicial Council of California, Part II, p 11.

A register of all coordination proceedings and a file for each are maintained for public inspection by the coordination attorney at the San Francisco office of the Judicial Council. Cal Rules of Ct 3.550(b)(2).

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B. Standards for Coordination

§44.7 1. Threshold Requirement

The threshold requirement for a petition for coordination or a motion to transfer for coordination is that the actions to be coordinated be pending in different courts and share a common question of fact or law. CCP §§403-404.

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2. Test for Appropriateness

§44.8 a. General Rule

Coordination is appropriate if having one judge preside over all actions for all purposes in a selected site or sites will promote the ends of justice. CCP §404.1.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.9 b. Factors to Consider

§44.9 b. Factors to Consider

Code of Civil Procedure §404.1 requires that the following factors be considered in deciding whether coordination is appropriate:

- Whether the common question of fact or law is predominating and significant to the litigation;
- The convenience of parties, witnesses, and counsel;
- The relative development of the actions and of the work product of counsel;
- The efficient utilization of judicial facilities and staff resources;
- The calendar of the courts;
- The disadvantages of duplicative and inconsistent rulings, orders, or judgments; and
- The likelihood of settlement without further litigation if coordination is denied.

For discussion of how to apply these factors, see *McGhan Med. Corp. v Superior Court* (1992) 11 CA4th 804, 14 CR2d 264 (reversal of trial court's denial of defendants' motion to coordinate 300 or more breast implant defect cases).

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.10 C. Declaration of Complexity

§44.10 C. Declaration of Complexity

A motion for transfer and coordination (CCP §403) or a petition for coordination (CCP §404) must be supported by a declaration stating facts that show whether the actions are complex or not as defined by Cal Rules of Ct 3.400-3.403 and 3.751. See Cal Rules of Ct 3.1501.

In complex litigation, "judicial management should begin early and be applied continuously." Cal Rules of Ct, Standards of J Admin 3.10(a). A complex case may involve (Cal Rules of Ct 3.400):

- Numerous pretrial motions raising difficult or novel legal issues that will be time consuming to resolve;
- Management of a large number of witnesses or a substantial amount of documentary evidence;
- Management of a large number of separately represented parties;
- Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court;
- Substantial postjudgment judicial supervision;
- Antitrust or trade relation claims;
- Construction defect claims involving many parties or structures;
- Securities claims or investment losses involving many parties;
- Environmental or toxic tort claims involving many parties;
- Claims involving mass torts;
- Claims involving class actions; or
- Insurance coverage claims arising out of any of the types of claims listed above.

No criterion is controlling; *i.e.,* the court has discretion to decide whether a case is complex. For example, if a court has significant experience in resolving similar claims, the management of those claims may have become routine. See Cal Rules of Ct 3.400(d).

NOTE: Counsel should check for local rules on complex cases. A court may declare by local rule that certain types of cases are or are not provisionally complex. See Cal Rules of Ct 3.400(d).

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III. PROCEDURES IN NONCOMPLEX CASES

A. Motion to Transfer Action for Coordination

§44.11 1. Filing Motion

In noncomplex actions, a party may file a motion to transfer an action from another court for coordination with an action involving a common question of fact or law. CCP §403. Before filing the motion, the moving party must make a good faith effort to get all parties to each action to agree to the proposed transfer and consolidation. Cal Rules of Ct 3.500(b).

The motion must conform to the requirements for motions in civil actions generally and be supported by a declaration stating facts that show that the actions are not complex (see §44.10) and meet the standards specified in CCP §404.1 (see §44.9). The declaration must also state facts showing that the moving party has made good faith efforts to get all parties to the actions to agree to the transfer, and has notified all parties that they must disclose to the court any information they may have about other motions requesting transfer that would be affected by granting of the motion. CCP §403; Cal Rules of Ct 3.500(c). Requirements for motion papers are found in CCP §1005 and Cal Rules of Ct 311-315. On noticed motions generally, see chap 12.

Notice of the motion must be served on all parties to each action and on each court where an action is pending. CCP §403. The moving party must notify all parties of their obligation to disclose to the court any information on other transfer motions that would be affected if the motion before the court is granted. Cal Rules of Ct 3.500(c).

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§44.12 2. Findings and Order

If the motion is granted, the order must specify the reasons supporting a finding that transfer will promote the ends of justice with reference to the standards in Cal Rules of Ct 3.500(d). With the addition of a finding that the actions are not complex, the Rule 3.500(d) standards are the same as the factors specified in CCP §404.1 for determining whether coordination is appropriate. See §44.9.

The moving party must provide copies of the order to all parties to each case, to the Judicial Council, and to the presiding judge of each court from which a case is to be transferred (Cal Rules of Ct 3.500(e)) and take all appropriate action to assure that the transfer happens forthwith (Cal Rules of Ct 3.500(f)).

If the judge decides that the actions that are subject to the motion to transfer should be consolidated in another court, the judge may order the parties to file the motion in the appropriate court. Cal Rules of Ct 3.500(h).

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§44.13 B. Conflicting Court Orders

The coordination staff in the Administrative Office of the Courts will review all transfer orders and will promptly confer with the presiding judge of any courts that have made conflicting orders under CCP §403. The presiding judges must confer with each other and with the judges who made the conflicting orders in order to resolve the conflict. Cal Rules of Ct 3.500(g).

If the court determines, after a noticed hearing, that any party failed to disclose information on pending motions, the court may find that the party's failure to disclose is an unlawful interference with the processes of the court (Cal Rules of Ct 3.500(g)); the offending party may face criminal contempt sanctions under CCP §1209. See 7 Witkin, California Procedure, *Trial* §§174-188, 195 (5th ed 2008).

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IV. PROCEDURES IN COMPLEX CASES

A. Petition for Coordination

§44.14 1. Practical Considerations

Among practical considerations to be explored before filing a petition for coordination in complex cases are the following:

- To achieve more prompt and economical results, cases likely to settle should normally not be included in coordination proceedings;
- In a complex coordination case, a petitioner may lose some control over the proceeding if a lead counsel is appointed or if the procedure requires a consensus or at least the joint involvement of other parties; and
- Once into coordination, a party may not be able to get out, which may complicate settlement efforts by increasing the number of interests included as parties.

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§44.15 2. Motion in Trial Court

In most instances, all plaintiffs or all defendants in an action that they seek to have coordinated with actions pending in other courts join to petition the Chief Justice directly for appointment of a coordination motion judge. CCP §404. Occasionally, multiple parties on a side in an action cannot agree to join in a petition for coordination. In that event, a preliminary motion must be made to the presiding judge in the trial court for permission to submit a petition. CCP §404; Cal Rules of Ct 3.520(b)(1). The motion must be supported by a declaration stating the facts that show that the actions are complex, as defined by Cal Rules of Ct 3.400-3.403 and 3.751, and meet the standards for coordination of CCP §404.1. CCP §404. See §44.9.

The motion is made in the manner provided by law for motions in civil actions generally. Cal Rules of Ct 3.520(a). Requirements for motion papers are found in CCP §1005 and Cal Rules of Ct 3.1110-3.1115. On noticed motions generally, see chap 12. To provide sufficient time for a party to submit the petition for coordination, the motion may include a request for a stay (for a reasonable time not to exceed 30 court or calendar days) of all related actions pending in that court. Cal Rules of Ct 3.520(b)(3).

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§44.16 3. Contents of Petition

The petition for coordination and supporting documents must list the parties to all included actions and their attorneys, describe the status of each included action, and set out facts sufficient to establish the appropriateness of coordination. Cal Rules of Ct 3.521(a)(2), (6)-(7).

If the plaintiff is the party submitting the petition for coordination, the petition must include a statement of whether counsel has served the summons and complaint on all parties in all included actions in which the attorney has appeared. Cal Rules of Ct 3.521(a)(3).

If any other actions pending in different courts and sharing a common question of fact or law are known to the petitioner but not included in the petition, reasons must be given for not including them. If the petitioner knows of no other such actions, the petition must include a statement that that the petitioner knows of no other actions sharing a common question of fact or law. Cal Rules of Ct 3.521(a)(5).

Facts must be set out to support any request that a particular site be selected for the hearing on the petition. Cal Rules of Ct 3.521(a)(8).

A petition for coordination may include an application for an order staying proceedings in any action being considered for, or affecting an action being considered for, coordination. CCP §404.5; Cal Rules of Ct 3.515(a).

JUDICIAL PERSPECTIVE: The court will look for the basic information it needs about the included actions and parties. The central issue is whether coordination is appropriate, based on the statutory standards (see §§44.7-44.9). Counsel should not include material that is irrelevant to that issue, *e.g.,* argument on the merits of an included action.

For guidance on how a court might evaluate a petition for coordination, see *Pesses v Superior Court* (1980) 107 CA3d 117, 165 CR 680. Although that case addresses issues of remand and transfer, the factors evaluated there must also be considered in ruling on a petition for coordination.

For the complete list of items required to be included in the petition and supporting documents, see Cal Rules of Ct 3.521. For form of petition for coordination, see §44.44.

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§44.17 4. Notice of Submission of Coordination Petition

The notice of submission of a petition for coordination identifies the attorney for the petitioner and the included action to which the petitioner is a party and provides notice of the time for submitting and serving any written opposition to the petition before the hearing date. Cal Rules of Ct 3.522.

NOTE: California Rules of Court 3.522 says a notice of submission must state that any written opposition to the petition must be submitted and served at least 9 court days before the hearing date; previously, the rule was 10 calendar days. The change to 9 court days conforms Cal Rules of Ct 3.522 with Cal Rules of Ct 3.513 and 3.525-3.526, which all provide that any papers in opposition or support of the petition must be filed at least 9 court days before the hearing.

For the complete list of items required to be included in the notice, see Cal Rules of Ct 3.522. For form of notice of submission of petition for coordination, see §44.46.

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§44.18 5. Filing and Service of Documents

A notice of submission of petition for coordination and a copy of the petition for coordination must be filed in each included action. Cal Rules of Ct 3.522.

A copy of the notice of submission of petition for coordination filed in each included action and a copy of the petition for coordination and of the supporting documents must be served on each party appearing in the included action. Cal Rules of Ct 3.523.

The following items must be submitted to the Chief Justice:

- The original and one copy of the petition for coordination, with a copy of each notice of submission of petition for coordination attached to the original and to the copy of the petition. Cal Rules of Ct 3.521(a), 3.522, 3.511.
- Proof of filing of a copy of the petition for coordination and a notice of submission of petition for coordination in each included action within 5 court days after submission. Cal Rules of Ct 3.521(b), 3.522. The requirement may be met by a single inclusive declaration.
- Proof of prior service on each party appearing in each included action of copies of (a) the notice of submission of petition for coordination filed in the action, (b) the petition for coordination, and (c) the supporting documents within 5 court days after submission. Cal Rules of Ct 3.521(b), 3.523.

All papers to be submitted to the Chief Justice must be transmitted to the San Francisco office of the Judicial Council. Cal Rules of Ct 3.511. The address is:

Chief Justice of California
Chairperson, Judicial Council
455 Golden Gate Avenue
San Francisco, CA 94102-3660

Service and proof of service of papers are made in the manner provided for civil actions generally. Cal Rules of Ct 3.510. On service and proof of service of papers generally, see chap 18.

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B. Proceedings After Petition Submitted

§44.19 1. Order Assigning Coordination Motion Judge

On receipt of a petition for coordination, the Chief Justice may assign a coordination motion judge or may authorize the presiding judge of a court to assign the matter in the same manner as in other civil actions. CCP §404. It is not the practice of the Chief Justice or the coordination attorney (see Note in §44.5) to evaluate the formal adequacy of the petition.

The order assigning the coordination motion judge includes a special title and number to be used in subsequent papers and specifies a court address for transmission of all papers to be submitted to the coordination motion judge. Cal Rules of Ct 3.524(a), 3.550(c).

The petitioner must serve a copy of the order on each party appearing in an included action and send it to each court in which an included action is pending for filing in the action. Cal Rules of Ct 3.524(b).

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§44.20 a. Stay of Proceedings

In the absence of a stay order, an order appointing a coordination motion judge automatically stays the trial and entry of judgment in any included action in which the trial has not yet commenced, but does not stay pretrial or discovery proceedings. Cal Rules of Ct 3.515(i). If a broader stay is desired, it may be sought by an application included with the petition for coordination or by a separate application to the coordination motion judge at any time before a determination on the petition. As a practical matter, the automatic stay appears to adequately cover most pretrial situations, and broader stays are rarely sought.

While the stay is in effect, the 5-year period for bringing an action for trial is tolled. Cal Rules of Ct 3.515(j). See CCP §583.310. But the 5-year period is tolled only when the petition for coordination has been granted because that is when the automatic stay becomes effective. The 5-year period is not tolled while the petition for coordination is *pending*. *Gordon's Cabinet Shop v State Compensation Ins. Fund* (1999) 74 CA4th 33, 87 CR2d 541.

On stay orders in coordination proceedings generally, see CCP §404.5; Cal Rules of Ct 3.515. For form of petition including application for stay order, see §44.44. For form of separate application for stay order, see §44.47. For form of statement in opposition to petition for coordination, including opposition to stay order, see §44.49. For form of separate statement in opposition to application for stay order, see §44.48.

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§44.21 b. Peremptory Challenge of Coordination Motion Judge

A motion challenging an assigned judge under CCP §170.6 must be submitted to the assigned judge in writing within 20 days after service of the order of the specific assignment. Cal Rules of Ct 3.516; *Stone v Superior Court* (1994) 25 CA4th 1144, 31 CR2d 56. Because the coordination statutes provide for assignment of a coordination motion judge and a coordination trial judge, and the rules contemplate that these assignments may be of two different judges, the term "assigned judge" in Rule 3.516 means the judge assigned for the particular purpose. *Stone v Superior Court, supra* (motion filed within 20 days after assignment of coordination motion judge as coordinating trial judge timely).

A party that successfully challenges a summary judgment ruling on appeal may then exercise a peremptory challenge of the trial judge, notwithstanding the 20-day limitation of Cal Rules of Ct 3.516. *Jane Doe 8015 v Superior Court* (2007) 148 CA4th 489, 55 CR3d 708. For purposes of applying CCP §170.6, all plaintiffs or similar parties in the included actions constitute a side and all defendants or similar parties constitute a side. Cal Rules of Ct 3.516. Except for a successful appellant after appeal, each group is limited to one such motion. CCP §170.6(a)(3).

A motion under §170.6 challenging the coordination judge is not made untimely by the fact that the judge had previously ruled on issues in one or more of the cases before they were coordinated. *Farmers Ins. Exch. v Superior Court* (1992) 10 CA4th 1509, 13 CR2d 449 (three cases in Contra Costa consolidated with one in Los Angeles). Nor is the motion precluded by any precoordination challenges made by a party on a side, because Cal Rules of Ct 3.516 takes effect only on the filing of a petition for coordination. *Philip Morris Inc. v Superior Court* (1999) 71 CA4th 116, 83 CR2d 671.

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§44.22 2. Responding to Petition

Any party to an included action may serve and submit a memorandum and declarations in opposition to or in support of a petition for coordination at least 9 court days before the hearing for coordination. Cal Rules of Ct 3.525; Cal Rules of Ct 3.526; Cal Rules of Ct 3.513.

Because general motion practice applies to coordination proceedings (see Cal Rules of Ct 3.504), it is necessary to establish the factual basis for any ruling sought. Consequently, if other parties have not established that basis, and assuming that the ruling is important to the client, the attorney should respond to the petition for coordination.

For form of statement in opposition to petition, see §44.49. For form of statement in support of petition, see §44.50.

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§44.23 3. Summary Denial of Petition

The imminence of a trial in any action otherwise appropriate for coordination may be a ground for summary denial of a petition for coordination in whole or in part. Cal Rules of Ct 3.521(d).

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/ 4. Hearing of Petition/§44.24 a. When Hearing Required

4. Hearing of Petition

§44.24 a. When Hearing Required

A hearing is required before a petition for coordination may be granted over the objection of any party and before a petition may be denied. Cal Rules of Ct 3.527(b).

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§44.25 b. Notice of Hearing

After the coordination judge assigns a hearing date for a petition for coordination, the petitioner must serve notice of the hearing on each party appearing in an included action. Cal Rules of Ct 3.527(a). The coordination motion judge also determines whether the petitioner has appropriately served the required documents regarding the proceeding on all parties entitled to them. If any party entitled to such service has not been appropriately served, the judge orders the petitioner to effect prompt service on the party. Cal Rules of Ct 3.527(a).

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§44.26 c. Who May Appear

Only the parties petitioning for coordination and those filing a response or opposition may appear at the hearing on the petition, unless otherwise permitted by the coordination motion judge for good cause. Cal Rules of Ct 3.514.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.27 d. Judge May Hear Specified Issues First

§44.27 d. Judge May Hear Specified Issues First

The coordination motion judge may order that specified issues be heard and determined first when their determination may be sufficient to dispose of the petition. Cal Rules of Ct 3.528.

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§44.28 e. Limited Evidence Permitted

No oral testimony may be presented at the hearing on the petition unless permitted by the coordination motion judge to resolve factual issues shown by the declarations to be in dispute. Cal Rules of Ct 3.514. The facts relied on must appear in declarations, answers to interrogatories, requests for admissions, depositions, or pleadings or must be judicially noticed. Cal Rules of Ct 3.514, 3.521(a)(7), (c).

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§44.29 5. Filing and Service of Order

The petitioner must file a copy of the coordination motion judge's order granting or denying the petition for coordination in each included action, and serve a copy of the order on each party appearing in an included action. Cal Rules of Ct 3.529(a).

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6. When Petition Granted

§44.30 a. Continuing Authority of Coordination Motion Judge

After a petition for coordination is granted and before a coordination trial judge is assigned, the coordination motion judge may, for good cause, make such orders as the ends of justice may require, *e.g.,* on showing of an urgent need for judicial action to preserve the rights of a party pending assignment of a coordination trial judge. Cal Rules of Ct 3.529(c).

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§44.31 b. Stay of Further Proceedings

When an order granting coordination is filed in an included action, all further proceedings in that action are automatically stayed, except as directed by the coordination motion judge. Cal Rules of Ct 3.529(b).

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§44.32 c. Designation of Appellate Court

When granting the petition, the judge assigned under CCP §404 designates the court having appellate jurisdiction if the coordinated actions are within the jurisdiction of more than one reviewing court. CCP §404.2.

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§44.33 7. Denial of Petition in Whole or in Part

The coordination motion judge may deny the petition for coordination in whole or deny it only with respect to particular included actions or severable claims within included actions. The original trial court continues to exercise jurisdiction over any severable claim that has not been ordered coordinated. Cal Rules of Ct 3.529(b).

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§44.34 8. Review by Writ

Within 20 days after service of a written notice of entry of an order granting or denying coordination, any party may petition, to any reviewing court having jurisdiction under the rules applicable to civil actions generally, for a writ of mandate. CCP §404.6; Cal Rules of Ct 3.505. See generally *Lautrup, Inc. v Trans-West Discount Corp.* (1976) 64 CA3d 316, 134 CR 348. Before the expiration of the 20-day period, the trial court may, for good cause, extend the time for one additional period not to exceed 10 days. CCP §404.6.

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C. Pretrial Proceedings

§44.35 1. Appointment of Coordination Trial Judge

After coordination is ordered, the Chief Justice either assigns a coordination trial judge or authorizes the presiding judge of a court to assign the matter in the same manner as assignments are made in other civil cases. CCP §404.3. The assigned judge may exercise all the powers over each coordinated action of a judge of the court in which the action was pending. The petitioner must file a copy of the assignment order in each coordinated action and send a copy to each party in the action. CCP §404.3; Cal Rules of Ct 3.540.

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§44.36 2. Peremptory Challenge of Coordination Trial Judge

The rules for a motion challenging a coordination trial judge under CCP §170.6 are the same as those for a motion challenging a coordination motion judge. See §44.21.

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§44.37 3. Preliminary Trial Conference

The coordination trial judge must hold a preliminary trial conference within 45 days after his or her assignment. All counsel and unrepresented parties must attend, prepared to discuss all matters specified in the order setting the conference. Counsel may serve and submit a proposed agenda and a proposed order covering such matters of procedure and discovery as may be appropriate. Cal Rules of Ct 3.541(a). The coordination trial judge manages all steps of pretrial, discovery, and trial proceedings to expedite the determination of the coordinated actions. Cal Rules of Ct 3.541(b).

Counsel preparing a proposed agenda or proposed order for the preliminary trial conference should consult both Cal Rules of Ct 3.541(a), which relates specifically to actions the coordination trial judge may take at the conference, and 3.541(b), which indicates other actions the judge might take at any time. As a practical matter, however, proposed agendas and orders are rarely submitted, except in very large proceedings. For form of proposed agenda, see §44.51. For form of proposed order, see §44.52.

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§44.38 4. Remand of Action or Claim

The coordination trial judge may remand any coordinated action or any severable claim or issue in a coordinated action to the court in which the action was pending when coordination was ordered. The remand may be ordered on the stipulation of all parties to the coordination proceeding or on the basis of evidence received at a hearing ordered on the court's own motion or that of any party to any coordinated action. Cal Rules of Ct 3.542.

Remand may be ordered over the objection of any party, however, only if the evidence demonstrates a material change in circumstances relevant to the criteria for coordination set out in CCP §404.1 (see §44.9). Cal Rules of Ct 13.542. An order for remand, unlike an order for transfer (see §44.39), removes the action, claim, or issue from the coordination proceeding. Cal Rules of Ct 3.501(15). On remand and transfer in coordination proceedings generally, see *Pesses v Superior Court* (1980) 107 CA3d 117, 165 CR 680. For form of motion for remand, see §44.53.

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§44.39 5. Transfer of Action or Claim

The coordination trial judge may transfer any coordinated action or any severable claim in a coordinated action from the court in which it is pending to another court for a specific purpose or for all purposes. The transfer may be ordered on the court's own motion or that of any party to any coordinated action. Transfer may be ordered over the objection of any party, however, only if a hearing is held, on 10 days' written notice served on all parties to the action, at which specified factors are considered by the court. Cal Rules of Ct 3.543(b). An order for transfer, unlike an order for remand (see §44.38), does not remove the action or claim from the coordination proceeding. Cal Rules of Ct 3.501(19). On remand and transfer in coordination proceedings generally, see *Pesses v Superior Court* (1980) 107 CA3d 117, 165 CR 680. For form of motion for transfer, see §44.54.

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§44.40 6. Add-on Cases

A request to coordinate an "add-on case" (see Cal Rules of Ct 3.501(2)) with the actions previously ordered coordinated is submitted to the coordination trial judge. The procedures are similar to those for the initial petition for coordination. CCP §404.4; Cal Rules of Ct 3.544. If no party files a notice of opposition within 10 days after the services of a request to add-on a case, the judge may enter an order granting or denying the request without a hearing. Cal Rules of Ct 3.544(b), (d). For form of petition to coordinate add-on case, see §44.55.

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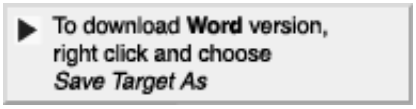
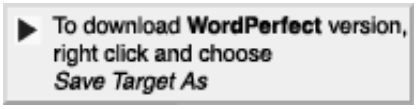
Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.41 V. CHECKLIST: PROCEDURE FOR PETITION FOR COORDINATION IN COMPLEX CASES

§44.41 V. CHECKLIST: PROCEDURE FOR PETITION FOR COORDINATION IN COMPLEX CASES





Petitioner's Initial Steps

Petitioning Party

NOTE: If all plaintiffs or all defendants in an action do not petition for coordination, a party must make a preliminary motion under CCP §404 to the presiding judge of the court for permission to submit its petition for coordination to the Chairperson of the Judicial Council (*i.e.,* the Chief Justice). Cal Rules of Ct 3.520-4.523. See §44.15.

- Prepare petition for coordination, declaration(s), and supporting memorandum
- For each included action, prepare notice of submission of petition for coordination
- File notice of submission and copy of petition for coordination in each included action
- Serve copy of notice of submission filed in each included action, and copy of petition for coordination and supporting documents, on each party appearing in that action
- Submit required items to the Chief Justice (see Cal Rules of Ct 3.511)
- Original and one copy of petition for coordination, with copy of each notice of submission attached to original and copy of petition
- Proof of filing of copy of petition for coordination and notice of submission in each included action
- Proof of service on each party appearing in each included action of copy of notice of submission filed in the action, and copy of petition for coordination and supporting documents

Proceedings After Submission of Petition for Coordination

Petitioning Party

- Serve notice of hearing date to each party appearing in an included action (Cal Rules of Ct 3.527)

If stay order requested in petition for coordination:

- Attend hearing on stay request if held

If stay order desired but not requested in petition for coordination:

- Prepare, serve, and file application for stay order, declaration(s), and supporting memorandum (Cal Rules of Ct 3.515)
- Attend hearing on stay request if held

If stay order not desired:

- Submit peremptory challenge of coordination motion judge within 20 days of assignment if appropriate (Cal Rules of Ct 3.516, CCP §170.6)
- Attend hearing on petition for coordination if held

If petition for coordination granted or denied:

- Promptly file the order in each included action and serve it on each party appearing in an included action (Cal Rules of Ct 3.529)

If petition for coordination denied in whole or in part and appellate review desired:

- Petition for writ of mandate within 20 days after service of notice of entry of order (CCP §404.6)

When coordination trial judge assigned in complex coordinated action:

- File the assignment order in each coordinated action and serve it on each party appearing in each action (Cal Rules of Ct 3.540)

Responding Party

If stay order requested by petitioner and responding party is opposed:

- Prepare, serve, and file papers in opposition at least nine court days before hearing date (Cal Rules of Ct 3.513, 3.525)
- Attend hearing on stay request if held

If responding party desires stay order not specifically requested by petitioner:

- Prepare, serve, and file application for stay order, declaration(s), and memorandum (Cal Rules of Ct 3.515)
- Attend hearing on stay request if held

If stay order not desired:

- Submit peremptory challenge of coordination motion judge within 20 days, if appropriate (Cal Rules of Ct 3.516; CCP §170.6)
- Prepare, serve, and file statement in opposition to petition for coordination or statement in support of petition for coordination and declaration(s) and memorandum at least 9 court days before hearing date (Cal Rules of Ct 3.513, 3.525)
- Attend hearing on petition for coordination if held

If appellate review of decision on petition for coordination desired:

- Petition for writ of mandate within 20 days after service of notice of entry of order (CCP §404.6)

Pretrial Proceedings After Coordination Ordered

Any Party

- Submit peremptory challenge of coordination trial judge within 20 days, if appropriate (Cal Rules of Ct 3.516; CCP §170.6)
- Serve and submit proposed agenda and proposed form of order for preliminary trial conference
- Seek remand of coordinated action or severable claim or issue, if desired (Cal Rules of Ct 3.542)
- Seek transfer of coordinated action or severable claim, if desired (Cal Rules of Ct 3.543)
- Request the coordination of add-on cases, if any (Cal Rules of Ct 3.544)

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/ VI. FORMS/ A. Coordination in Noncomplex Case/§44.42 1. Form: Motion to Transfer Action for Coordination

VI. FORMS

A. Coordination in Noncomplex Case

§44.42 1. Form: Motion to Transfer Action for Coordination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO TRANSFER**
	)	**ACTION FOR**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**COORDINATION;**
	)	**SUPPORTING**
	)	**MEMORANDUM;**
	)	**DECLARATION(S)**
	)	[*CCP §403*]
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §403 for an order transferring** _ _[*name and number of case*]_ _ **from the** _ _[*name of court*]_ _ **of California,** _ _ _ _ _ _ **County, to this Court for coordination with the actions listed in the attached declaration(s).**

The motion will be made on grounds that there are pending, in different courts of this state, noncomplex civil actions containing common questions of law or fact within the meaning of Code of Civil Procedure §404.

Any written opposition to this motion must be submitted and served at least 9 calendar days before the hearing date.

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**, on the supporting memorandum,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each party to each action and for each court in which an action is pending); ___ office copies.

Comment: California Rules of Court 3.522 provides that a notice of submission must state that any written opposition to the petition must be filed and served at least 9 calendar days before the hearing date. California Rules of Court 3.513, 3.522, and 3.525-3.526 all require that any papers in opposition or support of the petition must be filed *at least 9 calendar days* before the hearing. Thus, the deadline to be used in any notice of submission is now uniform. See §44.17.

The motion must be supported by a declaration stating facts that show that the actions are not complex and meet the standards specified in CCP §404.1. The declaration must also state facts showing that the moving party has made good faith efforts to get all parties to the actions to agree to the transfer, and notified all parties that they must disclose to the court any information they may have about other motions requesting transfer that would be affected by granting of the motion. See §44.11.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.43 2. Form: Declaration in Support of Motion to Transfer for Coordination

§44.43 2. Form: Declaration in Support of Motion to Transfer for Coordination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **(In Support of**
	)	**Motion for Transfer for**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Coordination of Actions)**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

I, _ _[*name of declarant*]_ _**, declare:**

1. I am _ _[*identify declarant, e.g., the attorney of record for (name of party)*]_ _**. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.**

2. The names of the parties to all actions for which coordination is sought, the name and address of each party's attorney of record, the complete title of each action, the title of the court in which the action is pending, the number of the action, and the status of each action, including the status of any pretrial or discovery motion or orders in that action that are known to petitioner are as follows: _ _[*Set forth specified information.*]_ _

[*Add one of the following alternatives*]

3. _ _[_ _[*The complete title of action*]_ _ *is known to the moving party to be pending in a court of this state that shares a common question of fact or law with this action. It is not included in the motion for transfer for coordination because* _ _[*state reasons*]_ _]_ _**.**

[*or*]

3. _ _[*No other action is known by petitioner to be pending in a court of this state that shares a common question of fact or law with this action.*]_ _

[*Continue*]

4. The actions meet the coordination standards specified in Code of Civil Procedure §404.1: _ _[*State facts showing that the actions meet the standards for coordination specified in CCP §404.1*]_ _**.**

5. The actions are not complex as defined by California Rules of Court 3.400-3.403, 3.751 in that: _ _[*State*

facts showing that the actions are not complex as defined by the California Rules of Court 3.400-3.403, 3.751]_ _.

6. I have made the following good faith efforts to obtain agreement to the transfer from all parties to the actions: _ _[*State facts showing good-faith efforts made*]_ _.

7. I have notified all parties of their obligation to disclose to the court any information they may have concerning any other motions requesting transfer that would be affected by the granting of this motion.

[*Add if petitioner is a plaintiff*]

[8]. I have served the summons and complaint in this action on all parties in all included actions in which I have appeared as counsel.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each party to each action and for each court in which an action is pending); ___ office copies.

Comment: A declaration must be filed in support of the motion for transfer for coordination showing the information required by Cal Rules of Ct 3.500(c) and meeting the standards for coordination specified in CCP §404.1. See §44.11.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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B. Coordination in Complex Cases

§44.44 1. Form: Petition for Coordination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**PETITION FOR**
vs	)	**COORDINATION** _ _[*AND*
	)	*APPLICATION FOR STAY*
_ _[*Name(s)*]_ _, **Defendant(s)**	)	*ORDER*]_ _; _ _[*SUPPORTING*
	)	*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S)*]_ _
	)	[*CCP §404*]

1. Petitioner _ _[*name*]_ _**, requests that the Chief Justice assign a judge to determine whether coordination of this action with the actions listed in the attached declaration(s) is appropriate.**

2. This petition is submitted under Code of Civil Procedure §404 on the following grounds set forth in Code of Civil Procedure §404.1 and by California Rules of Court 3.400-3.403, 3.751: _ _[*Specify applicable grounds*]_ _**.**

[*Add if petitioner is a plaintiff*]

[3]. Petitioner's attorneys in this action have served the summons and complaint in this action on all parties in all included actions in which they have appeared.

[*Add if not all plaintiffs or all defendants are joining in petition*]

3. The order granting the petitioner's motion under Code of Civil Procedure §404 for permission to submit this petition to the Chief Justice, which was signed by Presiding Judge _ _[*name*]_ _ **of this court on** _ _[*date*]_ _**, is attached.**

[*Add if stay order is sought*]

[4]. Pending determination of whether coordination is appropriate, petitioner requests that the coordination motion judge order a stay of the proceedings in the following actions that are _ _[*being considered for coordination/affecting an action being considered for coordination/being considered for coordination or affecting an action being considered for coordination*]_ _**:** _ _[*List by court, title, and number*]_ _**. All known related actions pending in any California court are set forth in the attached declaration. The request for the stay order is made under California Rules of Court 3.515 on the ground that the order is necessary and appropriate to effect the purposes of coordination.**

[*Continue*]

[5.] A hearing on this petition _ _[*is/is not*]**_ _ requested.**

[6.] This request is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _, *dated* _ _ _ _ _ _]_ _**, on the supporting memorandum, _ _**[*and*]**_ _ on all papers filed and records in this action _ _**[*, and on any evidence received at the hearing*]**_ _.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]**_ _**

Copies: Original and one copy (file with Chief Justice); ___ copies for service (one for each other party appearing in each included action and in any other action for which stay is sought); ___ copies for filing (one for each included action); ___ office copies.

Comment: See §§44.15-44.16. The court, title, and number in the caption are those of the action used as the vehicle for coordination. A copy of the petition filed in each included action should be attached to the notice of submission of petition for coordination. See §44.16. The petition for coordination must be supported by memorandum and declarations showing the information required by Cal Rules of Ct 3.521(a) and stating facts that show that the actions are complex, as defined by Cal Rules of Ct 3.400-3.403 and 3.751, and meet the standards for coordination specified in CCP §404.1. See §44.9.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.45 2. Form: Declaration in Support of Petition for Coordination

§44.45 2. Form: Declaration in Support of Petition for Coordination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**DECLARATION OF** _ _[*NAME*]_ _ **(In Support of Petition for Coordination of Actions)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

I, _ _[*name of declarant*]_ _**, declare:**

1. I am _ _[*identify declarant, e.g., the attorney of record for petitioner (name of party, plaintiff)*]_ _**. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them.**

[*Add if appropriate*]

2. The names of each party joining in this petition and the name and address of his or her attorney of record are as follows: _ _[*Set forth specified information*]_ _

[*Continue*]

[3]. The names of the parties to all included actions, the name and address of each party's attorney of record, the complete title of each included action, the title of the court in which the action is pending, the number of the action, and the status of each included action, including the status of any pretrial or discovery motion or orders in that action that are known to petitioner, are as follows: _ _[*Set forth specified information.*]_ _

[*Add one of the following alternatives*]

[4]. _ _[_ _[*The complete title of action*]_ _ *is known to the petitioner to be pending in a court of this state that shares a common question of fact or law with the included actions. It is not included in the petition for coordination because* _ _[*state reasons*]_ _]_ _**.**

[*or*]

[4]. _ _[*No other action is known by petitioner to be pending in a court of this state that shares a common question of fact or law with the included action.*]_ _

[*Continue*]

[5]. The actions are complex as defined by California Rules of Court 3.400-3.403, 3.751 in that: _ _[*State facts showing that the actions are complex as defined by Cal Rules of Ct 3.400-3.403, 3.751 (e.g., likely to involve numerous*

pretrial motions raising difficult or novel legal issues, or management of a large number of witnesses or a substantial amount of documentary evidence; or involve one or more of the following types of actions: antitrust or trade regulation claims, construction defect claims with many parties, securities claims, or claims involving toxic torts, mass torts, or class actions)]_ _.

[6]. The actions meet the coordination standards specified in Code of Civil Procedure §404.1: _ _[*State facts showing that the actions meet the standards for coordination specified in CCP §404.1*]_ _.

[*Add if petitioner is a plaintiff*]]

[7]. I have served the summons and complaint in this action on all parties in all included actions in which I have appeared as counsel.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original and one copy (file with Chief Justice); ___ copies for service (one for each other party appearing in each included action and in any other action for which stay is sought); ___ copies for filing (one for each included action); ___ office copies.

Comment: A declaration must be filed in support of the petition for coordination showing the information required by Cal Rules of Ct 3.521(a) and stating facts that show that the actions are complex, as defined by Cal Rules of Ct 3.400-3.403 and 3.751, and meet the standards for coordination specified in CCP §404.1. See §44.9.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.46 3. Form: Notice of Submission of Coordination Petition

§44.46 3. Form: Notice of Submission of Coordination Petition

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	**NOTICE OF SUBMISSION OF PETITION FOR COORDINATION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

PLEASE TAKE NOTICE that on _ _[*date*]_ _, a petition for coordination was submitted by _ _[*name of party*]_ _ through counsel, whose name, address, and telephone number appear above, to the Chief Justice, requesting assignment of a judge to determine whether coordination of _ _[*specify court, title, and number of action that is vehicle for coordination*]_ _ with this action and specified other actions is appropriate.

Any party who intends to oppose the petition for coordination must serve and submit written opposition to the petition at least 9 calendar days before the hearing date.

A copy of the petition for coordination and supporting documents is attached.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with clerk of court in which particular included action is pending); ___ copies for service (one for each other party appearing in included action); ___ copies for filing (two copies for Chief Justice); ___ office copies.

Comment: California Rules of Court 3.522 provides that a notice of submission must state that any written opposition to the petition must be filed and served at least 9 calendar days before the hearing date. California Rules of Court 3.513, 3.522, and 3.525-3.526 all require that any papers in opposition or support of the petition must be filed *at least 9 calendar days* before the hearing. Thus, the deadline to be used in any notice of submission is now uniform. See §44.17 (notice of submission of petition for coordination). A separate notice of submission of petition for coordination is prepared for each included action and contains the court, title, and number of the included action.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/ 4. Stay Order/§44.47 a. Form: Application for Stay Order

4. Stay Order

§44.47 a. Form: Application for Stay Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**Judicial Council Coordination**
vs	)	**Proceeding No.** _ _ _ _ _ _
	)	**APPLICATION FOR STAY**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**ORDER;** _ _[*SUPPORTING MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S)*]_ _
_____	)	

1. Pending determination of whether coordination is appropriate, petitioner, _ _[*name*]_ _**, requests that the coordination motion judge order a stay of the proceedings in the following actions that are** _ _[*being considered for coordination/affecting an action being considered for coordination/being considered for coordination or affecting an action being considered for coordination*]_ _**:** _ _[*List by court, title, and number*]_ _**. All known related actions pending in any California court are set forth in the attached declaration. The request for the stay order is made under California Rules of Court 3.515 on the ground that the order is necessary and appropriate to effectuate the purposes of coordination.**

2. This request is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** __[*, and on any evidence received at the hearing*]__**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination motion judge); ___ copies for service (one for each other party appearing in each included action and in any other action for which stay is sought); one copy for transmittal to Chief Justice; ___ office copies.

Comment: See §44.20 (stay of proceedings). If the coordination motion judge is known, the court in the caption will be the judge's court. If the judge is not known, the caption may be that of the case in which the petitioner is a party and the original and one copy of the application will be submitted to the Chief Justice. When the stay is sought by the party submitting the petition for coordination, the request may be included in the petition, making a separate application unnecessary. For form of petition including application for stay order, see §44.44.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading

paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.48 b. Form: Statement Opposing Application for Stay Order

§44.48 b. Form: Statement Opposing Application for Stay Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**Judicial Council Coordination**
vs	)	**Proceeding No.** _ _ _ _ _ _
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**STATEMENT OPPOSING APPLICATION FOR STAY ORDER; APPLICATION FOR STAY ORDER;**
	)	_ _[*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S)*]_ _

1. _ _[*Name*]_ _**, a party to** _ _[*specify court, title, and number of action*]_ _**, opposes the application of** _ _[*name*]_ _ **for an order staying that action on the ground that the order requested is not necessary and appropriate to effect the purposes of coordination. All known related actions pending in any California court are set forth in the attached declaration.**

2. This opposition is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination motion judge); ___ copies for service (one for each other party appearing in each included action and in any other action for which stay is sought); one copy for transmittal to Chief Justice; ___ office copies.

Comment: See §44.20 (stay of proceedings). If the coordination motion judge is known, the court in the caption will be the judge's court. If the judge is not known, the caption may be that of the case in which the person requesting the stay is a party and the original and one copy of the statement in opposition will be submitted to the Chief Justice. There is no requirement that the statement opposing a stay request be set forth separately from the response to the petition for coordination. For form of statement opposing petition for coordination, including opposition to stay order, see §44.49. Because the statement opposing a stay request should be submitted as soon as possible, it is generally not advisable to wait until it can be submitted as part of the response to the petition for coordination.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details

required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/ 5. Other Parties' Support or Opposition/ §44.49 a. Form: Statement Opposing Petition for Coordination

5. Other Parties' Support or Opposition

§44.49 a. Form: Statement Opposing Petition for Coordination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**Judicial Council Coordination**
vs	)	**Proceeding No. _ _ _ _ _ _**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**STATEMENT OPPOSING PETITION FOR COORDINATION;**
	)	_ _[*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S)*]_ _

1. _ _[*Name*]_ _**, a party to** _ _[*specify court, title, and number of action*]_ _ **opposes the petition for coordination by** _ _[*name*]_ _ **on the following grounds:** _ _[*E.g., One judge hearing all the actions for all purposes in a selected site or sites will not promote the ends of justice because* _ _[*cite applicable reasons based on considerations listed in CCP §404.1, e.g., the common question of fact or law is not predominating and significant to the litigation; the convenience of parties, witnesses, and counsel will not be served*]_ _]_ _**.**

[*Add if opposition to stay order will be included*]

2. _ _[*Name*]_ _ **also opposes the application for an order staying the action to which** _ _[*he/she/it*]_ _ **is a party on the ground that the order requested is not necessary and appropriate to effectuate the purposes of coordination. All known related actions pending in any California court are set forth in the attached declaration.**

[*Continue*]

[3.] This opposition is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination motion judge); ___ copies for service (one copy for each party appearing in each included action and in any other action for which stay is opposed); one copy for transmittal to Chief Justice; ___ office copies.

Comment: See §44.22 (responding to petition). If the coordination motion judge is known, the court in the caption will

be the judge's court. If the judge is not known, the caption may be that of the case in which the person petitioning for coordination is a party and the original and one copy of the statement in opposition will be submitted to the Chief Justice. Other possible grounds for opposition to a petition for coordination are that the included actions do not share a common question of fact or law (see CCP §404), the included actions are not pending in different courts (see CCP §404), and trial in an included action is imminent (see Cal Rules of Ct 3.521(d)). Because the opposition to a stay request should be submitted as soon as possible, it is generally not advisable to wait until it can be submitted as part of a response to the petition for coordination. Consequently, it is preferable in most instances to submit a separate statement opposing an application for a stay order. For form of statement opposing application for stay order, see §44.48.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.50 b. Form: Statement Supporting Petition for Coordination

§44.50 b. Form: Statement Supporting Petition for Coordination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**Judicial Council Coordination**
vs	)	**Proceeding No.** _ _ _ _ _ _
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**STATEMENT SUPPORTING PETITION FOR COORDINATION;**
	)	_ _[*MEMORANDUM;*]_ _
_____	)	_ _[*DECLARATION(S)*]_ _

1. _ _[*Name*]_ _**, a party to** _ _[*specify court, title, and number of action*]_ _ **supports the petition for coordination by** _ _[*name*]_ _ **on the grounds stated in the petition** _ _[*and on the additional ground(s) that* _ _[*list*]_ _]_ _**.**

2. This support is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination motion judge); ___ copies for service (one for each other party appearing in each included action); one copy for transmittal to Chief Justice; ___ office copies.

Comment: See §44.22 (responding to petition). If the coordination motion judge is known, the court in the caption will be the judge's court. If the judge is not known, the caption may be that of the case in which the person petitioning for coordination is a party and the original and one copy of the statement in support will be submitted to the Chief Justice.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/ 6. Preliminary Trial Conference/§44.51 a. Form: Proposed Preliminary Trial Conference Agenda

6. Preliminary Trial Conference

§44.51 a. Form: Proposed Preliminary Trial Conference Agenda

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**Judicial Council Coordination**
vs	)	**Proceeding No. _ _ _ _ _ _**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**PROPOSED PRELIMINARY TRIAL CONFERENCE AGENDA**

For the preliminary trial conference in this coordination proceeding on _ _[*date*]_ _, at _ _[*time*]_ _ in Department _ _,

[*Option 1*]

_ _[*name*]_ _ **proposes the following agenda: _ _[*List*]_ _.**

[*Option 2*]

_ _[*name*]_ _ **proposes the following additions to the agenda in the order setting the preliminary trial conference: _ _[*List*]_ _.**

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination trial judge); ___ copies for service (one copy for each party appearing in each coordinated action); one copy for transmittal to Chief Justice; ___ office copies.

Comment: See §44.37 (preliminary trial conference).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§44.52 b. Form: Proposed Preliminary Trial Conference Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**Judicial Council Coordination**
vs	)	**Proceeding No. _ _ _ _ _ _**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**PROPOSED PRELIMINARY TRIAL CONFERENCE ORDER**

For the preliminary trial conference in this coordination proceeding on _ _[*date*]_ _, at _ _[*time*]_ _ in Department _ _, _ _[*name*]_ _ proposes the following order: _ _[*Specify terms*]_ _.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination trial judge); ___ copies for service (one for each other party appearing in each coordinated action); one copy for transmittal to Chief Justice; ___ office copies.

Comment: See §44.37 (preliminary trial conference).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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7. Remand or Transfer Motions

§44.53 a. Form: Motion for Remand of Action or Claim

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**Judicial Council Coordination**
vs	)	**Proceeding No.** _ _ _ _ _ _
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**MOTION FOR REMAND OF**
	)	_ _[*ACTION/CLAIM*]_ _;
	)	_ _[*MEMORANDUM;*]_ _
	)	_ _[*DECLARATION(S)*]_ _

1. _ _[*Name*]_ _ requests that the coordination trial judge order the remand of _ _[*identify action or claim*]_ _ to _ _[*identify court in which action was pending when coordination was ordered*]_ _.

2. This request is submitted under California Rules of Court 3.542 on the ground of the following material change in circumstances relevant to the criteria for coordination as stated in Code of Civil Procedure §404.1: _ _[*Indicate change*]_ _.

3. This request is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of _ _[name]_ _, dated _ _ _ _]_ _, _ _[and]_ _ on all papers filed and records in this action _ _[, and on any evidence received at the hearing]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination trial judge); ___ copies for service (one for each party appearing in each coordinated action); ___ office copies.

Comment: See §44.38 (remand of action or claim).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27

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§44.54 b. Form: Motion for Transfer of Action or Claim

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	
	)	**Judicial Council Coordination**
vs	)	**Proceeding No.** _ _ _ _ _ _
_ _	)	
[*Name(s)*]_ _,	)	**MOTION FOR TRANSFER OF**
Defendant(s)	)	_ _[*ACTION/CLAIM*]_ _**;**
	)	_ _[*MEMORANDUM;*]_ _
_____	)	_ _[*DECLARATION(S)*]_ _

1. _ _[*Name*]_ _ **requests that the coordination trial judge order the transfer of** _ _[*identify action or claim*]_ _ **to** _ _[*identify court to which transfer is requested*]_ _ **for** _ _[*all purposes/for the following purpose:* _ _[*Indicate purpose*]_ _]_ _**.**

2. This request is submitted under California Rules of Court 3.543 on the following grounds set forth in that rule: _ _[*Specify applicable grounds*]_ _**.**

3. This request is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination trial judge); ___ copies for service (one for each other party appearing in each coordinated action); ___ office copies.

Comment: See §44.39 (transfer of action or claim).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/44 Coordination/§44.55 8. Form: Petition to Coordinate Add-on Case

§44.55 8. Form: Petition to Coordinate Add-on Case

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**Judicial Council Coordination**
vs	)	**Proceeding No.** _ _ _ _ _ _
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**PETITION TO COORDINATE ADD-ON CASE** _ _[*AND APPLICATION FOR STAY ORDER*]_ _; _ _[*MEMORANDUM;*]_ _ _ _[*DECLARATION(S)*]_ _
	)	[*In limited civil case, add:* **Amount demanded** _ _[*exceeds/does not exceed*]_ _ **$10,000**]

1. Petitioner, _ _[*name*]_ _**, requests that the coordination trial judge coordinate** _ _[*specify court, title, and number of action*]_ _ **with the actions presently being coordinated in this coordination proceeding.**

2. This petition is submitted under Code of Civil Procedure §404.4 on the following grounds set forth in Code of Civil Procedure §404.1: _ _[*Specify applicable grounds*]_ _**.**

[*Add if stay order is sought*]

3. Pending a determination of whether coordination is appropriate, petitioner requests that the coordination trial judge order a stay of the proceedings in the action being considered for coordination _ _[*and in the following actions affecting that action:* _ _[*List by court, title, and number*]_ _]_ _**. All known related actions pending in any California court are set forth in the attached declaration. The request for the stay order is made under California Rules of Court 3.515 on the ground that the order is necessary and appropriate to effectuate the purposes of coordination.**

[*Continue*]

[4.] A hearing on this petition _ _[*is/is not*]_ _ **requested.**

[5.] This request is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with coordination trial judge); ___ copies for service (one for each other party appearing in each coordinated action, the add-on case, and any other action for which stay is sought); one copy for transmittal to Chief Justice; ___ office copies.

Comment: See §44.40 (add-on cases).

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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45

Alternative Dispute Resolution

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I. INTRODUCTION

§45.1 A. Scope of Chapter

Alternative dispute resolution (ADR) is a term that describes a variety of mechanisms that may be used to resolve conflicts other than by litigating the issues in a full trial. These mechanisms may be considered when drafting agreements before a dispute arises (see §§45.4-45.6), or they may be used after a dispute arises by agreement of the parties (see §45.7). A variety of mechanisms may be used in any given case on a step-by-step basis in an attempt to reach a settlement.

NOTE: For discussion of available ADR processes and selecting the appropriate ADR process for particular cases, see A Litigator's Guide to Effective Use of ADR in California, chap 1 (Cal CEB 2005). The remaining sections of the chapter refer to this publication as Effective Use of ADR.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.2 B. Governing Law

§45.2 B. Governing Law

Arbitration by contractual agreement is generally governed by CCP §§1280-1294.2. Judicial arbitration is governed by CCP §§1141.10-1141.31 and is discussed in chap 37. Mediation administered through court-connected programs is governed by CCP §§1775-1775.15; see also Cal Rules of Ct 3.850-3.865, 3.890-3.898.

NOTE: For private mediations, many neutrals contractually bind themselves to certain standards of conduct and ethical rules as a prerequisite to obtaining malpractice insurance or membership in an ADR organization. Such rules embody core values universally recognized in the mediation community for assisting parties to resolve disputes. Before selecting a mediator in a case in which the California court rules are not operative, counsel should ask prospective neutrals for information about the set of guidelines they use for their mediations.

A person serving as a neutral arbitrator under an arbitration agreement must comply with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration adopted by the Judicial Council under CCP §1281.85. The standards appear in Cal Rules of Ct, Title 10 and are available on the Judicial Council's website at www.courtinfo.ca.gov. For discussion of ethics in contractual arbitration, see Effective Use of ADR, chap 10. On ethics in mediation, see Cal Rules of Ct 3.850-3.865 and Effective Use of ADR, chap 8.

The ethics standards for arbitrators in the judicial arbitration program are set out in CCP §1141.18(d), Cal Rules of Ct 3.816, and the California Code of Judicial Ethics (see Code of Judicial Ethics, Canon 6(D)). See Effective Use of ADR §§11.55-11.58.

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§45.3 II. ADVANTAGES AND LIMITATIONS

The demand for alternatives to litigation has increased rapidly to avoid trial delay, substantial expenses in the pretrial battle, and emotional stress. Alternative dispute resolution (ADR) is a broad term describing an entire spectrum of conflict management mechanisms used to attempt to resolve disputes efficiently, effectively, and inexpensively. The mechanisms may be viewed as being on a continuum from informal negotiations between the parties to advisory third party involvement to formal, binding adjudicatory hearings or abbreviated jury trials.

Most cases pass through some form of ADR, whether it is a hearing before a court-appointed discovery referee, a court-encouraged mediation, or a binding arbitration. In fact, when the complaint is filed, each court must make available to the plaintiff an ADR information package, including information on the potential advantages and disadvantages of ADR and descriptions of the principal ADR processes. Cal Rules of Ct 3.221.

NOTE: The courts are required to consider whether to assign the case to an ADR process at the initial case management conference (which must be held within 180 days of filing the complaint (Cal Rules of Ct 3.721)). If all parties agree to use an ADR process, they must jointly complete and file the ADR stipulation form provided under Cal Rules of Ct 3.221. Cal Rules of Ct 3.726.

Advantages. The use of alternative dispute mechanisms has many advantages. For example, alternative dispute mechanisms can:

- Provide forums that are creative and flexible, yet structured and effective;
- Greatly reduce the cost and time of resolving a dispute;
- Provide convenience for the participants, *e.g.,* the parties and counsel can agree on the hearing officer and choose the time, place, and format of the ADR mechanism they select;
- Minimize the emotional toll exacted by the litigation process by giving the parties greater control over the process and resolution of their dispute; and
- Anticipate as well as resolve disputes. Attorneys, as dispute resolution consultants, can assist clients in creating individualized mechanisms to resolve future disputes by including dispute resolution provisions in contracts or establishing internal grievance or complaint procedures. See Madden, *What Every Litigator Should Know About ADR*, 21 CEB Civ Litigation Rep (Sept. 1999).

Limitations. Although the benefits of ADR mechanisms are substantial, some questions have been raised about whether use of ADR may actually increase the number of disputes in which third-party help is sought. Its very success in reducing the cost of resolving conflicts could encourage an increase in disputes brought into ADR forums.

There is also some concern that separate justice systems will develop for the rich and the poor with the increased use of ADR mechanisms. The hourly rate for negotiators, mediators, or hearing officers may be prohibitive for poorer litigants. See Raven, *Alternative Dispute Resolution: Expanding Opportunities*, 43 Arb J 44, 47 (June 1988).

Further, although most clients are amenable to some alternative to full-scale litigation, some clients are so entrenched in their dispute that they will not be satisfied with anything less than an all-out litigation battle. In some situations, a party may conclude that delaying resolution of the problem is advantageous or may refuse to relinquish documents or records that are crucial to a fair resolution. In such cases, the court system and court enforced discovery may be the only way for the other party to move the matter forward or obtain pertinent records and documents. See Madden, *What Every Litigator Should Know About ADR*, 21 CEB Civ Litigation Rep (Sept. 1999).

Finally, as one commentator has observed, ADR procedures, "the much praised 'simple/fast/cheap' option to trial, are rapidly becoming 'complex/slow/expensive'" with developments in ADR law adding "layers of complexity to the ADR systems." See Madden, *ADR 2002: From "Simple/Fast/Cheap" to "Complex/Slow/Expensive"?*, 24 CEB Civ Litigation Rep (Nov. 2002).

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III. WHEN TO CONSIDER ALTERNATIVE DISPUTE RESOLUTION

§45.4 A. Before a Dispute Arises

Dispute resolution is rarely considered at the most opportune time: before a dispute arises. Yet a minimal amount of advance planning for future disputes can save the client money, time, and unnecessary distress in litigating those disputes if they arise.

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§45.5 1. Contracts

The most common opportunity an attorney has to establish ADR mechanisms for a client is in drafting contracts. Attorneys routinely incorporate standard arbitration clauses into their clients' contracts, but ADR is much more than arbitration. For example, written contracts may include provisions requiring the parties to mediate before filing litigation or an arbitration proceeding. The contract may condition recovery of attorney fees by the prevailing party in subsequent litigation or arbitration on participation in pre-suit mediation. Courts will enforce this contractual provision. See *Frei v Davey* (2004) 124 CA4th 1506, 22 CR3d 429 (provision in standard residential form purchase agreement that barred prevailing party from recovering attorney fees if he or she refused request to mediate was enforceable). On contractually mandated mediation, see Effective Use of ADR §5.18.

A contract providing for a number of mandatory steps before arbitration, such as party-only negotiation and third-party mediation, will increase the chances of an early settlement. See §45.65 for suggested provision mandating prearbitration attempts to settle the dispute. For drafting considerations, see §45.24.

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§45.6 2. Internal Grievance Procedures

In the context of the employment relationship, both management and employees can benefit financially and emotionally from carefully conceived internal grievance procedures. Because employee grievances are emotionally charged, some companies find that mediation is the most effective mechanism for resolving such disputes. Other companies prefer a more adjudicatory setting and choose arbitration, while yet others combine the two. On drafting internal grievance procedures, see Advising California Employers and Employees §§10.21-10.22 (Cal CEB 2005).

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§45.7 B. After a Dispute Arises

If a dispute arises that is not subject to a contractual agreement containing a dispute resolution clause or an employment grievance procedure, the attorney must decide whether the case is likely to settle through an ADR mechanism. There are very few cases in which litigation through trial is likely to be the only way of resolving the issues. For example, if there is no existing recognized cause of action but the attorney decides that there is an arguable cause of action, a trial may be the only way to test the new theory.

Even in the cases least likely to settle, however, exploration of possible settlement by use of one or more of the ADR mechanisms may help narrow the issues or help the parties and attorneys develop a relationship that will produce a less hostile atmosphere during litigation.

An attorney who decides that the case will eventually settle must then decide when it is in the client's best interest to settle and what mechanisms are most likely to help the parties reach a settlement. On selecting the appropriate ADR mechanism and when to do so, see Effective Use of ADR §§1.14-1.19.

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IV. DISCUSSING ADR WITH CLIENT AND OPPOSING COUNSEL

§45.8 A. Client

Counsel should give the client a realistic projection of the time and cost savings, as well as other advantages, of using ADR mechanisms. First, the attorney should map out the probable course of litigation, including the many paths discovery might take. It is important to describe the risks of protracted litigation, including the time and cost of interrogatories, depositions, requests for documents, requests for admissions, pretrial motions, settlement conferences, and the trial.

Next, the attorney should give the client a realistic and clear assessment of the likelihood of settling without trial. The attorney should also inform the client of the potential costs of a case that may take 5 years to litigate and of any projected increase or decrease in the settlement value of the case over time.

Finally, the attorney should discuss with the client the potential frustration and emotional stress involved in the lengthy process of litigation.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.9 B. Opposing Counsel

§45.9 B. Opposing Counsel

Convincing the opposition to agree on ADR may be challenging. Attorneys may resist for many reasons, including their own unfamiliarity with ADR options and procedures, reluctance to concede any weakness in their case, economic pressures, or a misunderstanding of the process. For tips on negotiating successfully with opposing counsel, see Effective Use of ADR, chap 3.

PRACTICE TIP: If opposing counsel seems unfamiliar with the ADR process you are suggesting, present a summary of how the process works and how it can benefit the parties.

The attorney proposing ADR should be familiar with the providers of alternative dispute resolution services in the geographic area where the matter will be pursued. It is important to ascertain whether a psychologist, attorney, retired judge, or a professional from the field in which the dispute arose would be the most appropriate third party to hear the case. It will be much easier to obtain opposing counsel's cooperation if he or she is presented with a list of highly respected mediators, arbitrators, and judges from which to choose. On choosing a mediator, see §45.16; Effective Use of ADR §§5.20-5.22. On selecting an arbitrator, see §45.39; Effective Use of ADR §§9.29, 9.68.

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V. METHODS OF ALTERNATIVE DISPUTE RESOLUTION

§45.10 A. Negotiation

At some point in pretrial litigation, a judge will compel the parties to discuss settlement, at which time they are likely to have a substantial emotional and financial investment in the conflict. In many cases, an attorney can provide the client an invaluable service by proposing and facilitating negotiation at an early stage of the dispute. For more information on negotiation and case settlement, see chap 46.

PRACTICE TIP: Before beginning to negotiate, counsel should think about the client's purpose in settling. Is it to right a wrong? To avoid litigation at whatever expense? To protect the client's reputation or ensure confidentiality? Is it a combination of purposes? There are many valid reasons to settle a case, but they should be pursued only after counsel and client have considered a more fundamental purpose. On meeting with the client and preparing for negotiation, see Effective Use of ADR, chap 2.

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1. Initial Process

§45.11 a. The Opening

Whether by an informal letter or a more formal face-to-face meeting, the beginning of a settlement negotiation, or the "opening," can be critical to its success. The opening is an opportunity to set a positive, productive tone for the remainder of the discussion. Beyond that, the opening can be used to clarify assumptions and expectations, build rapport, and lend structure to the discussion. For discussion on opening a negotiation, see Effective Use of ADR §§3.7-3.33.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.12 b. Information Exchange

§45.12 b. Information Exchange

Information exchanged—or not exchanged—in the negotiation process will affect the result obtained for the client. Exchanging information has the benefit of refining counsel's understanding of the parties' dispute and their constraints, interests, and aspirations for settlement.

NOTE: Revealing information is just as important as obtaining it for purposes of identifying value-creating opportunities. Each side has different sets of information from their respective clients, and one side cannot be expected to give the other side much information about what is important to them without reciprocal information offered in return.

For a thorough discussion on exchanging information during the negotiation process, see Effective Use of ADR §§3.34-3.94.

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2. Tactics

§45.13 a. Bargaining

Money is either the predominant component of a settlement or one of many components to a settlement package. Thus, at some point in the negotiation, attorneys must bargain about money or about other quantifiable settlement terms.

NOTE: In cases in which the parties value their ongoing relationship, it may be less important to wring out the most a of settlement for your client. Indeed, the opposite may be true, insofar as a generous offer or temperate demand may set the tone for an amicable resolution and, perhaps, for some needed healing between the disputants.

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§45.14 b. Breaking Through Impasse

If negotiations break down, attorneys should use the leverage available to them to get them back on track. This may have clear advantages for the stronger party, but in most cases it simply raises the level of contentiousness and increases the chances of deadlock. The harder one pushes, the harder the other resists. One way to get out of this vicious cycle is to find a neutral, objective standard that can be used to evaluate each side's proposals. Examples of such benchmarks include reported jury verdicts, information about comparable settlements, or other neutral indicia such as fair market value or industry custom.

If other strategies fail, attorneys should consider soliciting the advice or judgment of a neutral third party. For example, a mediator can help facilitate a difficult settlement negotiation. A mediator or another attorney can give a neutral third-party opinion about the value of a case. On mediation, see §45.15; Effective Use of ADR, chaps 5-6. Finally, if counsel feel they need something stronger than a third-party opinion, they may submit the entire dispute, or perhaps only certain issues, to arbitration. By doing so, however, both sides agree to be bound by the decision of the arbitrator. On contractual arbitration, see §45.22; Effective Use of ADR, chaps 9, 11.

On problem-solving techniques for moving a negotiation process forward when it appears to be stalled, see Effective Use of ADR §§3.155-3.222.

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§45.15 B. Mediation

> Mediation is the least intrusive form of third party involvement in a dispute. The mediator, in contrast to the judge or arbitrator, has no power to impose an outcome on disputing parties. Rather, the mediator's function is that of assisting the parties to reach their own agreement.

Goldberg, Sander & Rogers, Dispute Resolution p 91 (1999).

Mediation has become a widely accepted way of resolving disputes because it works. Mediators report that typically 85-95 percent of mediated cases result in a settlement, often with an investment of only one long day. On the advantages of choosing mediation, see Effective Use of ADR §5.2.

Most mediators use several types of communication models to assist in the resolution of a conflict, which include the following: joint sessions with all parties, attorneys, and any third parties (such as financial advisors); separate caucuses with only one side of a conflict; a combination of multiple joint sessions alternating with private caucuses; and telephonic or online sessions. Mediators often invite counsel to suggest at the premediation planning stage what types of mediation sessions they believe would be particularly helpful to their clients. On types of mediation sessions, see Effective Use of ADR §§5.8-5.11.

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1. Process

§45.16 a. Mediator Selection

Choosing a mediator is similar to retaining an expert witness; counsel should use the same practices of due diligence in recruiting mediators who will serve their clients' best interests. On choosing a mediator, see Effective Use of ADR §§5.20-5.22.

Mediators in California are not licensed by the state and a mediator need not be an attorney, licensed family counselor, doctor, or other regulated professional. In recognition of the important role mediators play in resolving so many cases, the Judicial Council promulgated ethical rules for mediators. Cal Rules of Ct 3.850-3.8698. These rules apply to all mediators who are selected from lists maintained by the court or who are recommended by a judge. For a discussion of ethics in mediation, see Effective Use of ADR, chap 8.

PRACTICE TIP: When selecting a mediator, ask colleagues for the names of mediators they recommend. Information about a particular mediator's style and experience is available through résumés on mediators' websites or by contacting ADR providers who offer lists and background information on mediators.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.17 b. Mediation Session

§45.17 b. Mediation Session

The opening stage of a mediation varies greatly from mediator to mediator and from case to case. After making a few short remarks, some mediators prefer to facilitate an opening dialogue among the participants. Other mediators meet only briefly, or not at all, in joint session, conferring separately at the start of the mediation with the parties and their attorneys, then convening in joint session to accomplish the tasks identified in the separate sessions. Attorneys have the opportunity to make opening remarks at the start of the mediation.

PRACTICE TIP: Many attorneys choose not to make an opening statement, relying instead on their written mediation statement (see Effective Use of ADR §§5.36-5.38). In most cases, however, it is advisable to take the opportunity to make some opening remarks, endeavoring both to affirm that any agreement must be in the client's best interest and to signal that the client is ready to explore settlement possibilities.

After opening presentations, counsel works with the mediator, either privately in separate caucuses or in joint session, to determine what information is important to obtain from, and to provide to, the other side so that all parties and their attorneys can understand the dispute sufficiently to allow resolution of the case. On the exchange of information in mediation, see Effective Use of ADR §§6.11-6.13.

After an initial exchange of information, the mediator usually helps the participants to identify the issues that need to be discussed to reach a settlement and to create an agenda for the mediation session. The participants are then able to identify possible solutions and to begin to engage in negotiations. On preparing for negotiation and the negotiation process, see Effective Use of ADR, chaps 2-3.

In most cases, a memorandum of understanding is written up and signed at the conclusion of the mediation, with the understanding that it will be followed by a more formal settlement agreement drafted by the attorneys and signed by the parties after the mediation. On drafting a memorandum of understanding, see Effective Use of ADR §6.42.

NOTE: All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or mediation consultation must remain confidential. Evid C §1119(c); *Foxgate Homeowners' Ass'n v Bramalea Cal., Inc.* (2001) 26 C4th 1, 11, 108 CR2d 642 (mediator violated confidentiality rules by reporting to court about participant's misconduct during mediation session); *Simmons v Ghaderi* (2008) 44 C4th 570, 588, 80 CR3d 83 (no implied waiver of mediation confidentiality); *Eisendrath v Superior Court* (2003) 109 CA4th 351, 134 CR2d 716 (communications made during confidential mediation are not admissible in later action absent express waivers by parties). On mediation confidentiality, see Effective Use of ADR, chap 7; on the ethical rules for mediators, see Effective Use of ADR, chap 8.

For an in-depth look at the mediation process, see Effective Use of ADR, chap 6.

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§45.18 c. Preparation

Experienced litigators approach mediation with the same degree of care and thoroughness that they would give to preparing for a court appearance or for trial. Effective preparation includes client preparation, preparation of the mediation statement or "mediation brief," and attorney preparation (see Effective Use of ADR §§5.30-5.35, 5.36-5.38, and 5.39 respectively).

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.19 d. Mediation Styles

§45.19 d. Mediation Styles

The means by which the mediator helps the parties resolve disputes varies according to the nature of the conflict, the personalities of the participants, and the complexity of the issues. The two main styles are facilitative mediation and evaluative mediation.

In facilitative mediation, a neutral with "process expertise" (often extensive formal training in the theory and practice of mediation) assists the parties in articulating their interests and communicating those interests to the other parties. The goal is for the parties to identify common ground and to find a mutually satisfying resolution (a "win-win" solution), which they negotiate for and among themselves.

Evaluative mediation is similar to facilitative mediation in that the mediator seeks to assist the parties in articulating their interests, identifying common ground, and reaching a mutually satisfying agreement. It differs in that the mediator may express opinions on the merits of the dispute or on how a party, the court, or a jury might view a particular fact or issue, or on the manner in which another party might react to a given settlement position.

NOTE: Most mediators, sometimes in the same mediation, use a hybrid form of styles, *e.g.,* starting with a facilitative approach and becoming more evaluative when the parties have been unable to reach agreement and the mediator seeks to avoid or to overcome impasse.

For discussion of the various mediation styles, see Effective Use of ADR §5.6.

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2. Types of Mediation

§45.20 a. Limited Mediation

Mediation can also be used for more limited functions in traditional litigation. A prime example is discovery. When both sides agree to minimize the expense of exchanging information, a mediator can assist in preparing a reasonable discovery plan. This strategy is particularly helpful in complex litigation involving multiple parties.

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§45.21 b. Hybrid Mediation-Arbitration

In a combination mediation-arbitration, a mediator facilitates discussions to the point when all parties agree that they are at impasse, and then (by prior consent) makes a binding decision on the unresolved issues. It is also not unusual for the parties to agree at the end of a mediation that the mediator will step into the role of binding arbitrator to resolve the impasse. But see Effective Use of ADR §12.45 on dangers of this combination, which turn chiefly on the conflicts presented by the mediator's learning confidential information during private meetings with each side and the arbitrator's ethical obligation to refrain from ex parte communications with any party before rendering his or her decision. Note that the ethical rules for mediators in court-connected cases provide that a mediator must "exercise caution" before combining the mediation with any other ADR process (such as binding arbitration) and should do so only with the informed consent of the parties. Cal Rules of Ct 3.857(g).

PRACTICE TIP: In light of this ethical principle, before the mediator assumes the role of arbitrator, it is good practice for counsel to ask that the parties be provided with a written explanation of the problematic aspects of the neutral playing a double role in the same case and that the client be given an opportunity to agree in writing to a "med-arb" process. On ethics for mediators, see Effective Use of ADR, chap 8.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.22 C. Arbitration by Contractual Agreement

§45.22 C. Arbitration by Contractual Agreement

Many standardized agreements contain clauses mandating arbitration of disputes arising under the contract. Common examples are uninsured motorist provisions of automobile insurance policies, health insurance policies, collective bargaining agreements, and contracts with architects or other professional providers.

NOTE: Under California law, parties to a contract may agree to arbitrate most contract disputes and tort claims. *Lewsadder v Mitchum, Jones & Templeton, Inc*. (1973) 36 CA3d 255, 111 CR 405. However, there are some limits on the right to arbitrate that the parties should be aware of before drafting an arbitration provision. For example, arbitration provisions in contracts conveying real property must conform to certain requirements on the form of the provision. See CCP §1298. Further, as is true of other contracts, agreements to arbitrate will not be enforced if they are unconscionable or contrary to public policy. See *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 99, 99 CR2d 745; CCP §1281. On unconscionability, see §45.28 and Effective Use of ADR §§9.48-9.50. For further discussion of grounds on which arbitration provisions may be subject to challenge, see Effective Use of ADR §§9.41-9.53.

Generally, the rules of law governing a contractual arbitration are contained in the arbitration agreement itself. See, *e.g., Rifkind & Sterling, Inc. v Rifkind* (1994) 28 CA4th 1282, 1292, 33 CR2d 828 (arbitration award is a private agreement governed by rules of the parties' own making or selection). Arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." CCP §1281. Thus, basic contract law applies to agreements to arbitrate, as it does to other agreements. See, *e.g., Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 98, 99 CR2d 745 (under California law, arbitration agreement may be invalidated only on grounds "as exist at law or in equity for the revocation of any contract").

The statutory provisions governing enforcement of arbitration agreements, the conduct of arbitration proceedings, the enforcement of arbitration awards, and other matters are found in the California Arbitration Act (CCP §§1280-1294.2).

PRACTICE TIP: A specific type of arbitration agreement may be governed by special statutes rather than by the general arbitration provisions of CCP §§1280-1294.2. For example, CCP §1295 applies to medical malpractice cases, CCP §1296 applies to disputes involving public construction contracts, CCP §§1297.11-1297.17 apply to international commercial disputes, Ins C §11580.2 applies to uninsured motorist claims, and Bus & P C §7191 applies to residential construction disputes. In each case, either in drafting contracts that will include an arbitration clause or in reviewing such contracts, counsel should ascertain whether specific statutes would apply to the contractual arbitration in the contract. Appropriate alterations should then be made in light of the specific statutory provisions that would otherwise apply.

On ethics standards for arbitrators in contractual arbitration, see §45.51 and Effective Use of ADR, chap 10.

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1. Contractual Provisions

§45.23 a. General Clause

Most private agreements to arbitrate contain a standard arbitration clause, such as the following:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be resolved by binding arbitration. Any party to this agreement may have the award of the arbitrator entered as a judgment in any court that has jurisdiction.

For a sample agreement, see §45.65.

PRACTICE TIP: Carefully focus on exactly what is being submitted to arbitration. If the provision provides that "disputes arising under the contract" are to be arbitrated, then it may be that related torts will not be arbitrable. If the contract provides that all disputes "arising under or related to the contract" are to be arbitrated, then both tort and contract claims should be arbitrable. Generally, a clause providing for arbitration of disputes "relating to this agreement" is to be interpreted broadly and reaches every dispute between the parties with a significant relationship to the contract or with its origins in the contract. *Simula, Inc. v Autoliv, Inc.* (9th Cir 1999) 175 F3d 716. If the arbitration clause refers to a statutory scheme, the clause may be limited to causes of action within the scope of the statutes. *Thompson v Toll Dublin, LLC* (2008) 165 CA4th 1360, 1370, 81 CR3d 736. If certain disputes are expressly excluded from arbitration, then ensure that the exclusions apply to all parties equally; lack of mutuality may result in the agreement being unenforceable. See Effective Use of ADR §9.50.

It is best practice to set out the arbitration provision in large, bold type and to require the other party to initial the provision, especially if the parties are not of equal bargaining power. Compare *Izzi v Mesquite Country Club* (1986) 186 CA3d 1309, 1318, 231 CR 315 (failure to read purchase agreement arbitration provision does not make it unenforceable), with *Spence v Omnibus Indus.* (1975) 44 CA3d 970, 119 CR 171 (criticizing arbitration provision buried in small type), and *Wheeler v St. Joseph Hosp.* (1976) 63 CA3d 345, 133 CR 775 (voiding arbitration provision not explained to hospital patient).

When a statute calls for a particular form for the arbitration provision, failure to use that form may make the provision unenforceable. *Malek v Blue Cross* (2004) 121 CA4th 44, 16 CR3d 687. For example, arbitration provisions in real estate contracts must include specific language, be in bold type, and be initialed by the parties. CCP §1298. See Effective Use of ADR §9.25.

NOTE: If the contract concerns interstate commerce, the Federal Arbitration Act (FAA) (9 USC §§1-16) may preclude the enforcement of any rules requiring that the arbitration provision be in a particular form. *Hedges v Carrigan* (2004) 117 CA4th 578, 11 CR3d 787. On the FAA, see Effective Use of ADR §§9.34-9.37.

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§45.24 b. Drafting Considerations

The statutory scheme for enforcement of arbitration agreements (see CCP §§1281-1281.96) applies only to *written* agreements. *Magness Petroleum Co. v Warren Resources of Cal., Inc.* (2002) 103 CA4th 901, 907, 127 CR2d 159. An oral agreement to arbitrate is ordinarily not enforceable.

NOTE: Under limited circumstances, *i.e.,* if there is demonstrated waiver, estoppel, or an agreement reflected in a written court or other record, courts may enforce an oral arbitration agreement. 103 CA4th at 909.

When drafting an arbitration agreement, counsel should specify the issues to be arbitrated and who is to conduct the arbitration.

Specify the Issues to Be Arbitrated. The agreement should specify the issues that the parties do and do not wish to arbitrate. The arbitrator may consider only the disputes covered by the arbitration agreement. *Mansdorf v California Physicians' Serv., Inc.* (1978) 87 CA3d 412, 151 CR 388. The question of whether the dispute is arbitrable is decided by the court unless the agreement expressly provides that the question of arbitrability will be submitted to arbitration. *First Options, Inc. v Kaplan* (1995) 514 US 938, 131 L Ed 2d 985, 115 S Ct 1920; *Dream Theater, Inc. v Dream Theater* (2004) 124 CA4th 547, 21 CR3d 322.

The usual arbitration agreement gives the arbitrator broad remedial powers, including the power to award punitive damages. See *Rifkind & Sterling, Inc. v Rifkind* (1994) 28 CA4th 1282, 1289, 33 CR2d 828 (arbitrator had power to award punitive damages when agreement read "If any controversy shall arise between the parties hereto, arising from or with respect to this Agreement, the controversy shall be submitted to mandatory, binding arbitration"). Parties that do not want the arbitrator to award punitive damages should explicitly say so in their agreement. A limitation on punitive damages, however, may invalidate the agreement. See *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 103, 99 CR2d 745.

Specify Who Is to Act as Arbitrator. When drafting an arbitration provision, it is important to consider what type of arbitrator is desired and how the arbitrator will be selected. If advance agreement is reached, the name of the arbitrator or organization from which the arbitrator will be selected should be included in the agreement. On considerations in selecting an arbitrator, see Effective Use of ADR §§9.28-9.29, 9.68.

Additional Issues to Address in Agreement. In addition to specifying the issues to be arbitrated and who will conduct the arbitration, the drafter of the arbitration provision may also want to address, *e.g.,* the scope of discovery, the arbitrator's powers, availability of motion practice (*e.g.,* summary judgment, demurrers), time limitations, admissibility of evidence, as well as the arbitrator fees and arbitration costs. In addition, if certain types of expert witnesses are likely to play a key role in future contract disputes, counsel should consider including specific provisions about the number of such witnesses each side may use, or an agreement that one expert will be chosen and how the choice is to be made.

NOTE: When drafting the agreement, it is important to understand that specificity may have unintended consequences. For example, if the agreement specifies a deadline for the arbitrator's decision and the decision is not timely rendered, the effectiveness of the decision may be in doubt; and the losing party may argue that the decision, being untimely, is beyond the arbitrator's jurisdiction and therefore void. See *Baar v Tigerman* (1983) 140 CA3d 979, 189 CR 834.

For a list of issues to consider when drafting an arbitration agreement, see Effective Use of ADR §9.31. On the differences between federal and state law, see Effective Use of ADR §§9.34-9.39.

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§45.25 c. Negotiated Submission Agreement

If a dispute arises under a standardized clause and the parties wish to change its terms (or if there is no arbitration clause and they want to enter into an arbitration for a dispute), they may enter into a negotiated submission agreement, altering the arbitration rules and procedures. See, *e.g., Glassman v McNab* (2003) 112 CA4th 1593, 1600, 6 CR3d 293 (parties to attorney fees dispute permissibly stipulated to increase arbitrator's statutory jurisdiction under Bus & P C §§6200-6206). When all sides are committed to resolving the dispute without litigation, the parties may be amenable to restructuring the arbitration hearing to expedite a resolution. For a detailed submission agreement, see §45.66.

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§45.26 2. Enforceability of Arbitration Agreement

The California Arbitration Act (California's version of the Uniform Arbitration Act) (CCP §§1280-1294.2) makes a private agreement to arbitrate a dispute valid, enforceable, and irrevocable except on grounds that exist to revoke any contract. CCP §1281.

On federal jurisdiction to enforce an arbitration agreement under the Federal Arbitration Act (FAA) (9 USC §§1-16), see *Vaden v Discovery Bank* (2009) ___US___, 173 LEd2d 206, 129 S Ct 1262, discussed in §7.17.

On enforceability of arbitration agreements, see Effective Use of ADR §§9.33, 9.40-9.53.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.27 a. Issues Affecting Enforceability

§45.27 a. Issues Affecting Enforceability

When a petition to compel arbitration is filed, the gateway "question of arbitrability" of the dispute arises, *i.e.,* whether the parties are bound by a valid, enforceable arbitration agreement. CCP §1281.2; *Howsam v Dean Witter Reynolds, Inc.* (2002) 537 US 79, 154 L Ed 2d 491, 123 S Ct 588. See also *Adajar v RWR Homes, Inc.* (2008) 160 CA4th 563, 570, 73 CR3d 17 (failure to prove existence of arbitration contract); *Omar v Ralphs Grocery Co.* (2004) 118 CA4th 955, 13 CR3d 562 (trial court erred by failing to consider gateway issues of arbitrability).

Several issues surround the issue of enforceability:

- **Who decides the issue of enforceability—the court or the arbitrator?** If a party challenges the validity of the entire contract, not just the arbitration provision, the arbitrator, not the court, must decide the contract's validity. *Buckeye Check Cashing, Inc. v Cardegna* (2006) 546 US 440, 445, 163 L Ed 2d 1038, 1043, 126 S Ct 1204 (addressing federal arbitration law under FAA). See *Preston v Ferrer* (2008) ___ US ___, 169 L Ed 2d 917, 128 S Ct 978 (under FAA, party not required to exhaust administrative remedy before entering arbitration). If a party challenges only the arbitration provision, the court decides the provision's enforceability. *Prima Paint Corp. v Flood & Conklin Mfg. Co*. (1967) 388 US 395, 18 L Ed 2d 1270, 87 S Ct 1801 (claim of fraud in inducement of arbitration clause is relevant to making of arbitration agreement); *Buckeye Check Cashing,* 546 US at 445. The court decides whether the "crux of the complaint" is a challenge to the arbitration clause or the entire contract. *Nagrampa v Mailcoups, Inc.* (9th Cir 2006) 469 F3d 1257, 1275. The court must decide a claim challenging an arbitration provision, even if state law requires an examination of the making of the entire contract as part of the analysis. 469 F3d at 1271. By specific reference in the arbitration agreement, the parties may delegate the issue of arbitrability to an arbitrator. *Dream Theater, Inc. v Dream Theater* (2004) 124 CA4th 547, 21 CR3d 322. See also *Gilbert Street Developers, LLC v La Quinta Homes, LLC* (2009) 174 CA4th 1185, 1193, 94 CR3d 918 (no jurisdictional authority for arbitrator when agreement did not clearly and unmistakably provide for it and merely incorporated by reference American Arbitration Association rules, which, when agreement was executed, did not permit arbitrators to decide jurisdiction); *Parada v Superior Court* (2009) 176 CA4th 1554, 1564, 98 CR3d 743; *Bruni v Didion* (2008) 160 CA4th 1272, 1284, 73 CR3d 395 (although agreement provided for arbitrator to decide issue of arbitrability, court was required to resolve unconscionability issue because plaintiffs denied knowledge of arbitration provision).
- **Did the parties agree to arbitrate?** Generally speaking, a party cannot be compelled to arbitrate a dispute that he or she has not agreed to resolve by arbitration. *Benasra v Marciano* (2001) 92 CA4th 987, 990, 112 CR2d 358. See also *Rodriguez v Superior Court* (2009) 176 CA4th 1461, 1470, 98 CR3d 728 (in medical malpractice action in which patient signed arbitration agreement four days prior to surgery and then died during CCP §1295(c)'s 30-day recision period, agreement unenforceable against patient's heir and thus no order compelling arbitration could be issued). Courts have recognized that in some circumstances (*e.g.,* an agency relationship or a third-party beneficiary of the contract), it is equitable that an arbitration agreement binds a nonsignatory party. See, *e.g.*, *Rowe v Exline* (2007) 153 CA4th 1276, 1284, 63 CR3d 787 (nonsignatory sued as alter ego of corporation); *Westra v Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 CA4th 759, 28 CR3d 752 (nonsignatory to purchase agreement can compel arbitration as agent of parties to agreement); *NORCAL Mut. Ins. Co. v Newton* (2000) 84 CA4th 64, 76, 100 CR2d 683 (insured psychiatrist's spouse who accepted insurance policy benefits by allowing insurer to assume cost of defense was bound by policy's arbitration clause). An arbitration provision also may not be binding on a party if it is not incorporated by reference into a contract between the parties. *Kleveland v Chicago Title Ins. Co.* (2006) 141 CA4th 761, 46 CR3d 314. See also *Goldman v KPMG, LLP* (2009) 173 CA4th 209, 234, 92 CR3d 534 (defendant nonsignatory to agreement containing arbitration clause may not compel arbitration under equitable estoppel theory unless claims against nonsignatory rely on or are inextricably bound up with contractual obligations of agreement). Similarly, an arbitration provision may not be enforceable if it is included in a writing that does not appear to be a contract and its terms do not draw the attention of the recipient. *Metters v Ralph's Grocery Co.* (2008) 161 CA4th 696, 702, 74 CR3d 210.

See also Effective Use of ADR §9.41.

- **Was the arbitration provision obtained by fraud or duress?** Confusion exists over the effect of fraud on the enforceability of an arbitration agreement. This confusion stems in part from the distinction under California law between fraud in the inducement and fraud in the execution or inception of the contract. The California Supreme Court has held that claims of fraud in the inducement of the contract (as opposed to the arbitration provision) are subject to arbitration; claims of fraud in the execution of the entire agreement are not arbitrable under state or federal law. *Rosenthal v Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 416, 58 CR2d 875. See *Hotels Nevada v L.A. Pac. Ctr., Inc.* (2006) 144 CA4th 754, 50 CR3d 700 (contract void at inception does not contain enforceable arbitration provision). When the validity of the entire contract is challenged, an otherwise valid arbitration provision is enforceable separate and apart from the remainder of the contract. *Prima Paint Corp. v Flood & Conklin Mfg. Co.* (1967) 388 US 395, 403, 18 L Ed 2d 1270, 1277, 87 S Ct 1801; *Buckeye Check Cashing, Inc. v Cardegna* (2006) 546 US 440, 444, 163 L Ed 2d 1038, 1043, 126 S Ct 1204; *Lucas v Gund, Inc.* (CD Cal 2006) 450 F Supp 2d 1125. See Effective Use of ADR §9.42.
- **Did the party waive the right to compel arbitration?** A party to a contract containing an arbitration clause may be able to avoid arbitration if it can establish that the other party has waived its right to compel arbitration. Whether a party has waived the right to arbitration is a question of fact. *Engalla v Permanente Med. Group, Inc.* (1997) 15 C4th 951, 64 CR2d 843. On what constitutes waiver, see Effective Use of ADR §§9.43-9.45.
- **Is the party estopped to assert the right to compel arbitration?** The doctrine of equitable estoppel provides that a party cannot contradict facts if, by the party's conduct or representations, it has misled another party to the latter's prejudice. *Platt Pac., Inc. v Andelson* (1993) 6 C4th 307, 320, 24 CR2d 597 (court rejected plaintiffs' argument that because defendant had agreed to reschedule settlement conference, defendant was estopped to insist that plaintiff comply with contractual deadline to request arbitration; defendant had not misrepresented any facts).
- **Do other principles prevent enforcement of the arbitration provision?** Examples include illegal contracts and contracts to arbitrate disputes that the legislature has committed to the courts (see *Jaramillo v JH Real Estate Partners, Inc.* (2003) 111 CA4th 394, 3 CR3d 525 (arbitration provision in residential lease agreement is unenforceable because statutory provision precludes tenants from agreeing to arbitrate tenancy disputes in residential lease agreements)), and failure to comply with required conditions of performance under the contract (see *Brown v Dillard's Inc.* (9th Cir 2005) 430 F3d 1004 (employer that breaches arbitration agreement by refusing to participate in arbitration proceedings brought by employee loses right to enforce agreement later)).

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.28 b. Unconscionability

§45.28 b. Unconscionability

Like contracts generally, an agreement to arbitrate may not be enforced if it is unconscionable. *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 114, 99 CR2d 745; CC §1670.5.

Two Aspects of Unconscionability. The courts have recognized that unconscionability has two aspects, procedural and substantive, and that both must exist before a contract or arbitration provision will be found unconscionable. 24 C4th at 113; *Stirlen v Supercuts, Inc*. (1997) 51 CA4th 1519, 60 CR2d 138. Procedural unconscionability focuses on the manner in which the agreement was negotiated, *i.e.,* because of unequal bargaining power, one party was oppressed or surprised by a contract term, and substantive unconscionability focuses on the terms of the agreement, *i.e.,* their overly harsh or one-sided result. *A & M Produce Co. v FMC Corp.* (1982) 135 CA3d 473, 186 CR 114. See also *Higgins v Superior Court* (2006) 140 CA4th 1238, 45 CR3d 293 (arbitration agreement procedurally unconscionable because arbitration provisions were near end of lengthy, single-spaced document, and not in boldface type; substantively unconscionable because it was egregiously one-sided and permitted only defendants to compel arbitration).

Although both procedural and substantive unconscionability must be present for a court to find a provision unconscionable, they need not be present in the same degree. That is, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz,* 24 C4th at 114; see also *Laster v AT&T Mobility LLC* (9th Cir 2009) 584 F3d 849; *Harper v Ultimo* (2003) 113 CA4th 1402, 1406, 7 CR3d 418.

An agreement that is permeated by unconscionability will not be enforced. See *Nyulassy v Lockheed Martin Corp.* (2004) 120 CA4th 1267, 16 CR3d 296 (mandatory employment arbitration agreement unenforceable because it lacks mutuality, imposes prearbitration resolution procedure controlled by employer, and severely limits time within which employee may demand arbitration). If the offensive terms do not "permeate" the agreement, they may be excised by the court and the agreement enforced in other respects.

Procedural Unconscionability. The procedural unconscionability element focuses on "oppression" or "surprise" due to unequal bargaining power. *Armendariz,* 24 C4th at 114. In general, procedural unconscionability is established by showing a contract of adhesion. *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1071, 130 CR2d 892. An adhesion contract is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Armendariz v Foundation Health Psychcare Servs., Inc., supra,* quoting *Neal v State Farm Ins. Co.* (1961) 188 CA2d 690, 694, 10 CR 781.

An adhesion contract or provision will not be enforced against the weaker or adhering party if it does not fall within the reasonable expectations of that party. *Armendariz,* 24 C4th at 113. Even if the contract or arbitration provision is within the reasonable expectation of the parties, it will not be enforced if, as a matter of equity, the court finds that "considered in its context, it is unduly oppressive or 'unconscionable.'" *Armendariz v Foundation Health Psychcare Servs., Inc., supra.* See also *Parada v Superior Court* (2009) 176 CA4th 1554, 1578, 98 CR3d 743 (expensive fees associated with requirement that disputes be heard before panel of three arbitrators and prohibition on joinder of claims not within reasonable expectations of investors); *Olvera v El Pollo Loco, Inc.* (2009) 173 CA4th 447, 454, 93 CR3d 65 (new dispute resolution policy procedurally unconscionable in part because inaccurate policy description necessarily made workers' agreement uninformed); *Gentry v Superior Court* (2007) 42 C4th 443, 470, 64 CR3d 773 (failure to opt out of arbitration agreement not product of authentic informed choice).

NOTE: Although a finding of an adhesion contract almost always equates with a finding of procedural unconscionability, an adhesion contract or provision is *not* a prerequisite to a finding of procedural unconscionability. *Harper v Ultimo* (2003) 113 CA4th 1402, 1410, 7 CR3d 418.

Substantive Unconscionability. The substantive unconscionability element focuses on "overly harsh" or "one-sided results." *Armendariz v Foundation Health Psychcare Servs., Inc.*, 24 C4th at 114. Although a wide variety of factors may contribute to making an arbitration provision substantively unconscionable, the primary factor is lack of mutuality,

and the key question is whether the contract terms are so one-sided or harsh as to lack basic fairness. *Thompson v Toll Dublin, LLC* (2008) 165 CA4th 1360, 1373, 81 CR3d 736 (provision was unfairly one-sided because homeowner claims would be subject to arbitration, but sellers would have no reason to sue homeowner after escrow closed); *Gutierrez v Autowest, Inc.* (2003) 114 CA4th 77, 7 CR3d 267 (arbitration clause in automobile lease was unconscionable because fee required to initiate arbitration was unaffordable and there was no fee waiver provision for consumer); *Nagrampa v Mailcoups, Inc.* (9th Cir 2006) 469 F3d 1257, 1284 (franchisee required to submit any controversy to arbitration, but franchiser could seek provisional remedy from any court; arbitration forum near franchiser). But see *Roman v Superior Court* (2009) 172 CA4th 1462, 1471, 92 CR3d 153 (arbitration agreement not substantively unconscionable for beginning with phrase "I agree"; phrase did not make agreement unilateral under circumstances); *Jones v Humanscale Corp*. (2005) 130 CA4th 401, 29 CR3d 881 (arbitration clause in employment contract was not unconscionable because it did not expressly require parties to split arbitration fees and expenses).

For more examples of cases discussing the problem of substantive unconscionability, particularly in employment contracts, see Effective Use of ADR §9.50.

Class Action Waivers. Not "all class action waivers are necessarily unconscionable." *Discover Bank v Superior Court* (2005) 36 C4th 148, 162, 30 CR3d 76. Whether a class action waiver is unconscionable depends on the application of state law. *Provencher v Dell, Inc.* (CD Cal 2006) 409 F Supp 2d 1196. For example, on remand from the supreme court in *Discover Bank v Superior Court, supra,* the appellate court held that under Delaware law, the class action waiver in a credit-card holder agreement was enforceable. *Discover Bank v Superior Court* (2005) 134 CA4th 886, 36 CR3d 456. See also *Laster v AT&T Mobility LLC* (9th Cir 2009) 584 F3d 849 (Federal Arbitration Act does not preempt California law governing unconscionable class action waivers in consumer adhesion contracts; waiver at issue unconscionable under California law); *Aral v Earthlink, Inc.* (2005) 134 CA4th 544, 557, 36 CR3d 229 (under California law, class action waiver was unconscionable in action arising from Internet service agreement under Bus & P C §17200); *Klussman v Cross Country Bank* (2005) 134 CA4th 1283, 36 CR3d 728 (class action waiver was unconscionable in action on claims under Consumers Legal Remedies Act and Unfair Competition Law). See also *Olvera v El Pollo Loco, Inc.* (2009) 173 CA4th 447, 456, 93 CR3d 65 (class arbitration waiver substantively unconscionable for being unfairly one-sided and because class action likely would be only way for low-wage workers to vindicate rights); *Sanchez v Western Pizza Enters.* (2009) 172 CA4th 154, 90 CR3d 818.

When the class action waiver is found unconscionable, typically courts have deemed the entire arbitration clause or agreement unenforceable. See, *e.g., Klussman v Cross Country Bank,* 134 CA4th at 1300 (unconscionable class action waiver could not be severed from arbitration clause, making clause itself unenforceable); *Aral v Earthlink, Inc., supra*. See also *Franco v Athens Disposal Co.* (2009) 171 CA4th 1277, 1299, 90 CR3d 539 (because arbitration agreement contained invalid class arbitration waiver and prevented plaintiff from acting as private attorney general, entire agreement unenforceable).

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§45.29 c. Nonwaivable Public Rights

Although under California and federal law the parties can usually agree to arbitrate statutory claims, "arbitration agreements that encompass *unwaivable* statutory rights must be subject to particular scrutiny." *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 100, 99 CR2d 745 (setting out conditions under which employer can require employees to arbitrate claims under Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996)). An unwaivable statutory right is one enacted for public purpose. See *Fittante v Palm Springs Motors, Inc.* (2003) 105 CA4th 708, 129 CR2d 659 (Lab C §970, which was enacted to prevent unscrupulous treatment of employees who are induced to move on promise of employment, was enacted for public purpose). See also CC §3513 (although anyone may waive law intended solely for his or her benefit, "a law established for a public reason cannot be contravened by a private agreement").

When unwaivable public rights are the subject of arbitration, whether statutory or nonstatutory, the arbitration agreement must meet the minimum requirements articulated by *Armendariz v Foundation Health Psychcare Servs., Inc.,* 24 C4th at 99. See *Gentry v Superior Court* (2007) 42 C4th 443, 456, 64 CR3d 773 (class arbitration waivers in employment arbitration agreements); *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 130 CR2d 892 (arbitration of claim of wrongful termination in violation of public policy must meet *Armendariz* requirements); *D.C. v Harvard-Westlake School* (2009) 176 CA4th 836, 864, 98 CR3d 300 (arbitration of hate crime claims must meet *Armendariz* requirements). But see *Giuliano v Inland Empire Personnel, Inc.* (2007) 149 CA4th 1276, 1288, 58 CR3d 5 (arbitration clause not governed by *Armendariz* because claim not based on state law or fundamental public policy).

NOTE: The arbitration agreement in *Armendariz* was a mandatory employment agreement that the employee had to sign as a condition of employment. Arbitration agreements knowingly and voluntarily entered into by the parties *after* a dispute has arisen generally would not be subject to these additional *Armendariz* requirements. See *Armendariz v Foundation Health Psychcare Servs., Inc.*, 24 C4th at 103 n8.

In addition to requiring a neutral arbitrator (an essential requirement of any arbitration agreement), a contract to arbitrate an unwaivable public right under *Armendariz* must provide, at a minimum, for the following:

- Adequate discovery (see *Fitz v NCR Corp.* (2004) 118 CA4th 702, 13 CR3d 88 (arbitration agreement provision limiting discovery to only two depositions did not affect both parties equally and did not provide plaintiff with sufficient discovery, because employer already possessed many relevant documents and employed many relevant witnesses));
- A written decision that permits limited judicial review;
- All the types of relief that would otherwise be available in court, *e.g.,* punitive damages and attorney fees; and
- Limitations on arbitration costs, *i.e.,* when the agreement covers Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) claims, the employer must pay all costs unique to the arbitration.

Armendariz v Foundation Health Psychcare Servs., Inc., 24 C4th at 102, endorsing *Cole v Burns Int'l Sec. Servs.* (DC Cir 1997) 105 F3d 1465. See also *D.C. v Harvard-Westlake School*, *supra,* (because hate crime laws award attorney fees only to prevailing plaintiffs, prevailing defendant in arbitration of hate crimes claim not entitled to arbitral expenses or attorney fees).

Because there are different standards for enforcing arbitration of public versus private rights, the critical initial inquiry is identifying the nature of the claim. *Abramson v Juniper Networks, Inc.* (2004) 115 CA4th 638, 652, 9 CR3d 422. If a claim arises from nonwaivable public rights, the arbitration agreement must satisfy the requirements set out in *Armendariz*. *Abramson v Juniper Networks, Inc.*, 115 CA4th at 652. If, on the other hand, private rights are at issue, then the agreement is analyzed under standard contract principles for unconscionability. *Abramson v Juniper Networks, Inc.,* 115 CA4th at 651. See also *Boghos v Certain Underwriters at Lloyd's* (2005) 36 C4th 495, 30 CR3d 787 (insurance-related claims involved private rights).

On unconscionability, see §45.28.

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§45.30 d. Severability

If the court finds as a matter of law that a contract or a clause of a contract was unconscionable when it was made, the court has discretion to (1) refuse to enforce the contract, (2) excise the offending clause from the contract, or (3) limit the application of the unconscionable clause to avoid an unconscionable result. CC §1670.5(a).

In determining whether it is appropriate to restrict or sever illegal terms rather than void the entire agreement, "[t]he overarching inquiry is whether 'the interests of justice… would be furthered' by severance." *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 124, 99 CR2d 745 (citation omitted). See *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 130 CR2d 892 (severing one-sided arbitration appeal provision from arbitration agreement). The court may not, however, under the guise of severing or limiting the offending term, reform the contract. See *Armendariz,* 24 C4th at 125.

Examples of cases addressing severability in the arbitration context include *Parada v Superior Court* (2009) 176 CA4th 1554, 1578, 98 CR3d 743, 1586 (terms included in arbitration agreement to discourage or prevent customers from vindicating their rights were unconscionable and not severable; arbitration provisions unenforceable in entirety); *Klussman v Cross Country Bank* (2005) 134 CA4th 1283, 1300, 36 CR3d 728 (unconscionable class action waiver not severable from arbitration clause; entire arbitration clause unenforceable); and *Aral v Earthlink, Inc.* (2005) 134 CA4th 544, 557, 36 CR3d 229 (injunctive relief claim severable from restitution claim that was subject to arbitration, and unconscionable class action waiver rendered entire arbitration agreement unenforceable).

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3. Arbitration Procedures

§45.31 a. Enforcement of Right to Arbitrate

When both parties agree to comply with the terms of the arbitration agreement, the arbitration procedure will commence without court intervention. If one party refuses to arbitrate, the procedures for enforcement of the right to arbitrate depend on whether the arbitration agreement is self-executing or non-self-executing.

Self-Executing Arbitration Clause. If the arbitration provision is self-executing, it is not necessary to go to court to start the arbitration. *King v Larsen Realty, Inc.* (1981) 121 CA3d 349, 354, 175 CR 226. To be self-executing, the clause must provide the following:

- A method for selecting the arbitrator if the other party refuses to participate;
- A procedure for going forward if the other party does not answer; and
- An agreement that the hearing may proceed without the other party.

When a self-executing clause exists, the party seeking to enforce the right to arbitration must make a demand and appoint an arbitrator under the terms of the arbitration clause. Assuming proper service has been made, if the other party refuses to appear, the arbitrator may proceed to hear evidence and enter an award.

NOTE: Arbitration clauses that select providers are all self-executing clauses.

For sample self-executing arbitration clause, see Effective Use of ADR §9.88.

Nonself-Executing Arbitration Clause. When the arbitration clause is not self-executing, the party who believes that a controversy is arbitrable under an underlying contract should begin by writing a short letter setting out generally the nature of the dispute and demanding arbitration. If the responding party does not reply to this letter or if the responding party challenges the right to arbitrate, the proponent must file a petition to compel arbitration. See §45.32.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.32 b. Petition to Compel Arbitration

§45.32 b. Petition to Compel Arbitration

If the arbitration agreement is not self-executing and the opposing party either does not respond to the demand letter or refuses to participate in arbitration proceedings, a party may file a petition to compel arbitration in the superior court. See *Condee v Longwood Mgmt. Corp.* (2001) 88 CA4th 215, 218, 105 CR3d 597.

NOTE: If the party initiating the dispute resolution process would prefer not to arbitrate, even though there is an arbitration clause, that party may decide to file a complaint and then wait to see if the other side elects to compel arbitration. If the other side does not timely elect to compel arbitration, both sides will have waived the arbitration provision and the matter will proceed as normal litigation.

A proceeding to compel arbitration is, in essence, a suit in equity to compel specific performance of a contract. When a party to an arbitration agreement refuses to submit to arbitration, the other party or parties may petition the court to compel arbitration and stay any pending proceedings. CCP §§1281.2, 1281.4. *Condee v Longwood Mgmt. Corp., supra*.

The Petition. The petitioner must allege the existence of an agreement to arbitrate the controversy (CCP §1281.2); facts necessary for a ruling on the agreement's enforceability are proved by affidavits or declarations. See *Brodke v Alphatec Spine, Inc.* (2008) 160 CA4th 1569, 73 CR3d 554. Further, the arbitration agreement's provisions must be set forth verbatim or a copy must be attached to the petition and incorporated by reference. *Adajar v RWR Homes, Inc.* (2008) 160 CA4th 563, 569, 73 CR3d 17 (appellant failed to produce video or sample warranty booklet that allegedly contained arbitration clause); Cal Rules of Ct 3.1330. The court must then conduct a summary hearing in the manner provided by law for the hearing of motions. CCP §1290.2; *Condee,* 88 CA4th at 218.

NOTE: A party may raise arbitration as an affirmative defense in an answer and then move to compel. This may be necessary when a response to a complaint is required and there is insufficient time to file a petition to compel as an initial responsive pleading.

Venue. A petition to compel arbitration must be filed in a court having jurisdiction in the county where (1) the agreement was to be performed or (2) the agreement was made. CCP §1292(a). If the agreement does not specify a place of performance and if it was made out of state, the petition must be filed in the county where any party resides or has a business. CCP §1292(b). In all other cases, the petition may be filed in any California county. CCP §1292(c).

NOTE: If the arbitration agreement provides that all arbitrations will be conducted in a forum convened by, and subject to the rules of, a chosen self-regulatory organization, *e.g.,* the National Association of Securities Dealers (NASD), and the chosen organization refuses to arbitrate in California, the court must decide whether the out-of-state location selected by the organization is proper and if the dispute should be arbitrated there. If the out-of-state location is not proper, the dispute should be decided by the California courts. *Alan v Superior Court* (2003) 111 CA4th 217, 3 CR3d 377 (self-regulatory organization refused to arbitrate in California because it did not want to comply with California's ethical standards for arbitrators). On the Securities Exchange Act and NASD arbitrations, see Effective Use of ADR §9.38.

Notice, Service, and Hearing Date. When the arbitration provision selects an arbitration provider such as the American Arbitration Association, that provider will have a set of rules that will govern how the arbitration is to proceed. When no provider with its own set of rules has been selected in the contract, the Code of Civil Procedure provides that notice of a petition to compel arbitration must be given in accordance with the time provisions applicable to motions, except that at least 10 days' notice of the hearing must be given. CCP §1290.2.

A copy of the petition and written notice of the time and place of the hearing must be served in the manner prescribed in the arbitration agreement. CCP §1290.4(a). If the agreement does not specify how service is to be made, and if the person to be served has neither appeared in the proceeding nor been served previously, service must be made as stated in CCP §1290.4(b). If the person to be served has previously appeared or been served under CCP §1290.4(b), service may be made under CCP §§1010-1020. CCP §1290.4(c). The petition may not be heard until at

least 30 days after the date of the service when service is made outside the state. CCP §1290.4(b)(2).

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§45.33 c. Petition to Appoint Arbitrator

Counsel should file a petition to appoint a neutral arbitrator concurrently with the petition to compel arbitration. CCP §1281.6. These petitions may be combined in one document. The parties can agree on an arbitrator without court intervention (Cal Rules of Ct 3.815(a)); however, the parties cannot stipulate that a sitting judge serve as an arbitrator and that his or her decision be binding and subject to confirmation under the California Arbitration Act. *Heenan v Sobati* (2002) 96 CA4th 995, 1002, 117 CR2d 532. On when to petition court to appoint arbitration, see Effective Use of ADR §9.30.

PRACTICE TIP: If one of the parties is opposing arbitration, it is prudent for that party to request the court to appoint an arbitrator if arbitration is to be compelled. A court with an arbitration program may, by local rule or procedures, establish an arbitrator selection method that gives each side an opportunity to challenge at least one listed arbitrator peremptorily and ensures that an arbitrator is appointed within 30 days of the case's submission to arbitration. Cal Rules of Ct 3.815(a).

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.34 d. Response to Petitions

§45.34 d. Response to Petitions

A response to the petition to compel arbitration (and to a petition to appoint an arbitrator) must be served and filed within 10 days after service of the petition or, if served under CCP §1290.4(b)(2), within 30 days after service. The time may be extended by written agreement of the parties or, for good cause, by order of the court. CCP §1290.6.

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§45.35 e. Order Compelling or Denying Arbitration

A proceeding to compel arbitration is analogous to a suit in equity to compel specific performance of a contract. *Giuliano v Inland Empire Personnel, Inc.* (2007) 149 CA4th 1276, 1284, 58 CR3d 5. The powers of the court in acting on a petition are limited to those specified in CCP §1281.2. *Harrison v California State Auto. Ass'n, Inter-Ins. Bureau* (1976) 56 CA3d 657, 661, 128 CR 514. If the court finds that a valid written agreement to arbitrate exists, that a party has refused to arbitrate, and that no grounds exist for opposing or delaying arbitration, it must issue an order compelling arbitration. CCP §1281.2. See §25.67 for time to answer if petition is denied.

The court may refuse to order arbitration if it finds any of the following (CCP §1281.2(a)-(c)):

- The petitioner has waived the right to compel arbitration;
- Grounds exist for revocation of the agreement; or
- A party to the arbitration agreement is also a party to a pending action with a third party arising out of the same transaction, and there is a possibility of conflicting rulings. See *Birl v Heritage Care, LLC* (2009) 172 CA4th 1313, 1319, 91 CR3d 777 (no abuse of discretion to deny motion to compel arbitration when all criteria of CCP §1281.2(c) were satisfied).

Under CCP §1281.2(c), a "pending action" includes an action initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed but on or before the date of the hearing on the petition.

If the court determines that a party to the arbitration proceeding is also party to a pending action with a third party, the court may take the following actions (CCP §1281.2(c)) (see *Whaley v Sony Computer Entertainment Am., Inc.* (2004) 121 CA4th 479, 17 CR3d 88):

- Refuse to enforce the arbitration agreement and order intervention or joinder of all parties in a single action;
- Order intervention or joinder of all or only some issues;
- Order arbitration among the parties who have agreed to arbitration and stay the other action pending the outcome of arbitration; or
- Stay arbitration pending the outcome of the other action.

A signer of an arbitration agreement, or a signer's agent who can enforce the agreement, is not a third party under CCP §1281(c). See *RN Solution, Inc. v Catholic Healthcare W*. (2008) 165 CA4th 1511, 1520, 81 CR3d 892.

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§45.36 f. Appeal from Order Compelling or Denying Arbitration

An order compelling arbitration is not appealable. *Muao v Grosvenor Props., Ltd.* (2002) 99 CA4th 1085, 1088, 122 CR2d 131; *Atlas Plastering, Inc. v Superior Court* (1977) 72 CA3d 63, 67, 140 CR 59. See *Vivid Video, Inc. v Playboy Entertainment Group, Inc.* (2007) 147 CA4th 434, 442, 54 CR3d 232 (order compelling arbitration of question whether court or arbitrator should decide claims not reviewable).

An order compelling arbitration is reviewable only by a writ of mandate in exceptional circumstances, or on appeal after judgment has been entered on the arbitration award. *Muao v Grosvenor Props., Ltd., supra*; *La Pietra v Freed* (1978) 87 CA3d 1025, 1030, 151 CR 554. Writ review is proper if the matter arbitrated falls clearly outside the scope of the arbitration agreement, or arbitration would be unduly time-consuming or expensive. *Zembsch v Superior Court* (2006) 146 CA4th 153, 160, 53 CR3d 69.

An order denying or dismissing a petition to compel arbitration, on the other hand, is appealable. CCP §1294; *Los Angeles Police Protective League v City of Los Angeles* (1985) 163 CA3d 1141, 209 CR 890, disapproved on other grounds in *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 427 n28, 253 CR 426. An order denying a petition to compel arbitration in California, but directing arbitration in a sister state, is appealable under CCP §1294(a), which provides that an aggrieved party may appeal from an order denying a petition to compel arbitration. *Porter v United Servs. Auto. Ass'n* (2001) 90 CA4th 837, 838, 108 CR2d 860.

If requested by a party, the court must make a statement of decision of an appealable order. CCP §1291. Because an order compelling arbitration is not appealable, a statement of decision is not required even if requested. See *Wheeler v St. Joseph Hosp.* (1976) 63 CA3d 345, 133 CR 775.

A party may appeal an order denying attorney fees issued after the court has denied a petition to compel arbitration. *Otay River Constructors v San Diego Expressway* (2008) 158 CA4th 796, 801, 70 CR3d 434 (order denying petition was essentially judgment on only issue before court).

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§45.37 g. Removal of Arbitrator After Appointment

Code of Civil Procedure §1281.6 provides that if the agreed method of appointment "fails or for any reason cannot be followed, or when an arbitrator appointed fails to act… the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator." This provision has been resorted to by parties to remove an arbitrator during arbitration proceedings. See, *e.g.*, *Bosworth v Whitmore* (2006) 135 CA4th 536, 37 CR3d 560, in which the court held that a court may remove an arbitrator only under limited circumstances, including "when an arbitrator fails to act." 135 CA4th at 551. The court found that the trial court abused its discretion in removing the arbitrator at the plaintiff's request because his failure to meet a deadline did not justify removal when the entire proceedings were reviewed; the arbitrator had managed the case effectively for 2 years and several delays were not his fault. Because the removal was improper, the trial court was not authorized to appoint a successor (the appointment also violated the parties' contract) and, thus, the successor arbitrator's award was void. 135 CA4th at 551.

NOTE: *Bosworth* may be an extreme example of delays in arbitration and party differences that led to improper removal of the arbitrator. The court's voiding of the arbitration award was necessary to avoid injustice but unfortunately precipitated further delay in already protracted proceedings. See also *American Home Assur. Co. v Benowitz* (1991) 234 CA3d 192, 285 CR 626 (award obtained unilaterally by insured (who argued that insurer had unreasonably delayed in responding to arbitration demand) was void because it was obtained without legal authority, causing more delay).

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.38 4. Arbitration Process

§45.38 4. Arbitration Process

The following is an overview of the arbitration process, from the selection of the arbitrator through the arbitration hearing. For discussion of all aspects of the process, see Effective Use of ADR §§9.68-9.77.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.39 a. Arbitrator Selection

§45.39 a. Arbitrator Selection

If the agreement does not provide a process for selecting an arbitrator, or if the parties do not follow the method for selecting the arbitrator specified in the agreement, a party may petition the court to appoint an arbitrator. See CCP §1281.6 for court nomination procedure. When the parties agree to be bound by the provisions of a company that provides arbitrators, the company sends a list of arbitrators to the parties, and each party numbers consecutively those who are most desired to those who are least desired; the person receiving the lowest number will be designated the arbitrator.

After being selected, the arbitrator is required to disclose all matters that could cause a person aware of the facts of the matter to reasonably doubt the impartiality of the arbitrator. CCP §1281.9(a); *Jakks Pac., Inc. v Superior Court* (2008) 160 CA4th 596, 72 CR3d 914.

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§45.40 b. Discovery

The parties to arbitration have no automatic right to discovery under California law, unless the right to conduct discovery is specified in the arbitration or submission agreement or the case is subject to CCP §§1282.2(a)(2), 1283.05, or 1283.1.

PRACTICE TIP: Many litigators feel very uncomfortable presenting a case without prehearing discovery; as a result, both sides to arbitration will often voluntarily agree to prehearing depositions of at least key players in the transaction. Further, experienced arbitrators will encourage the parties to reach voluntary agreements concerning prehearing discovery in order to shorten the hearings and run them more efficiently.

On discovery in arbitration, including tips on how to deal with the unavailability of discovery, see Effective Use of ADR §9.69.

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§45.41 c. Witness and Document Lists

The arbitration statutes provide for an abbreviated exchange of information before the hearing if (1) the amount in controversy exceeds $50,000 and the arbitrator is notified in writing of this fact and (2) the action does not involve a tort claim for death or bodily injury, a collective bargaining agreement, or an arbitration agreement that expressly provides otherwise. CCP §1282.2(a)(2). Once these prerequisites are satisfied, either party may, within 15 days after receipt of the notice of hearing, demand a list of witnesses to be called, including designated experts, and a list of documents the other party intends to introduce. CCP §1282.2(a)(2)(A).

NOTE: The parties may modify this procedure in the arbitration agreement.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.42 d. Involuntary Dismissal

§45.42 d. Involuntary Dismissal

An arbitrator may dismiss an arbitration proceeding for failure to proceed with reasonable diligence if the matter is not brought to a hearing within 5 years. *Burgess v Kaiser Found. Hosps.* (1993) 16 CA4th 1077, 20 CR2d 488.

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§45.43 e. Arbitration Hearing

Although arbitration is often less formal than a judicial proceeding, the parties have a right to representation and any contractual waiver of that right can be revoked. CCP §1282.4(a). Each party, as well as the arbitrator, also has the right to serve subpoenas and subpoenas duces tecum to secure the presence of witnesses and the production of evidence at the arbitration hearing. CCP §1282.6. The testimony of witnesses need not be given under oath unless requested by a party (CCP §1282.2(d)); however, witnesses are usually sworn. Although live witnesses are preferred, witnesses may be allowed to provide testimony by telephone or affidavit.

Neither the rules on the admissibility and exclusion of evidence nor the rules of judicial procedure applies to arbitration hearings, unless the parties' agreement provides otherwise. CCP §1282.2(d); *Sapp v Barenfeld* (1949) 34 C2d 515, 520, 212 P2d 233. See also Effective Use of ADR §9.75.

NOTE: The parties may agree to make the arbitration hearing more formal by, *e.g.,* requiring the application of rules of evidence.

An informal preliminary hearing is often used in arbitrations to discuss, *e.g.,* the availability of witnesses, the determination of the extent to which the evidence rules will be applied, the issuance of subpoenas, and the exchange of briefs.

The arbitrator's discretion in conducting the hearing is exceedingly broad, unless the agreement provides otherwise. On arbitrator's powers, see Effective Use of ADR §9.74.

At the beginning of the hearing, the parties generally will be required to file arbitration briefs setting forth the facts that each intends to prove, together with an analysis of the applicable law. Once the arbitration hearings are concluded, arbitrators will often request postarbitration briefs from each party, setting out the party's arguments, the conclusions he or she wants the arbitrators to reach, and the reasons for those conclusions. Additionally, if the damages are complex, arbitrators may request briefing on how damages are to be computed.

Arbitration exhibits should be comprehensible and persuasive, and should demonstrate as little bias as possible. If the controversy justifies the expense, a court reporter should attend, at the request of one or both parties, to record and transcribe the proceedings.

For practical tips on the preparation of briefs and exhibits, see Effective Use of ADR §9.77.

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§45.44 5. Effect of Arbitration on Other Proceedings

Arbitration may affect pending or other related proceedings, as well as the parties' pursuit of provisional remedies. For example, a party to an arbitration agreement may petition the court to consolidate all or part of separate arbitration proceedings under CCP §1281.3.

If an action is pending that involves the same issues sought to be arbitrated, counsel for the party desiring arbitration may want to file a motion under CCP §1281.4 to stay the pending action or proceeding, in addition to the petition to compel arbitration. Section 1281.4 requires the court to stay a proceeding, or sever and stay any issue, that is subject to arbitration until the completion of the arbitration. *Heritage Provider Network v Superior Court* (2008) 158 CA4th 1146, 1152, 70 CR3d 645.

PRACTICE TIP: A motion to stay proceedings may be useful because it will bring all the potentially responsible parties into one forum, which may facilitate settlement or trial. A party may decide not to bring such a motion, however, in the belief that it may gain a tactical advantage from a prompt arbitration. On filing a motion to stay, see CCP §1281.4 and Cal Rules of Ct 3.650.

An arbitrator may have the power to grant provisional remedies, *e.g.,* preliminary injunction, appointment of a receiver, or attachment, according to the terms of the agreement to arbitrate. Some difficult issues arise, however, when a party to an arbitration agreement seeks ancillary relief from the court either before arbitration is commenced or while arbitration proceedings are pending. Obtaining injunctive relief may constitute an estoppel to seeking arbitration later. See generally *Freshman, Mulvaney, Marantz, Comsky, Kahan & Deutsch v Superior Court* (1985) 173 CA3d 223, 236, 218 CR 533, citing *Writers Guild of Am., W., Inc. v Screen Gems, Inc.* (1969) 274 CA2d 367, 374, 79 CR 208. A court may provide provisional relief as an adjunct to arbitration. See generally *Loeb & Loeb v Beverly Glen Music, Inc.* (1985) 166 CA3d 1110, 1116, 212 CR 830. Thus, before pursuing ancillary judicial remedies, counsel should carefully consider the potential impact on future or pending arbitration proceedings.

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6. Arbitration Awards and Remedies

§45.45 a. Award

The arbitration award must be in writing and "include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." CCP §1283.4. However, arbitrators may base their decision on "broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action." *Sapp v Barenfeld* (1949) 34 C2d 515, 523, 212 P2d 233; *Case v Alperson* (1960) 181 CA2d 757, 761, 5 CR 635. Findings of fact are not required nor is the arbitrator required to disclose the rationale or reasons for the award. *Cothron v Interinsurance Exch.* (1980) 103 CA3d 853, 860, 163 CR 240; *Interinsurance Exch. v Bailes* (1963) 219 CA2d 830, 837, 33 CR 533.

For discussion of the arbitration award, including amending awards and the service and timing of an award, see §45.49. See also Effective Use of ADR §§9.78-9.86.

NOTE: An award following a contractual arbitration proceeding is not a "favorable termination," for the purposes of a subsequent malicious prosecution action. Thus, a person may not sue for malicious prosecution of an action that the parties resolved through contractual arbitration. This rule applies whether the underlying action began in court and ended in contractual arbitration or whether it began and ended in arbitration. *Brennan v Tremco, Inc.* (2001) 25 C4th 310, 314, 105 CR2d 790.

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§45.46 b. Remedies

An arbitrator's award may provide for any remedy that is rationally drawn from the contract as interpreted by the arbitrator. *Advanced Micro Devices, Inc. v Intel Corp.* (1994) 9 C4th 362, 36 CR2d 581; but see *Broughton v CIGNA Healthplans* (1999) 21 C4th 1066, 90 CR2d 334 (court held that injunctive relief portion of claim brought under Consumers Legal Remedies Act (CLRA) (CC §§1750-1784) could not be arbitrated, although claim for damages under CLRA could be); *Cruz v PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 133 CR2d 58 (extended *Broughton* to include claims to enjoin unfair competition under Bus & P C §§17200-17210 and to enjoin misleading advertising under Bus & P C §§17500-17509).

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.47 c. Fees and Costs

§45.47 c. Fees and Costs

Unless the arbitration agreement provides otherwise, each party must pay its prorata share of the expenses and fees of the arbitrator and its own attorney and witness fees. CCP §1284.2. *Kauffman v Shearson Hayden Stone, Inc.* (1982) 128 CA3d 809, 180 CR 566.

PRACTICE TIP: Counsel representing a party stipulating to arbitration that is to be governed by CCP §§1280-1294.2 or drafting an arbitration clause in a contract should consider including a clause that provides for an award of costs and fees to the prevailing party. On attorney fee awards in arbitration, see Effective Use of ADR §9.81.

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§45.48 d. Award Finality

Generally, the arbitrator's decision is final and binding whether or not it is correct in law or in fact, even if the "error appears on the face of the award and causes substantial injustice to the parties." *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 6, 10 CR2d 183; *Briggs v Resolution Remedies* (2008) 168 CA4th 1395, 1400, 86 CR3d 396 (no judicial review of arbitrator's discretionary prehearing stay order). The sufficiency of the evidence is not reviewable. *Case v Alperson* (1960) 181 CA2d 757, 761, 5 CR 635. The award will be upheld if it is "even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source." *Advanced Micro Devices, Inc. v Intel Corp.* (1994) 9 C4th 362, 381, 36 CR2d 581. See also *Bosack v Soward* (9th Cir 2009) 573 F3d 891, 899 (arbitration panel's good faith misinterpretation of governing law and factual errors insufficient grounds to vacate award under Federal Arbitration Act).

An exception to this rule is when the arbitration agreement provides for judicial review on the merits. *Cable Connection, Inc. v DIRECTV, Inc*. (2008) 44 C4th 1334, 1361, 1364, 82 CR3d 229; *Christensen v Smith* (2009) 171 CA4th 931, 935, 90 CR3d 57 (provision stating merely that arbitrator "shall render an award in accordance with substantive California law" does not provide basis for judicial review). In addition, an arbitrator's award may not extend beyond the issues that were arbitrable under the contract between the parties. See *California Faculty Ass'n v Superior Court* (1998) 63 CA4th 935, 75 CR2d 1.

NOTE: Full judicial review is required for discovery orders of an arbitrator affecting a third party. *Bergland v Arthroscopic & Laser Surgery Ctr.* (2008) 44 C4th 528, 538, 79 CR3d 370.

The sole grounds for vacation of the award are listed in CCP §1286.2(a) and include fraud or some other fundamental defect in the process itself. However, a limited exception to the finality rule exists for an error that is so egregious that it yields a result entirely beyond the parties' expectations, *e.g.,* when the arbitrator exceeds his or her powers by arbitrarily remaking the contract under which the arbitration occurs (*PG&E v Superior Court* (1993) 15 CA4th 576, 19 CR2d 295) or when finality of the award would be inconsistent with protection of a party's statutory rights (*Board of Educ. v Round Valley Teachers Ass'n* (1996) 13 C4th 269, 52 CR2d 115; *Advanced Micro Devices, Inc. v Intel Corp., supra*). See also *Burlage v Superior Court* (2009) 178 CA4th 524, 530, 100 CR3d 531 (arbitrator's exclusion of material evidence substantially prejudiced party and undermined "fundamental principle" of CCP 1286.2(a)(5)).

In *Moncharsh v Heily & Blase, supra,* the supreme court established judicial review and invalidation of an arbitration award that in effect violated public policy. This "public policy" exception was successfully argued in *Jordan v DMV* (2002) 100 CA4th 431, 123 CR2d 122 (arbitration award violated clear expression of public policy against making gifts of public funds). See also *City of Palo Alto v Service Employees Int'l Union, Local 715* (1999) 77 CA4th 327, 91 CR2d 500.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.49 e. Confirming, Correcting, or Vacating Award

§45.49 e. Confirming, Correcting, or Vacating Award

An arbitration award made under a private agreement is not automatically entered as a judgment in the matter. After the arbitration award has been made, any party to the arbitration may petition the court to confirm, correct, or vacate the award. CCP §1285. When a petition to vacate is not timely opposed, the allegations of the petition are deemed admitted. CCP §1290.6; *Taheri Law Group, A.P.C. v Sorokurs* (2009) 176 CA4th 956, 960, 98 CR3d 634. However, this does not mean that the court must grant the petition; the court must draw its own conclusions from the allegations and confirm, correct, or vacate the award as appropriate. 176 CA4th at 960.

Parties may agree to waive their rights to challenge a binding arbitration award. See *Allstate Ins. Co. v Superior Court* (2006) 142 CA4th 356, 48 CR3d 266 (trial court not permitted to vacate award in favor of homeowners and remand for further consideration when parties agreed to waive their rights to challenge award). An award that is not confirmed or vacated acts as a contract between the parties to the arbitration. CCP §1287.6.

If a petition or response seeks to confirm a properly served and filed award, the court must confirm it unless it corrects or vacates the award or dismisses the proceedings. CCP §1286. See *Weinberg v Safeco Ins. Co.* (2004) 114 CA4th 1075, 1083, 8 CR3d 224; *Ajida Technols., Inc. v Roos Instruments, Inc.* (2001) 87 CA4th 534, 537, 104 CR2d 686; see also *Law Offices of David S. Karton v Segreto* (2009) 176 CA4th 1, 8, 97 CR3d 329 (when one party failed to petition trial court to confirm award and other party petitioned court to correct award, error to simply deny petition; court required under CCP §1286 to confirm initial award if it did not correct, vacate, or dismiss it); *Landis v Pinkertons, Inc.* (2004) 122 CA4th 985, 18 CR3d 890 (trial court properly confirmed award despite petitioners' failure to comply with statutory procedure). If the arbitration agreement contains a severance clause, and a provision in the agreement is invalid or unenforceable, the remainder of the agreement is valid and enforceable. *Oakland-Alameda County Coliseum Auth. v CC Partners* (2002) 101 CA4th 635, 646, 124 CR2d 363, disapproved on other grounds in *Cable Connection, Inc. v DIRECTV, Inc.* (2008) 44 C4th 1334, 1361, 82 CR3d 229.

A final award may be amended at any time before judicial confirmation of the award. *A.M. Classic Constr., Inc. v Tri-Build Dev. Co.* (1999) 70 CA4th 1470, 1478, 83 CR2d 449. In *Century City Med. Plaza v Sperling, Isaacs & Eisenberg* (2001) 86 CA4th 865, 103 CR2d 605, the court added the additional condition that an amended award must be made during the allowed time for correction of an award. See CCP §§1284, 1286.6. In *Delaney v Dahl* (2002) 99 CA4th 647, 659, 121 CR2d 663, the court rejected this additional condition, and held only that the amended award must be consistent with other findings on the merits and not cause demonstrable prejudice against any party's legitimate interests. See also *Law Offices of David S. Karton,* 176 CA4th at 5 (noting that State Bar's Committee on Mandatory Fee Arbitration has issued "Arbitration Advisory" recognizing conflict between *Century City Med. Plaza* and *Delaney*, and choosing to follow *Delaney*).

If confirmed, an award is entered as a judgment and has the same force and effect as a judgment in a civil action of the same jurisdictional classification and may be enforced like any other such judgment. CCP §1287.4; *Wade v Schrader* (2008) 168 CA4th 1039, 1045, 85 CR3d 865.

Although an arbitrator may issue incremental or successive awards in deciding all issues of a case, an arbitrator may not use this process to correct or modify a confirmed award. *Roehl v Ritchie* (2007) 147 CA4th 338, 351, 54 CR3d 185 (arbitrator's reservation of jurisdiction to issue second award did not lead to modification of first confirmed award).

The court must vacate the award if it finds any of the grounds listed in CCP §1286.2. *Advantage Med. Servs., LLC v Hoffman* (2008) 160 CA4th 806, 72 CR3d 935 (arbitrator failed to disclose business relationship with insurer). Section 1286.2 is the exclusive grounds for vacating an award. *Mossman v City of Oakdale* (2009) 170 CA4th 83, 88, 87 CR3d 764. Inadequate disclosure is not grounds to challenge an arbitration award, if the party knew of the deficiencies and consented to the arbitrator. *Dornbirer v Kaiser Found. Hosp. Plan, Inc.* (2008) 166 CA4th 831, 842, 83 CR3d 116.

NOTE: On the time limits for filing a petition to confirm, correct, or vacate an award, see CCP §1288 and Effective Use of ADR §9.83.

Parties to an arbitration agreement may agree to contractually expand the scope of judicial review beyond that

provided by statute, *i.e.,* to provide for judicial review of the merits of the arbitrator's decision. See CCP §§1286.2, 1286.6; *Cable Connection, Inc. v DIRECTV, Inc*. (2008) 44 C4th 1334, 1361, 1364, 82 CR3d 229. The parties may also agree to an appellate step to the arbitration in which another arbitrator reviews the award under normal appellate standards of review. See *Cummings v Future Nissan* (2005) 128 CA4th 321, 27 CR3d 10 (provision in arbitration agreement for second-level review of arbitration award was not unconscionable).

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.50 f. Appeal

§45.50 f. Appeal

The following arbitration orders are appealable (see CCP §1294):

- Order dismissing a petition to confirm, correct, or vacate (CCP §1287.2);
- Order vacating an award, unless a rehearing in arbitration is ordered;
- Judgment entered in accordance with the arbitration statutes; and
- Special order after final judgment.

NOTE: Although a judgment confirming an arbitration award is generally appealable, it may not be appealed when there are causes of action remaining to be tried in the proceeding. *Rubin v Western Mut. Ins. Co.* (1999) 71 CA4th 1539, 1547, 84 CR2d 648.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.51 7. Neutral Arbitrator Ethics Rules

§45.51 7. Neutral Arbitrator Ethics Rules

Except for arbitrators of public or private sector collective bargaining agreements, any person selected to serve as a neutral arbitrator in a contractual arbitration hearing conducted in California or under an arbitration agreement subject to the California Arbitration Act must comply with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Ethics Standards) as adopted by the Judicial Council. See CCP §1281.85. The Ethics Standards appear in Cal Rules of Ct, Title 10. Arbitrators must also comply with CCP §1281.9(a)(1) (incorporating CCP §170.1 grounds for disqualification of a judge) and §1281.91 (disqualification of a neutral arbitrator).

The standards are intended to establish the minimum standards of conduct for neutral arbitrators and are expressly not intended to affect any civil cause of action or create any new civil cause of action. See Cal Rules of Ct, Ethics Standards for Neutral Arbitrators in Contractual Arbitration 1(d).

For discussion of ethics in contractual arbitration, see Effective Use of ADR, chap 10.

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§45.52 D. Judicial Arbitration

Recognizing that litigation of small cases had become complex and costly and that parties were being denied the right to prompt resolution of minor civil disputes, the legislature saw the need for mandatory court-ordered arbitration. CCP §1141.10. The legislature endorsed arbitration as a proven, efficient, and equitable method for resolving small civil cases (CCP §1141.10), and enacted a system of mandatory court-ordered arbitration (CCP §§1141.10-1141.31; Cal Rules of Ct 3.810-3.830). The ethics standards for arbitrators in the judicial arbitration program are set out in CCP §1141.18(d), Cal Rules of Ct 3.816, and the California Code of Judicial Ethics (see Code of Judicial Ethics, Canon 6(D)).

For full discussion of judicial arbitration, see chap 37 and Effective Use of ADR, chap 11.

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E. Settlement Conference

§45.53 1. Process

A settlement conference is a form of nonbinding mediation before a judge, unless the parties agree that it should be binding. The settlement conference may be sponsored by the court system, or the parties may agree to a settlement conference before a retired judge through one of the private retired judge systems. Settlement conferences may be mandatory or voluntary. For discussion of judicial settlement conferences, see Effective Use of ADR §1.9; on mediation, see §45.15 and Effective Use of ADR, chaps 5-6.

WARNING: Settlement conferences under Cal Rules of Ct 3.1380 are not protected by mediation confidentiality. Evid C §1117(b)(2). A footnote in *Rojas v Superior Court* (2004) 33 C4th 407, 417 n4, 15 CR3d 643, suggests that in any given case the question of whether a court-ordered conference is a "mediation" or a "settlement conference" may be an open question. In *Travelers Cas. & Sur. Co. v Superior Court* (2005) 126 CA4th 1131, 1139 n8, 24 CR3d 751, the court expressly declined to clarify any differences that might exist between a mediation and a voluntary settlement conference. The court cautioned against construing its decision as holding that all voluntary settlement conferences are mediations subject to mediation confidentiality rules.

Witnesses do not testify at a settlement conference. The parties may be asked initially to describe the facts and explain their positions, or the judge may ask each party to address specific issues. The judge may then speak privately to the attorney for each party, going over the strengths and weaknesses of each position and exploring various settlement possibilities. Without disclosing any party's top or bottom settlement figure, the judge may go back and forth between the parties, attempting to have each side compromise enough to reach a reasonable settlement acceptable to all. On negotiating the monetary settlement through the use of a mediator, see Effective Use of ADR §§6.26-6.33.

The success or failure of the settlement conference depends on the parties' willingness to realistically assess the strengths and weaknesses of their cases and negotiate in good faith. It also depends on the skill of the judge as a mediator and on whether the judge has carefully reviewed the statements in advance and is familiar with the facts and issues in the case. Some judges are "born" mediators, while others use the full force of their judicial position to convince a party to settle. An effective settlement judge draws not only on his or her legal knowledge and experience but also on the respect parties tend to accord to the judiciary itself.

A useful variation of the settlement conference is the binding "high-low" conference, generally suggested by either plaintiff's counsel or an insurance company in a personal injury case. Variously referred to as a binding settlement conference, binding mediation, or binding arbitration, the basic format and goal is always the same. Before the conference, the parties have agreed to an unannounced minimum and maximum floor and ceiling. These figures will not be revealed to the judge, to avoid any tendency by the judge to "split the difference," and to get a true value for the case. At the conference, each side makes an abbreviated presentation as they would in an informal settlement conference, and then the judge sets a value on the case. If the judge's assessment of damages is outside the predetermined parameters, the parties' high-low figures set the limits. Because the high-low conference is entered into by stipulation of all parties, it is available at both court and private settlement conferences.

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2. Court-Sponsored Conferences

§45.54 a. Mandatory Settlement Conference

On the court's own motion or at the request of any party, the court may set a mandatory settlement conference. Cal Rules of Ct 3.1380(a). Most superior courts have adopted local rules for scheduling mandatory settlement conferences. See *e.g.,* San Francisco Ct R 5.0(C) (mandatory settlement conference must be set within 3 weeks of date set for trial). In cases subject to the delay reduction rules (see chap 40), the court must set an initial case management conference within 180 days of the filing of the initial complaint (Cal Rules of Ct 3.721); the date and time of an early settlement conference may be set at the case management conference.

Under Cal Rules of Ct 3.1380(d), the court cannot appoint a person to conduct a mediation, or appoint a person to conduct the settlement conference who is also serving as a mediator in the action. See also *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 53 CR3d 115 (case management-ordered mediation was improper).

Trial counsel, parties, and persons with full authority to settle the case must personally attend the conference, unless they are excused by the court for good cause. If any consent to settle is required for any reason, the party with consensual authority must be personally present at the conference. Cal Rules of Ct 3.1380(b). Before the conference, the parties must submit a mandatory settlement conference statement containing a good faith settlement demand, summarizing the case, setting out the disputed issues, and attaching relevant documents. Cal Rules of Ct 3.1380(c).

NOTE: The format and content of the statement, as well as the format and rules of the conference, may vary according to local rules of court or the rules of the private system. Because the California Rules of Court do not contain format rules for settlement conference statements, counsel should check with the settlement conference judge to determine what is required.

For an in-depth discussion of mandatory settlement conferences, see §§40.71-40.85.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.55 b. Voluntary Settlement Conference

§45.55 b. Voluntary Settlement Conference

Counsel desiring to settle a case early in the proceeding should schedule a voluntary settlement conference before a judge. Such conferences often prove fruitful from the standpoint of obtaining an independent evaluation of verdict value and settlement potential. On the benefits of using objective standards, including the evaluation of a third-party neutral, see Effective Use of ADR §3.212.

Some courts by local rule permit voluntary or "specially set" settlement conferences. See *e.g.* San Francisco Ct R 5.0(D).

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.56 3. Private Settlement Conference

§45.56 3. Private Settlement Conference

In addition to court-sponsored settlement conferences, the parties can submit their case to a retired private judge for a settlement conference. Private settlement conferences can often be scheduled more quickly than through the courts and offer the parties more flexibility in calendaring and more freedom in selecting the judge. The parties, however, must pay the costs of private settlement conferences; there is no charge for settlement conferences scheduled in the courts.

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§45.57 F. Mini-Trial

A mini-trial is a voluntary, confidential, and nonbinding procedure consisting of an informal, summary presentation of each party's best case by the attorneys and experts. Generally, the case is presented to business executives, one from each side of the dispute, who have the authority to negotiate a settlement. A neutral adviser may preside over the mini-trial and offer an advisory opinion to facilitate settlement. The mini-trial is a sophisticated settlement conference that may be particularly helpful in cases involving complex questions of mixed law and fact that typically arise, *e.g.,* in patent, product liability, antitrust, and unfair competition cases.

As with all ADR mechanisms, the mini-trial can be structured to meet the parties' particular needs. Usually, the parties agree to a basic framework and set the ground rules. They exchange information informally before trial unless the dispute is in the advanced stages of litigation, in which case they continue formal discovery procedures. The hearing generally lasts from half a day to 4 days. The attorneys and experts are able to present their cases to their best advantage, to ask questions directly, and to use exhibits and visual aids liberally.

The party representatives, having heard all the evidence, withdraw from the attorneys, the neutral adviser, and the parties emotionally involved in the dispute. These representatives then attempt to negotiate a resolution based on sound business judgment and expertise.

A potential disadvantage of the mini-trial is the opportunity it provides a less than candid party for not disclosing all information until trial. If the case does not settle after the mini-trial, one side may take advantage of the disclosed trial strategies of the other side. In most cases, however, subsequent discovery will minimize this risk.

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§45.58 G. Trial by Private Judge

An increasing number of retired judges have been recruited by the public and the State Bar to preside over private trials. The use of private judges has been popularized as "rent-a-judge," a generic phrase referring to referees under an order of reference (see §§45.59-45.60), as well as to temporary judges appointed under Cal Const art VI, §21 (see §§45.61-45.62).

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1. Trial by Referee

§45.59 a. Procedure

Parties Stipulate to a Reference. The court may, on stipulation of all parties, refer any or all issues in a pending lawsuit for trial by a referee. CCP §638; see Cal Rules of Ct 3.900-3.910. If the entire case is referenced, the resulting decision will stand as the decision of the court, and when the decision is filed, judgment may be entered as if the matter had been tried by the court. CCP §644. If the agreement addresses the payment of the referee's fees, it shall be enforced as written. *Carr Bus. Enters. v City of Chowchilla* (2008) 165 CA4th 1568, 82 CR3d 64. If the agreement does not address the payment of fees, the court may apportion the fees in any manner determined by the court to be fair and reasonable. CCP §645.1.

NOTE: In practice, it is rare to have the court reference an entire case.

Motion for Reference by One Party. A reference may also be ordered on motion of a party to a written contract or lease that provides that any controversy arising under the contract or lease will be heard by a referee. CCP §638. In the past, it was hard to find a reported court of appeal case that refused to enforce an agreement to resolve a dispute by reference procedures. This encouraged businesses to turn to judicial reference as a way to avoid the risks of a jury trial. However, *Pardee Constr. Co. v Superior Court* (2002) 100 CA4th 1081, 123 CR2d 288 demonstrated that courts are willing to use the same protective policy approach in consumer judicial reference cases as they have used in consumer arbitration cases. In *Pardee,* the court refused to enforce a judicial reference provision in a form contract used by a developer, reasoning that the contract was procedurally defective because the judicial reference provision was buried in the contract and it did not define or explain the term "judicial reference." The court also held that the contract was substantively unconscionable because it waived punitive damages and the buyer received no consideration for waiving a jury. But see *Greenbriar Homes Communities, Inc. v Superior Court* (2004) 117 CA4th 337, 11 CR3d 371 (reference provision in home sales contract not unconscionable and thus could be enforced against original buyers; court could not decline to enforce reference provision to avoid multiplicity of lawsuits); *Woodside Homes, Inc. v Superior Court* (2003) 107 CA4th 723, 132 CR2d 35 (distinguishing *Pardee* and enforcing judicial reference provision in residential sales contract).

Court Orders Issue(s) Referenced. The court may also, without the parties' consent, order a particular issue, *e.g.*, discovery, refereed. CCP §639; see Cal Rules of Ct 3.920-3.926. When the court appoints a referee without the parties' consent, it must be by written order, which includes a finding either that (1) no party has established an economic inability to pay a prorata share of the costs of the reference or (2) another party has agreed voluntarily to pay the prorata share of the referee's fee that would otherwise be paid by the party with the economic inability. CCP §639(d)(6). If the court appoints a discovery referee, it must specify in its order whether the referee is being appointed for all discovery purposes and include a statement of the extraordinary circumstances that make the appointment necessary. CCP §639(c), (d)(2). See also *Hood v Superior Court* (1999) 72 CA4th 446, 449, 85 CR2d 114. These special referees are sometimes called "special masters."

Court Appoints Referee. If the parties agree to have the entire case heard by a referee, the court will appoint from one to three persons designated by the parties. CCP §640. If the parties cannot agree, the court may appoint from one to three referees. Alternatively, the reference may be to a court commissioner in the county where the action is pending. CCP §640. See *Estate of Doran* (1956) 138 CA2d 541, 292 P2d 655 (substantial compliance with requirement that all parties consent).

Referee Issues "Statement of Decision." If there is a general reference, the referee tries all issues, whether of fact or law, and renders a statement of decision. CCP §638. The statement of decision must be submitted in writing within 20 days after the testimony is closed. CCP §643. The referee's findings become part of the judgment roll. *Chiarodit v Chiarodit* (1933) 218 C 147, 21 P2d 562. Judgment may be entered after the referee's statement of decision is filed, as if the action had been tried by the court. CCP §644. A party may appeal from the judgment entered in accordance with the referee's decision under the rules of appellate procedure, just as from a regular trial court judgment. CCP §645.

Procedures and Rules of Evidence in Referenced Cases. Because a general reference is almost always made only on agreement of the parties, the procedures and rules of evidence are also generally a matter of stipulation in these cases. The statutory rules of evidence and procedure govern a general reference made on motion of a party or on the court's own motion. It is not always clear whether the parties to a stipulation intend to engage in a reference or contractual arbitration. It is important to distinguish, however, because governing procedures and the applicable scope of judicial review for each are quite different. On contractual arbitration, see §45.22; Effective Use of ADR, chap 9. In *Sy First Family LP v Cheung* (1999) 70 CA4th 1334, 83 CR2d 340, for example, the parties entered into a stipulation that used the word "reference" in its title and referred to CCP §638, but, on the other hand, provided the matter would be tried by the American Arbitration Association (AAA) under AAA rules. The appellate court found that, given the fact that the parties agreed at the hearing that the panel could issue an "arbitration award," the parties could not later object that they intended a reference. 70 CA4th at 1344.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.60 b. Advantages and Disadvantages

§45.60 b. Advantages and Disadvantages

The advantages of a trial by a referee include the following:

- The parties select their own referee. The referees need not be attorneys. In fact, parties often opt for those with special expertise in the subject matter of the dispute. The parties' mutual selection of the trier of law and fact results in fewer appeals.
- The parties set the trial at a mutually convenient time.
- The parties may agree to simplified rules of evidence and procedures.
- The parties retain their right to appeal. However, unlike judicial arbitration (CCP §§1141.10-1141.31), there is no right to a trial de novo following trial on reference.

Potential disadvantages of a trial by a referee include the following:

- The referee's powers terminate when the statement of decision is filed. All subsequent motions must be presented to the court before a judicial officer unfamiliar with the case.
- The referee cannot punish for contempt. The referee's powers are strictly defined by the order of reference.

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2. Trial by Temporary Judge

§45.61 a. Appointment

The California Constitution provides civil litigants the opportunity to resolve their disputes in a private trial presided over by a temporary judge. California Constitution art VI, §21 provides: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." A stipulation to a particular temporary judge, however, does not allow the court to transfer the matter to another temporary judge over a party's objection if the first judge becomes unavailable. *Kim v Superior Court* (1998) 64 CA4th 256, 75 CR2d 468.

Under Cal Rules of Ct 2.831, there must be a written stipulation, including the name and office address of the proposed temporary judge, the stipulation must be approved by the presiding or supervising judge of the court, and the temporary judge must consent to the stipulation and take an oath of office (unless a court commissioner is the temporary judge).

PRACTICE TIP: Because the California Constitution refers expressly to "parties litigant," a contractual dispute resolution clause providing for trial by a temporary judge in the event of a future dispute would not be enforceable. However, there is no bar to providing in a contract for the resolution of future disputes by use of an order on reference. On trial by referee, see §§45.59-45.60.

California Rules of Court 2.831(e)-(f), 2.832 provide for such matters as disqualification of a privately compensated temporary judge under CCP §§170.1-170.5, use of court facilities and court personnel, hearings (trials) that are open and accessible to the public and of which notice has been given, withdrawal of the stipulation for appointment of a temporary judge, sealing the records, and intervention by another in the case. Temporary judges serve without compensation unless the parties agree in writing on a compensation rate. Cal Rules of Ct 2.832.

PRACTICE TIP: It is generally advisable to include in the stipulation for appointment of the temporary judge a waiver of the peremptory disqualification of a judge allowed by CCP §170.6.

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§45.62 b. Authority

Once a temporary judge has taken the oath of office and the oath has been filed, he or she has the same authority as a sitting judge (see generally *Estate of Kent* (1936) 6 C2d 154, 163, 57 P2d 901), including the contempt power (see generally *In re Frye* (1983) 150 CA3d 407, 197 CR 755; *Rosenstock v Municipal Court* (1976) 61 CA3d 1, 132 CR 59), and enjoys full judicial immunity (see generally 66 Ops Cal Atty Gen 69 (1983)). The trial is conducted under California rules of evidence and procedure (see Evid C §300) unless the parties agree otherwise. Private trials are held in an attorney's office, a public courtroom, or facilities provided by the private judging company. A privately retained court reporter records the proceedings.

The temporary judge renders a decision and enters judgments in the same manner as a sitting judge and submits a statement of decision when and as required by CCP §632 and Cal Rules of Ct 3.1590. The temporary judge retains jurisdiction to hear posttrial motions, such as a motion for a new trial (see *Anderson v Bledsoe* (1934) 139 CA 650, 34 P2d 760). The parties can appeal the judgment as in any civil case decided by an active judge. See Comment, 17 UC Davis L Rev 611 (Winter 1984).

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§45.63 c. Differences Between Temporary Judges and Referees

There are a number of differences between a temporary judge and a referee. Some of the most important differences are:

- A temporary judge retains jurisdiction after a decision is rendered until final determination of the case, and a referee does not; a temporary judge enters judgment in the case, and a referee does not.
- A temporary judge must be a member of the State Bar; a referee can be any qualified person mutually acceptable to the parties.
- A temporary judge must take an oath of office, and a referee does not.
- A temporary judge is empowered to punish for contempt, and a referee does not have contempt power.
- The parties must stipulate to appointment of a temporary judge, while a referee may be appointed on motion of a party to a contract providing for reference as a means of resolving disputes arising under the contract.

PRACTICE TIP: In complex litigation, many issues continue to arise after a decision is entered. The temporary judge, already familiar with the case, can resolve posttrial motions quickly and efficiently. This is a distinct advantage over a trial by a referee, who cannot hear posttrial motions.

On trial by referee, see §§45.59-45.60; on trial by temporary judge, see §§45.61-45.62.

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§45.64 H. Summary Jury Trial

Another pretrial settlement technique is the summary jury trial. After discovery is complete and all pretrial motions have been resolved, a jury is impaneled to give the parties an advisory verdict based on a summary of admissible evidence presented by the attorneys. Witnesses are not allowed to testify, but the parties must attend to help reach an eventual settlement.

Summary jury trials are conducted by a judge or magistrate before a lengthy trial in those cases in which juror response is difficult to predict. Counsel submit trial briefs on legal issues as well as prospective jury instructions. In most cases, a court reporter is not present and the trial is not open to the public. The parties agree in advance to the form and effect of the verdict. Some agree to a consensus verdict on liability and damages, while others prefer an individual assessment by each juror. In some cases, the parties may agree to a binding verdict.

Because the summary jury trial is conducted on the eve of trial, the expense of discovery and trial preparation has already been incurred. However, by avoiding a lengthy jury trial, the savings from a successful settlement can be significant.

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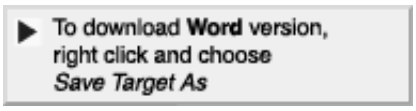
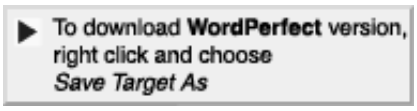
VI. FORMS

§45.65 A. Form: Sample Dispute Resolution Agreement





The following form is a sample contractual agreement for resolving disputes arising under a contract. It provides for a variety of alternative dispute resolution methods to be used on a step-by-step basis. This form may be adapted to the needs of the contracting parties by adding additional steps or provisions or by deleting any of those included in the sample form.

DISPUTE RESOLUTION AGREEMENT

I. PURPOSE

It is our objective to establish procedures to facilitate the informal and inexpensive resolution of any disputes arising under this contract by mutual cooperation and without resort to outside counsel and litigation.

To accomplish this objective, we agree that all disputes arising under this contract will be resolved by submission to binding arbitration. The parties agree that arbitration must be initiated within one year after the claimed breach occurs and that the failure to initiate arbitration within the one-year period constitutes an absolute bar to the institution of any proceedings. The parties further agree that, before the initiation of arbitration proceedings, the parties will conduct a mediation session.

II. MANDATORY PREARBITRATION ATTEMPTS TO SETTLE DISPUTES

Before initiating arbitration, persons with settlement authority shall meet face to face to discuss the dispute in the presence of a mutually selected mediator.

III. ARBITRATION

The aggrieved party may initiate arbitration by sending written notice of an intention to arbitrate by registered or certified mail to all parties and to the arbitrator. The notice must contain a description of the dispute, the amount involved, and the remedy sought.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.66 B. Form: Negotiated Submission Agreement

§45.66 B. Form: Negotiated Submission Agreement

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

The following form may be used by parties after a dispute has arisen either to modify existing contractual provisions for arbitration or as a separate agreement to arbitrate the dispute.

NEGOTIATED SUBMISSION AGREEMENT

1. This agreement is made between _ _[*names of parties*]_ _ regarding a dispute that has arisen between them.

2. The parties submit their existing dispute for _ _[*nonbinding/binding*]_ _ arbitration.

3. The dispute involves _ _[*briefly describe nature of controversy, amount of money at issue, and remedy sought*]_ _.

4. The Arbitrator

[*Option 1*]

The parties agree to __ _[*name*]_ __ to serve as arbitrator.

[*Option 2*]

The parties request __ _[*name*]_ __, an arbitration service, to provide the names of three potential arbitrators, giving each party the opportunity to strike one name. The remaining arbitrator will be accepted by the parties.

[*Option 3*]

The parties agree to arbitration by a three-member panel. The parties request __ _[*name*]_ __, an arbitration service, to provide the names of five potential arbitrators, giving each party the opportunity to strike one name. The three remaining arbitrators will be accepted by the parties as the arbitration panel.

[*Continue*]

5. Prehearing Conference

A prehearing conference will be scheduled at which the parties will agree on procedural matters, arrange for the exchange of information, obtain stipulations, and attempt to narrow the issues to be arbitrated.

6. Discovery

[*Option 1*]

The parties will submit a proposed discovery schedule to the arbitrator(s) at the prehearing conference. The scope and duration of discovery will be within the sole discretion of the arbitrator(s).

[*Option 2*]

It is our objective to expedite the arbitration proceedings by placing the following limitations on discovery:

a. Each party may propound only one interrogatory requesting the names and addresses of the witnesses to be called at the arbitration hearing.

b. On a date to be determined at the prehearing conference, each party may serve one request for the production of documents. The documents are to be exchanged within 15 days after the demand.

c. Each party may depose _ _[*insert number*]_ _ witnesses. Each deposition must be concluded within four hours and all depositions must be taken within 30 days after the prehearing conference. Any party deposing an opponent's expert must pay the expert's fee for attending the deposition.

[*Option 3*]

It is our objective to expedite the arbitration proceedings by eliminating discovery as provided by the California Civil Discovery Act (CCP §§2016.010-2036.050). Instead of discovery, the parties agree to the following exchange of information:

a. Either party may make a written demand for lists of the witnesses to be called or the documents to be introduced at the hearing. The demand must be received before the prehearing conference.

b. The lists must be served within 15 days after the demand has been mailed.

c. No depositions may be taken for discovery.

[*Continue*]

7. The Hearing

a. Hearing Briefs

The parties must file briefs with the arbitrator(s) at least three days before the hearing, specifying the facts each intends to prove and analyzing the applicable law.

b. Powers of Arbitrator

(1) Evidence

Judicial rules of evidence and procedure relating to the conduct of the hearing, examination of witnesses, and presentation of evidence do not apply. The arbitrator(s) will admit any relevant evidence, including hearsay, if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law.

(2) Inspection and Investigation

An arbitrator finding it necessary to make an investigation or inspection must notify the parties of the time and place. The arbitrator must provide them with an oral or written report and give them an opportunity to comment.

(3) Adjournments

The arbitrator(s) may, without special notice, recess the hearing and reconvene at reasonable and warranted times and intervals.

(4) Closing the Hearing

The arbitrator(s) will close the hearing after presentation of the evidence or receipt of final briefs, if requested. The time limit within which the award must be filed begins to run from the closing of the hearing.

(5) Reopening the Hearing

The arbitrator(s) may reopen the hearing at the request of either party any time before the award is made.

c. Rights of Parties

(1) Representation by Counsel

The parties have the right to representation by legal counsel throughout the arbitration proceedings.

(2) Presentation of Evidence and Cross-Examination

Within reasonable limits, both sides at the hearing may call and examine witnesses for relevant testimony, introduce relevant exhibits or other documents, cross-examine or impeach witnesses who have testified orally on any matter relevant to the issues, and otherwise rebut evidence, as long as these rights are exercised in an efficient and expeditious manner.

(3) Record of Hearing

Any party desiring a stenographic record may hire a court reporter to attend the proceedings. The requesting party must notify the other parties of the arrangements before the hearing and must pay the costs.

(4) Oaths

On the request of any party, the oral evidence will be given under oath.

8. The Award

a. Scope

The decision will be based on the evidence introduced at the hearing, including all logical and reasonable inferences made from it. The arbitrator(s) may grant any remedy or relief that is just and equitable.

b. Time

The award must be mailed promptly to the parties no later than 30 days from the closing of the hearing.

c. Form

The award, which must be made in writing and signed by either the arbitrator or a majority of the arbitrators, will contain a concise statement of the reasons supporting the decision.

9. Fees and Expenses

a. Witnesses

Each party must pay its own witness fees.

b. Arbitrators

Each party must pay its prorata share of the arbitrator fees.

c. Attorneys

[*Option 1*]

The arbitrator(s) __ _[*has/have*]_ __ the authority to award attorney fees to the prevailing party.

[*Option 2*]

The arbitrator(s) must award attorney fees to the prevailing party.

[*Option 3*]

Each party must pay its own attorney fees.

[*Continue*]

10. Finality

The award can be judicially confirmed, corrected, or vacated under Code of Civil Procedure §§1285-1288.8.

The award is final and binding, and there is no direct appeal from the award on the grounds of error in the application of the law.

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Source: Civil Litigation/California Civil Procedure Before Trial/45 Alternative Dispute Resolution/§45.67 C. Form: Petition to Confirm, Correct, or Vacate Contractual Arbitration Award (Alternative Dispute Resolution) (Judicial Council Form ADR-106)

§45.67 C. Form: Petition to Confirm, Correct, or Vacate Contractual Arbitration Award (Alternative Dispute Resolution) (Judicial Council Form ADR-106)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
PETITION TO ☐ CONFIRM ☐ CORRECT ☐ VACATE CONTRACTUAL ARBITRATION AWARD	
Jurisdiction *(check all that apply):* ☐ **Action is a limited civil case** Amount demanded ☐ does not exceed $10,000 ☐ exceeds $10,000, but does not exceed $25,000 ☐ **Action is an unlimited civil case** (exceeds $25,000)	CASE NUMBER:

NOTICE: You may use this form to request that the court confirm, correct, or vacate an award in an arbitration conducted pursuant to an agreement between the parties that is subject to Code of Civil Procedure section 1285 et seq. and that does not involve an attorney-client fee dispute. If you are requesting court action after an attorney-client fee arbitration award, please read Alternative Dispute Resolution form ADR-105, *Information Regarding Rights After Attorney-Client Fee Arbitration.*

1. **Petitioner and respondent.** Petitioner *(name each):*

   alleges and requests relief against respondent *(name each):*

2. **Contractual arbitration.** This petition requests the court to confirm, correct, or vacate an award in an arbitration conducted according to an agreement between the parties that is subject to Code of Civil Procedure section 1285 et seq.

3. **Pending or new action.**
   a. ☐ A court case is already pending, and this is a petition filed in that action. *(If so, proceed to item 4.)*
   b. ☐ This petition commences a new action. *(If so, complete items 3b(1) through 3b(4).)*
      (1) **Petitioner's capacity.** Each petitioner named in item 1 is an individual,
      ☐ except petitioner *(state name and complete one or more of the following):*
      (a) ☐ is a corporation qualified to do business in California.
      (b) ☐ is an unincorporated entity *(specify):*
      (c) ☐ is a representative *(specify):*
      (d) ☐ is *(specify other capacity):*

      (2) **Respondent's capacity.** Each respondent named in item 1 is an individual,
      ☐ except respondent *(state name and complete one or more of the following):*
      (a) ☐ is a business organization, form unknown.
      (b) ☐ is a corporation.
      (c) ☐ is an unincorporated entity *(specify):*
      (d) ☐ is a representative *(specify):*
      (e) ☐ is *(specify other capacity):*

Form Approved for Optional Use
Judicial Council of California
ADR-106 [New January 1, 2004]

PETITION TO CONFIRM, CORRECT, OR VACATE CONTRACTUAL ARBITRATION AWARD (Alternative Dispute Resolution)

Print

PETITIONER:	CASE NUMBER:
RESPONDENT:	

3. b. (3) **Amount or property in dispute.** This petition involves a dispute over *(check and complete all that apply)*:
   (a) ☐ the following amount of money *(specify amount)*: $
   (b) ☐ property *(if the dispute involves property, complete both of the following)*:
      (i) consisting of *(identify property in dispute)*:
      (ii) having a value of *(specify value of property in dispute)*: $
   (4) ☐ **Venue.** This court is the proper court because *(check (a) or (b))*:
      (a) ☐ this is the court in the county in which the arbitration was held.
      (b) ☐ the arbitration was not held exclusively in any county of California, or was held outside of California, **and** *(check one or more of the following)*:
         (i) ☐ this is the court in the county where the agreement was made.
         (ii) ☐ this is the court in the county where the agreement is to be performed.
         (iii) ☐ the agreement does not specify a county where it is to be performed and was not made in any county in California, and the following party resides or has a place of business in this county *(name of party)*:
         (iv) ☐ the agreement does not specify a county where it is to be performed and was not made in any county in California, and no party to this action resides or has a place of business in California.

4. **Agreement to arbitrate.**
   a. **Date.** Petitioner and respondent entered into a written agreement on or about *(date)*:
   b. ☐ **Attachment.** A copy of the agreement is submitted as Attachment 4(b) and incorporated herein by this reference.
   c. **Arbitration provision.** Paragraph _____ of the agreement provides for arbitration of disputes arising out of the agreement as follows *(either copy the arbitration provision in full or summarize the provision)*:

5. **Dispute subject to arbitration.** A dispute arose between petitioner and respondent concerning the following matter covered by the agreement to arbitrate *(summarize the dispute)*:

6. **Arbitrator.** The following person was duly selected or appointed as arbitrator *(name of each arbitrator)*:

7. **Arbitration hearing.** The arbitration hearing was conducted as follows *(complete both of the following)*:
   a. **Date** *(each date of arbitration)*:
   b. **Location** *(city and state where arbitration was conducted)*:

8. **Arbitration award.**
   a. **Date of award.** The arbitration award was made on *(date)*:
   b. **Terms of award.** The arbitration award *(check one or more of the following)*:
      (1) ☐ requires ☐ petitioner ☐ respondent to pay the other party this amount: $
      (2) ☐ requires neither party to pay the other anything.
      (3) ☐ is different as to different petitioners and respondents.
      (4) ☐ provides *(specify other terms or check item 8(c) and attach a copy of the award)*:
   c. ☐ **Attachment of Award.** A copy of the award is submitted as Attachment 8(c).

9. **Service of award.**
   a. The signed award or an accompanying document indicates that the award was served on petitioner on *(date)*:
   b. ☐ Petitioner alleges that a signed copy of the award was actually served on *(date)*:

Print

PETITIONER:	CASE NUMBER:
RESPONDENT:	

10. **Petitioner requests that the court** *(check all that apply):*
    a. ☐ **Confirm the award, and enter judgment according to it.**
    b. ☐ **Correct the award and enter judgment according to the corrected award, as follows:**
        (1) The award should be corrected because *(check all that apply):*
            (a) ☐ the amount of the award was not calculated correctly, or a person, thing, or property was not described correctly.
            (b) ☐ the arbitrator exceeded his or her authority.
            (c) ☐ the award is imperfect as a matter of form.
        (2) The facts supporting the grounds for correcting the award alleged in item 10b(1) are as follows *(if additional space is required, check here* ☐ *and submit facts on an attachment labeled 10b(2)):*
        (3) The award should be corrected as follows *(if additional space is required, check here* ☐ *and describe requested correction on an attachment labeled 10b(3)):*
    c. ☐ **Vacate (cancel) the award.**
        (1) The award should be vacated because *(check all that apply):*
            (a) ☐ the award was obtained by corruption, fraud, or other unfair means.
            (b) ☐ an arbitrator was corrupt.
            (c) ☐ the misconduct of a neutral arbitrator substantially prejudiced petitioner's rights.
            (d) ☐ the arbitrator exceeded his or her authority, and the award cannot be fairly corrected.
            (e) ☐ the arbitrator unfairly refused to postpone the hearing or to hear evidence useful to settle the dispute.
            (f) ☐ an arbitrator failed to disclose within the time for disclosure a ground for disqualification of which the arbitrator was then aware.
            (g) ☐ an arbitrator should have disqualified himself or herself after petitioner made a demand to do so.
        (2) The facts supporting the grounds for vacating the award alleged in item 10c(1) are as follows *(if additional space is required, check here* ☐ *and submit facts on an attachment labeled 10c(2)):*
        (3) Petitioner ☐ does ☐ does not request a new arbitration hearing.
    d. ☐ **Award petitioner interest** from *(date):*
        (1) ☐ at the statutory rate.
        (2) ☐ at rate of ____ % per year.
    e. ☐ **Award petitioner costs of suit:**
        (1) ☐ in the amount of: $
        (2) ☐ according to proof.
    f. ☐ **Award petitioner attorney fees incurred in this action** *(check only if attorney fees are recoverable in this action according to statute or the parties' agreement):*
        (1) ☐ in the amount of: $
        (2) ☐ according to proof.
    g. ☐ **Award petitioner the following other relief** *(describe relief requested; if additional space is required, check here* ☐ *and describe relief on an attachment labeled 10g):*

11. **Pages and attachments.** Number of pages attached:

Date:

▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER OR ATTORNEY)

PETITION TO CONFIRM, CORRECT, OR VACATE CONTRACTUAL ARBITRATION AWARD (Alternative Dispute Resolution)

Comment: For discussion of confirmation, correction, or vacation of a contractual arbitration award, see §45.49 and

Effective Use of ADR §9.83. This form is for use in an arbitration conducted under an agreement that does not involve an attorney-client fee dispute. For the forms requesting court action after an attorney-client fee arbitration award, see Judicial Council Forms ADR 103-105.

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46

Negotiation and Case Settlement

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I. INTRODUCTION

§46.1 A. Scope of Chapter

This chapter tracks the phases of a successful negotiation and the strategies that effective negotiators use in the process of reaching agreement. This chapter is also helpful for attorneys preparing to negotiate a case settlement with the assistance of a mediator. The chapter begins with preparing to negotiate, including evaluating the case and developing a negotiation strategy. See §§46.4-46.11. The next part discusses the negotiation process, from the opening remarks through the exchange of information, offers, and demands. See §§46.12-46.28. It introduces problem-solving approaches to negotiation and provides practical tips for overcoming impasse. See §§46.29-46.40. Practitioners may find it useful to copy the checklist in §46.41 into their client files for consideration when forming and implementing their negotiation strategy. The chapter also covers important considerations in memorializing a settlement after agreement has been reached (§§46.42-46.44) and briefly addresses the means of enforcing your hard-sought settlement agreement (§§46.45-46.47).

Settlement topics covered in other chapters include:

- Settlement conferences (chap 40);
- Demand for judgment under CCP §998 (chap 47);
- Sliding scale recovery agreements (chap 49);
- Determining good faith of a settlement (chap 50); and
- Special statutes and rules that govern the settlement of minor's claims (chap 9).

On settlement of actions by injured workers against third parties when an employer or workers' compensation insurer has intervened or noticed a lien, see California Workers' Damages Practice §§3.38-3.48 (2d ed Cal CEB 2001).

On settlement of personal injury actions when Medicare has noticed a lien, see California Tort Damages §16.16 (2d ed Cal CEB 2002).

NOTE: Business and Professions Code §6103.5(a) requires an attorney to communicate to his or her client the amount, terms, and conditions of any written settlement offer made by the opposing party.

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§46.2 B. Terminology

Settlement. A settlement is an agreement to terminate or forestall all or part of a lawsuit. See *Setzer v Moore* (1927) 202 C 333, 338, 260 P 550. The agreement may be oral or written, and may be entered into by parties or by their attorneys. See §46.11 on attorneys' authority; see also §46.43 on who should sign the agreement. General principles of contract law govern the interpretation and enforcement of settlement agreements. On enforcing settlement agreements, see §§46.45-46.47; A Litigator's Guide to Effective Use of ADR in California, chap 13 (Cal CEB 2005).

NOTE: Stipulations made by the parties on the terms of a settlement orally before the court or in writing that may be entered as a judgment are governed by CCP §664.6.

The settlement of a lawsuit is reached when a plaintiff agrees to dismiss or otherwise terminate the action in return for a defendant's agreement to pay a specified sum or to give relief in another form. Settlement negotiations often comprise an exchange of several demands and offers before agreement is reached:

- A "demand" is a plaintiff's statement of the amount of money (or other recompense) the plaintiff would accept to release the defendant from liability.
- An "offer" is a defendant's statement of what the defendant would give to obtain a dismissal from the action and any further liability.

Counterpart. As used in this chapter, "counterpart" refers to the person on the other side of the negotiating table. Unless the other side is representing itself, this will be opposing counsel.

Party or Principal. The terms "party" or "principal" refer specifically to the client(s), not their legal representatives.

Other Side. The term "other side" refers to anyone on the other side of the negotiation, *i.e.,* the counterpart, party, or principal, or all of them.

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§46.3 C. The Purpose of Settlement

Before beginning to negotiate, it is worthwhile to consider the client's purpose in settling. Is it to right a wrong? To avoid litigation at whatever expense? To protect the client's reputation or ensure confidentiality? Is it a combination of purposes? There are many valid reasons to settle a case, but they should be pursued only after counsel and client have considered a more fundamental purpose. On meeting with the client and preparing for negotiation, see §46.9.

Seek a Result That Beats Litigation for Both Sides. At the most basic level, the purpose of settlement should be to place your client in a position that is superior to his or her next-best option—typically litigation—factoring in both the pros and cons of that option. For settlement to make sense, it should not be merely an alternative to litigation, it should be a *better* alternative. See A Litigator's Guide to Effective Use of ADR in California §3.5 (Cal CEB 2005).

Find Ways for Both Sides to Win Relative to Litigation. Instead of approaching settlement from inside the dispute (*i.e.,* who did what to whom, the relative strengths of each side's argument), look outside the dispute (*i.e.,* how does a particular settlement proposal compare with the next-best alternative if no agreement is reached). Try not to think in terms of how your client can "win" in a contest with the other side, but rather how *both* clients can win relative to their default option of litigation.

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§46.4 II. PREPARING FOR SETTLEMENT NEGOTIATION

Experienced negotiators communicate with their clients before developing a negotiation strategy and systematically work toward the goals set during the preparation stage. Essential to preparing for negotiation is counsel's evaluation of whether the client can obtain a better result through settlement compared with litigation. See §46.3.

Like any other legal proceeding, negotiation requires counsel to review the facts of the case, study the applicable legal precedent, and develop a case theory. Negotiation also involves many nonanalytical skills that most attorneys have not had an opportunity to master in law school or in a traditional litigation practice, such as listening and thinking about a solution that leaves each party better off. For practical tips on preparing for negotiation, see A Litigator's Guide to Effective Use of ADR in California §§2.34-2.40 (Cal CEB 2005).

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A. Reviewing Facts and Law

§46.5 1. Investigate Facts

An effective negotiator learns all relevant facts about the case, including the circumstances that led to the dispute and the factors that may help the parties to focus on reaching a settlement. A review of the file may reveal that necessary information is missing, and if so, counsel must plan how to obtain it. On exchanging information with the other side, see §§46.18-46.23.

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§46.6 a. Pleadings, Discovery, and Other Documents

Pleadings. A well-drafted complaint (either filed or sent to the other side before filing) may give the defendant significant information about the facts and, more importantly, about the plaintiff's perception of the facts. Similarly, the answer may provide insight into the defendant's fact interpretations and case theories.

Discovery. It is essential to carefully review any deposition testimony and all documents that the parties have produced in response to discovery demands. Counsel should also review any client documents that have not yet been produced to assess the strengths and weaknesses of the case.

Demand Letter. In some types of practices (*e.g.,* personal injury), it is customary for the plaintiff to send a detailed demand letter to the defendant. For the defendant, a demand letter is an excellent source of information about the plaintiff's theory of the case and negotiation position. For the plaintiff, the demand letter is an opportunity to make an opening statement that has a significant bearing on how the parties will negotiate. For samples of form demand letters, see §§46.48-46.49.

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.7 b. Other Sources of Information

§46.7 b. Other Sources of Information

To be fully prepared to negotiate, it may be necessary to engage in a fact-finding investigation and, if so, to assess how best to obtain the information needed for the negotiation. Information may be obtained through communication with your client or the other side. It may also be helpful to seek the assistance of individuals with experience dealing with similar disputes for ideas about typical fact patterns, important issues, or settlement terms. Counsel should investigate the applicable norms and the parties' involvement in any other lawsuits.

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§46.8 2. Research Law

Attorneys are frequently called on to assess the likelihood of their clients' prevailing on the merits if their cases go to trial. Depending on the client's degree of risk aversion, counsel's analysis of the legal merits of the case may be a significant factor in determining whether the parties will engage in negotiation and how they will conduct the negotiation. In researching the law, counsel should do the following:

- **Investigate Applicable Jury Instructions.** Jury instructions are very helpful in summarizing the legal elements that must be proved to prevail on particular claims. See the Judicial Council of California Civil Jury Instructions (CACI), which may be viewed via links on the Administrative Office of the Courts' website at www.courtinfo.ca.gov.
- **Analyze Evidence Tending to Prove Causes of Action and Affirmative Defenses.** Counsel should perform a meaningful analysis of the information available, or still needed, that supports the parties' respective positions. This information in turn will enable counsel to evaluate the relative strength of the claims and defenses presented. On use of an abstract of pleadings to start this evaluation process, see A Litigator's Guide to Effective Use of ADR in California §2.7 (Cal CEB 2005).
- **Consider Effects of Venue.** Filing the lawsuit in a county where jury verdicts are frequently large may give the plaintiff considerable leverage during the negotiation. Similarly, if a defendant stands to gain an advantage from a motion for a change of venue, defense counsel may not want to begin negotiations until the motion is filed or granted. On motions to change venue, see chap 20.
- **Evaluate Feasibility of Dispositive Motion.** Counsel should consider all procedural and substantive legal arguments that may allow the client to prevail on a motion that disposes of the complaint or some other part of the case. For example, if a party has a good chance of obtaining summary judgment, or summary adjudication of a cause of action or of an affirmative defense (see CCP §437c(f)(1)), counsel should consider filing the motion before starting the negotiation process, unless its costs or risks would outweigh the benefits to the client. On summary judgment and summary adjudication of the issues, see chap 36.

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.9 B. Counseling the Client: Pre-Negotiation Meetings

§46.9 B. Counseling the Client: Pre-Negotiation Meetings

It is important to discuss the negotiation with your client first to uncover the client's interests and assess the various options for satisfying those interests. See A Litigator's Guide to Effective Use of ADR in California §§2.13-2.18 (Cal CEB 2005).

The pre-negotiation meeting with the client should include preliminary decisions about the negotiation, including:

- **Who will attend?** Determine who are the final decision-makers and ensure that they are available to attend. Decide whether the parties' presence at the negotiation would be helpful, and consider whether it would be useful to have experts attend the negotiation session.
- **Where and how will negotiations take place?** Counsel should consider where to meet, *i.e.,* at the offices of one side's counsel or at some neutral location. Counsel must also decide whether to arrange for face-to-face negotiations or negotiate remotely, *e.g.,* by telephone or e-mail.
- **When to negotiate?** Counsel must consider when is the "right time" to negotiate. Examples of timing considerations include whether there is adequate time to evaluate the case, the advantages of early settlement, and whether there is any needed discovery. On timing considerations, see Effective Use of ADR §2.12.

As part of the pre-negotiation meeting, counsel should assemble information about the other side. It is important for counsel to partner closely with the client in this phase of preparation; often the client knows the principals better than anyone else and can provide invaluable information.

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§46.10 C. Developing Negotiation Strategy

In developing a negotiation strategy, it is important to consider the following:

- The parties' relationship, *i.e.,* learn about their past and present relationship and explore whether a future relationship has value.
- The value of the client's case. On factors for determining case value and the use of decision analysis, see A Litigator's Guide to Effective Use of ADR in California §2.24 (Cal CEB 2005).
- The client's propensity for risk.
- The other side's propensity for risk.
- The Zone of Possible Agreement (ZOPA), *i.e.,* the range between the parties' respective reservation points ("bottom line" or "top dollar"). On the ZOPA, see Effective Use of ADR §3.71; on reservation points, see §46.25.

After gathering information about both sides' interests and alternatives, counsel should list as many options as possible to resolve the problem. Counsel should then develop proposals and packages for the negotiation. See Effective Use of ADR §§2.28, 2.30.

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§46.11 D. Finalizing Authority

As a final step in the preparation for negotiation, counsel must finalize the authority to settle. It is crucial for the attorney and client to be clear about the authority the attorney has for reaching an agreement on the client's behalf.

Business and Professions Code §6103.5(a) requires an attorney to communicate to his or her client the amount, terms, and conditions of any written settlement offer made by the opposing party. An attorney cannot bind a client to pay or accept a settlement without the client's specific authorization or consent. *Bice v Stevens* (1958) 160 CA2d 222, 325 P2d 244; see *Navrides v Zurich Ins. Co.* (1971) 5 C3d 698, 702 n1, 97 CR 309. The summary enforcement procedure found in CCP §664.6 can only be used against a party who either agreed to the settlement orally before the court or signed a written settlement agreement; for the purposes of §664.6, a party is not bound by a settlement agreement signed by the party's agent, attorney, spouse, or codefendant. See *Gauss v GAF Corp.* (2002) 103 CA4th 1110, 127 CR2d 370; *Williams v Saunders* (1997) 55 CA4th 1158, 64 CR2d 571. On who should sign the settlement agreement, see §46.44.

PRACTICE TIP: It is a good idea to confirm your authority throughout the negotiation and verify whether your client wants to confer with you before declining an offer from the other side that is outside your authority.

For more on attorney duties during negotiation, including duties relating to decision making, communication, and confidentiality, see A Litigator's Guide to Effective Use of ADR in California §§4.3-4.4 (Cal CEB 2005).

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III. ENGAGING IN SETTLEMENT NEGOTIATION

§46.12 A. Opening the Negotiation

Think of the opening as an opportunity to set a positive, productive tone for the remainder of your discussion. Beyond that, the opening can be used to clarify assumptions and expectations, build rapport, and lend structure to the discussion. Use the opening to introduce your client's positions, interests, and aspirations, while you invite your counterpart to participate in setting the agenda and a joint process.

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§46.13 1. Set the Right Tone

How to set the right tone for the negotiation depends in large part on what tone you wish to convey. For example, you may strongly believe that a particular lawsuit instituted against your client was frivolous and brought in bad faith. In that case, your attitude toward settlement may understandably be very different than if you believe that resolution is in the best interests of all parties involved. Consider the following to set the right tone:

Develop Rapport. Establishing a good rapport with your counterpart will go a long way toward fostering conditions that facilitate settlement. Rapport can be established in a number of ways, including chit-chat, paying compliments, humor, and graciousness. Choose a method that comes naturally and works for you; it is less important how you do it than the sincerity with which you do it.

Convey Understanding of, or Empathy Toward, the Other Side. One of the best things to do at the outset of a settlement negotiation is to show your understanding of how the other side may be feeling as a result of the underlying events or why it is taking a certain position or advancing a certain argument. By understanding and acknowledging the other party's point of view first, *before* you forge ahead with your own, you are sending a signal that you are prepared to be fair and balanced. This can go a long way toward setting a constructive tone for the negotiation.

PRACTICE TIP: The key here is not just to understand but to *demonstrate* your understanding through your words, your acts, and, most important, your sincerity. Do not simply state that you understand or know how the other party feels; rather, refer to specific things they said, point to particular facts or events, and relate your personal experiences. On active listening techniques, see §46.21.

Assure the Other Side That You Are Participating in Good Faith. Convey your client's sincerity and optimism about settlement by, *e.g.,* explaining *why* your client is interested in terminating the litigation at this time. Conduct is as important as words in conveying your client's seriousness about settlement, *i.e.,* extend to your counterpart the courtesy of returning his or her telephone calls, e-mails, and other correspondence even if your client is not interested at the present time.

Pay Attention to Body Language. Be attuned to the nonverbal cues you transmit, such as facial expressions, hand gestures, and the way in which you sit. In addition to your own body language, pay attention to that of your counterpart. For further reading on this subject, see Ekman, Emotions Revealed: Recognizing Faces and Feelings to Improve Communication and Emotional Life (2003).

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§46.14 2. Introduce Problem-Solving Orientation

An important component of setting a positive tone for the settlement negotiation is to steer away from an adversarial orientation and toward a problem-solving one. The following are some suggestions on what negotiators can do to foster such a problem-solving atmosphere:

- **Do Not Argue About Right and Wrong.** Arguing about the merits is of little use in the absence of a judge or jury to declare one side the winner. It is far more productive to determine how both sides could be better off by settling rather than taking their chances in court.

NOTE: When trying to figure out whether any particular settlement option is superior to litigation, you will undoubtedly find yourselves looking at the merits of the case. However, at this point, the purpose of analyzing the merits should not be to "win" relative to the other side, but rather for both sides to evaluate whether the settlement option is truly better than the alternative of continuing litigation. On seeking a result that beats litigation for both sides, see §46.3.

- **Turn the Dispute Into a Deal.** Instead of looking at your counterpart as the enemy, look at your counterpart as a partner who can help both of your clients avoid a potentially much larger problem, *i.e.,* the costs, time, and risk of continued litigation.
- **Approach Their Problem as *Your* Problem.** Frame the negotiation as a joint search for solutions to joint problems, not as a separate search for partisan solutions. When making offers or demands, think of your task as developing "yesable" proposals—proposals that will be difficult for the other side to turn down.

For discussion of a problem-solving orientation, see A Litigator's Guide to Effective Use of ADR in California §§3.13-3.16, 3.155-3.188 (Cal CEB 2005).

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§46.15 3. Convey Your Client's Perspective and Aspirations for Settlement

Another component of the opening phase of a negotiation is articulating your client's intentions, needs, and hopes regarding a settlement. The following are suggestions for asserting your client's point of view in a way that can also foster an atmosphere conducive to settlement:

Be Firm but Flexible. Avoid using terms such as "no" or "never." Instead, try to use other expressions that will keep the other side's expectations in check but still convey optimism and possibility, *e.g.,* "maybe," "possibly," and "unlikely, but."

NOTE: A willingness to be flexible does not compromise your professional duty to act as a zealous advocate of your client. Flexibility is in your client's interest because it gives you room to craft a solution that will be sellable to the other side. It is not inconsistent to be firm about what is important to your client *and* to remain flexible about the details of how your client's needs are satisfied.

Avoid Making Judgments. When the dispute that gave rise to litigation is highly contentious, it is easy to make judgments about one side's conduct or character, or to make statements that appear accusatory or defensive. Mitigate this tendency by eschewing judgments of the other side in favor of subjective descriptions of your client's experience, and by disentangling the intentions behind words or conduct from the impact of those words or conduct.

Emphasize the Client's Interests, Not Positions. At the outset of the negotiation, it is wise not to start with a particular position such as "My client needs at least $100,000 to settle this case." Instead, emphasize what motivates your client's position. Why does your client need $100, 000? Is it important to your client to have enough financial resources to honor other contractual obligations? Does your client seek some kind of insurance against future breaches by the same party? Is it important that your client feel respected or receive some acknowledgment or apology for the breach? By getting to the root of what is important to your client, you can demonstrate flexibility about outcomes.

PRACTICE TIP: Revealing your client's motives and underlying interests early on in the negotiation may leave your client exposed. Nonetheless, expressing your client's desires and aspirations for settlement in terms of primary concerns—*i.e.,* what is most important to your client—is typically a more fruitful strategy than issuing a narrow or specific demand.

Avoid Extreme Contentions. When it comes to human interactions, sweeping conclusions and absolute judgments are extremely difficult to support. Instead, try to embrace the multifaceted aspect of every human interaction and acknowledge the role, however small, that your client had or may have had in causing or worsening the problem.

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§46.16 4. Agree on Agenda, Goals, and Process

Settlement discussions may take shape during informal discussions between the principals, or they may be highly orchestrated, set to begin and end in a conference room, with multiple participants flying in from around the country. It is useful toward the beginning of the process to reach some agreements about how to work together and what to accomplish.

It is very important to conduct settlement discussions with an agenda. The agenda can be limited to an upcoming meeting or it can be more ambitious, setting the framework for a series of meetings.

PRACTICE TIP: An agenda doesn't have to be drawn up in advance: If you find yourself in a meeting that is not getting any traction, call a break and get everyone's input on how you can make the most productive use of your remaining time. For suggested issues to include in an agenda, see A Litigator's Guide to Effective Use of ADR in California §3.25 (Cal CEB 2005).

It is helpful to design a *joint* process that is tailored to both sides' needs and both of your negotiating styles. On negotiation styles, see §46.17. For example, consider whether it will be necessary to structure some formal exchange of documents as part of the settlement process, or whether a simple back-and-forth of numbers by e-mail will be sufficient. On cultivating a successful process, including getting mini-agreements along the way and negotiating ground rules, see Effective Use of ADR §§3.26-3.28.

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§46.17 5. Negotiation Styles

It may be helpful to understand your own negotiation style and how it interacts with other styles, including that of your counterpart. There are many ways of classifying negotiation styles and of describing the way they interact; none is perfect and all involve a degree of generalization. The following are examples of negotiation styles and how they interact:

Competitor-Competitor Dynamic. In the competitor-competitor dynamic, both sides are highly assertive and naturally inclined to try and "win" as much as possible for the client. Although competitors are sometimes well-paired against each other, the problem with this pairing is that it often results in impasse. If you notice a competitor-competitor dynamic in your negotiation, it may be helpful to use more active-listening skills to try to see the problem from the other side's perspective (see §46.21), or to steer yourselves away from a "win-lose" mentality and toward figuring out how *both* of you can "win" by avoiding litigation. See §46.3.

Competitor-Accommodator Dynamic. In the competitor-accommodator dynamic, one side is naturally inclined to press its client's interests while the other side is more comfortable trying not to rock the boat. Problems can arise when the accommodator reveals all his or her cards immediately in the hope of facilitating a speedy and amicable settlement, but the competitor refuses to make reciprocal disclosures and then takes advantage of the imbalance of information. Alternatively, the competitor may exert pressure on the accommodator to make unwise concessions; accommodators need to be aware of this possibility so that they do not concede too much, and competitors need to consider the problems associated with "bulldozing" an accommodating counterpart if they seek a final agreement that will stick.

Competitor-Avoider Dynamic. The competitor-avoider dynamic is very similar to the competitor-accommodator dynamic, except that the competitor's counterpart is more comfortable putting off or avoiding the negotiation than engaging in it. The task for the competitor is to realize that what appears to be a lack of good-faith participation could simply be a well-intentioned but "avoiding" negotiation style. Instead of putting more pressure on your counterpart, a better approach may be to make a safe, inviting proposition and help the avoider to initiate engagement. By contrast, the avoider may be tempted to cut off negotiations prematurely, feeling bullied or cornered by the competitor. The avoider should find a way to be more assertive, perhaps by teaming up with a colleague or associate or by making explicit the terms on which the avoider is willing and able to participate.

Accommodator-Accommodator Dynamic. Negotiations between accommodators can often result in a surprisingly quick agreement, but the seeming ease of the settlement may mask lost opportunities for both sides, *i.e.,* in their zeal for maintaining a cordial relationship, accommodators sometimes overlook superior outcomes.

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.18 B. Exchanging Information

§46.18 B. Exchanging Information

Information exchanged—or not exchanged—in the negotiation process will affect the result obtained for your client.

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§46.19 1. The Information-Sharing Process

Consider dedicating a part of the negotiation to a process of exchanging information. This is an opportunity for each side to ask questions about the other's perspective, goals, and underlying interests, to present the clients' particular concerns or viewpoints, to share assessments of the strengths and weaknesses of each side's case, or anything else that will increase collective knowledge about the dispute and how best to resolve it.

PRACTICE TIP: Resist the urge to suggest solutions, make proposals, or talk numbers during the information-exchange phase. The purpose of sharing information is to promote a comprehensive understanding of the problem to come up with sensible and mutually agreeable solutions.

On the reasons to share information, see A Litigator's Guide to Effective Use of ADR in California §§3.36-3.38 (Cal CEB 2005).

Negotiators differ in their views about the timing of the exchange of information. Some suggest it is best to have such a process early in the negotiation, before discussing numbers. Others maintain that information exchange cannot happen in earnest until both sides have started to formulate solutions and realize that they need to gather more information. Still others think of exchanging information as a dynamic process, one that punctuates the entire negotiation and is not reducible to a discrete period or phase.

In an ideal world, it is more efficient to exchange information before ever talking about solutions. Reality, however, is much messier. Take whatever approach appears to make the most sense to you and your counterpart. It is far worse to impose a rigid order on the negotiation than to find yourselves exchanging information in fits and starts.

It is helpful to create guidelines to facilitate a thorough and meaningful exchange of information. Consider the following:

- Decide who needs to be present for the exchange of information.

PRACTICE TIP: The attorneys alone may be sufficient, but legal representatives are no substitute for the principals if your goal is to understand the underlying concerns and interests of the ultimate decision-makers.

- Decide what supporting evidence is needed to resolve factual issues.
- Create a safe environment for the parties to feel comfortable sharing information.

PRACTICE TIP: If sensitive or private information, or confidential information such as trade secrets, may need to be discussed during the exchange of information, consider formalizing a confidentiality agreement and perhaps a protective order. In addition to giving your client legal protection in the event of disclosure, a confidentiality agreement may help foster an environment in which both sides feel they can discuss issues freely.

- Avoid rehashing legal arguments.

PRACTICE TIP: Do not argue the merits to convince your counterpart that you are right; rather, discuss the merits as a way of figuring out at what cost it makes more sense for both parties to settle than to continue to litigate. You can "agree to disagree" and still have a productive discussion about the merits.

- Consider postponing the discussion of solutions.

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.20 2. Listening and Questioning Techniques

§46.20 2. Listening and Questioning Techniques

Skilled negotiators focus more on listening and questioning than on speaking and answering. See Shell, Bargaining for Advantage: Negotiation Strategies for Reasonable People 144-145 (1999). Inexperienced negotiators tend to focus on their arguments and positions, while skilled negotiators focus more on learning as much as they can about the other side. The more adept you are at listening, the more successful you will be at eliciting important information from your counterpart.

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§46.21 a. Active Listening Techniques

You improve the chances of persuading your counterpart if you can both understand *and* demonstrate your understanding to the other side. Active listening can develop and refine understanding by helping you tune in to subtle or mixed messages, to identify tacit assumptions or expectations, and to lend order to confusing or unorganized communication. In addition, it can improve your ability to show your understanding to the other side.

A common active listening technique is the "loop of understanding," *i.e.,* a three-step process that you can use to understand the speaker, demonstrate your understanding, and confirm that your understanding was correct. The process works as follows:

- Set an intention to understand.
- Pay close attention to the speaker.
- Reflect back to the speaker what you have understood.

Start from a point of genuine curiosity about what the speaker is saying. Then try to understand the speaker, in terms of both the content and the feeling that goes into it. Pay attention to any internal noise you may have as well as the speaker's dynamics, *i.e.,* whether the speaker seems evasive or uncomfortable. Finally, demonstrate to the speaker that you have understood what has been said by paraphrasing the crux of the message in your own words.

While listening, it is important to focus your attention away from the speaker's personality and toward understanding the issues being discussed or the problem you are both trying to solve. By active listening, you make the other side feel that you are genuinely interested in finding out more about their position, making them more willing to divulge information. Remember, seeking to understand the other side does not entail sympathizing or agreeing with them. On "understanding is not agreeing," see A Litigator's Guide to Effective Use of ADR in California §3.37 (Cal CEB 2005).

PRACTICE TIP: Phrases such as "What you just said is very important" or "I'm glad you mentioned that" are useful because they signal to the other side that you are interested in learning more. Even if you do not believe that what was said was important, merely uttering the phrase can help you focus on eliciting more information.

It is important to avoid the common pitfalls to active listening, which include the following:

- **Responding With a Counterargument.** Although responding to what you believe is a false or incorrect statement is sometimes necessary, the downside is that it can quickly turn the best of intentions into a shouting match.
- **Asking Another Question.** Although follow-up questions are useful and sometimes necessary, they are distinct from the process of listening; before you ask follow-up questions, make sure you have first listened well.
- **Stating That You Have Understood.** Simply saying that you understand does not *demonstrate* that you in fact do so; it is far better simply to reflect back the crux of what you heard.

For further discussion on active listening techniques and pitfalls, see Effective Use of ADR §§3.51-3.59.

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.22 b. Effective Questioning Techniques

§46.22 b. Effective Questioning Techniques

The most efficient way to gather information from someone is to ask open-ended questions, *i.e.,* questions that can be answered in a potentially infinite number of ways, thereby giving the speaker a broad canvas to tell you what is most important to him or her. Examples of open-ended questions are "Could you tell me more about…?" and "Why?"

Unlike open-ended questions, closed-ended questions are narrow in scope and can typically be answered with "yes" or "no." Asking a closed-ended question narrows the playing field through assumptions about what is likely to be important or relevant to the speaker. Asking closed-ended questions is more effective in confirming your grasp of what the other side has said than in gathering new information. Closed-ended questions can also be used to refine your comprehension of a certain point or to fill out details.

PRACTICE TIP: As is often used in deposition practice, negotiators may employ the "funnel" technique, which involves starting off with open-ended, general questions and gradually moving to closed-ended, specific questions as you obtain more information.

For examples of effective questions, see A Litigator's Guide to Effective Use of ADR in California §§3.63-3.67 (Cal CEB 2005).

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.23 3. Managing the Exchange of Information

§46.23 3. Managing the Exchange of Information

Information is power. Hardball negotiators will use this to their advantage by getting you to reveal all your cards before they reveal any of their own. The more they know about what it is like from your perspective—your constraints, your needs, and your concerns—the better positioned they will be to take advantage of your weaknesses and tailor their responses to your questions. How you manage information can influence the result you obtain for your client.

One way to manage information is to think in terms of what Joseph Harbaugh has termed "getting," "giving," and "guarding" information. The following are some considerations you may wish to take into account:

Getting Information. What information you seek from the other side will obviously vary from case to case. Nonetheless, some regularly important categories should be considered:

- **Information About Underlying Interests.** If your counterpart has made an offer or demand, or staked out some other requirement or condition for settlement, find out what underlies it.
- **Information About the Other Side's Reservation Point**, *i.e.,* the point above which the defendant has determined it is better off proceeding with litigation, or the point below which the plaintiff is unwilling to settle. Once you have learned the other side's reservation point, you can determine the zone of possible agreement, or range between the parties' reservation points. See §46.25.
- **Information About Alternatives.** One way to improve your leverage is to obtain more information about the other side's alternatives to reaching a settlement. If those alternatives are few and not very attractive, gaining that knowledge places you in a stronger bargaining position.
- **Information About Assumptions.** Don't assume that your counterpart approaches or views the issues the way you do. Test the waters and see if your assumptions are shared or different and, if the latter, find out why.
- **Information That May Identify Value-Creating Opportunities.** Consider probing for information that may help you and your counterpart to create value, as opposed to dividing it up between yourselves. On expanding the settlement pie, see §46.31.

The most effective way to get information is to use active listening and effective questioning techniques. See §§46.21-46.22. Skilled negotiators try to get as much information as possible from their counterparts before revealing any of their own, but it is difficult to justify asking for more information when you have not given any in return. When it comes to the net amount of information exchanged, equality is a reasonable benchmark.

Giving Information. Consider volunteering information about your client's underlying interests, strengths, and leverage. However, because the information you choose to give depends largely on what the other side requests, it may be more useful to think in terms of what information you will *not* give, *i.e.,* information you plan to guard (see "Guarding Information" below).

The goal is to achieve a balanced exchange of information, not one-way information-giving. If you feel that the other side is not revealing information in equal proportion to what you are revealing, invoke the reciprocity principle, *i.e.,* the instinctive obligation to return things of value given to us. On the reciprocity principle, see A Litigator's Guide to Effective Use of ADR in California §§3.79, 3.135 (Cal CEB 2005).

PRACTICE TIP: Provide information only in a planned way or in response to a specific question. Resist the urge to divulge information to fill silence or compensate for some other gap in the conversation. There should be a good reason for every piece of information you give out.

The timing of disclosures will generally depend on whether you are disclosing "bad news" or "good news." Most negotiators agree that it is best to give bad news, *i.e.,* news that tends to disappoint your counterpart, as soon as possible. By giving information about your comparative strength or leverage early, you avoid inflating the other side's expectations. On using your leverage, see §46.33.

With respect to information your counterpart would consider good news, there is less consensus about timing. For example, if your client is willing to concede a large point or if there is some mutually beneficial solution, early disclosure

may set an optimistic tone for the negotiation. On the other hand, if you have been asked about something that might give the other side more leverage over you, consider postponing the disclosure until a time when the information may be less consequential.

Guarding Information. If you have prepared well for a settlement negotiation, you have already determined what information you will not disclose to the other side. Although it varies from case to case, categories of information that you may want to keep confidential include the following:

- **Reservation Points.** Keeping the other side guessing about your client's reservation point can be considered an essential aspect of any negotiation. On reservation points, see §46.25.
- **Reasons Your Client Wants to Settle.** Guarding information about your client's needs, constraints, or other reasons for settling may prevent the other side from having more leverage over you, but hiding the ball in this fashion may cause you to miss out on value-creating opportunities that are only possible if both sides cooperate and share information. It may be better to guard information about why your client seeks to settle until after you get the other side to disclose their reasons for settling or you have reason to believe that your counterpart will be equally forthcoming about his or her client's needs and interests.
- **Damaging Facts.** Obviously, you will want to keep any damaging facts private to preserve your client's leverage. Note, however, that incomplete disclosure, and nondisclosure of facts that would be reasonably necessary to correct a misleading statement, may amount to actionable misrepresentation. See *Randi W. v Muroc Joint Unified Sch. Dist.* (1997) 14 C4th 1066, 1084, 60 CR2d 263 (allegation of incomplete disclosure amounting to "misleading half-truths" stated claim of misrepresentation); *Vega v Jones, Day, Reavis & Pogue* (2004) 121 CA4th 282, 292, 17 CR3d 26 (disclosure schedule deliberately omitted existence of material "toxic" stock provisions); CACI 1901. On fraud by concealment and silence, see Effective Use of ADR §§4.21-4.30.

There are numerous ways to guard information; the trick is to do it in a way that does not tip off the other side to the fact that you are being evasive.

For a thorough discussion on managing the exchange of information, including getting, giving, and guarding information, see Effective Use of ADR §§3.68-3.92.

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.24 C. The Numbers Game: Opening Offers and Demands, Concessions, and Hard-Bargaining Tactics

§46.24 C. The Numbers Game: Opening Offers and Demands, Concessions, and Hard-Bargaining Tactics

Money is either the predominant component of a settlement or one of many components to a settlement package. Thus, at some point in the negotiation you will need to bargain about money or about other quantifiable settlement terms.

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§46.25 1. Knowing Your Reference Points

To negotiate with numbers in a principled fashion, you first need to be clear about three things:

- Your client's "reservation point";
- Your client's "target point"; and
- Your "opening offer or demand."

These three values will serve as signposts to help orient you as you navigate the possibilities for settlement.

Reservation Point. The reservation point, otherwise known as the "bottom line" or "walk-away price," is the point at which you and your client have determined that you are better off litigating (or pursuing some other alternative) than settling. The reservation point may be expressed as a monetary amount or as a package that involves quantifiable and nonquantifiable elements. Either way, the reservation point should remain fixed. Having a clear idea of your client's reservation point will help you assess offers and counteroffers made during the negotiation and ensure that you do not accidentally exceed it.

NOTE: Exceeding your client's reservation point will put you in breach of your ethical and professional duties (see Cal Rules of Prof Cond 3-110, requiring attorneys to perform legal services with competence) or, worse, could subject you to malpractice liability. See *Marriage of Helsel* (1988) 198 CA3d 332, 338, 243 CR 657 (client whose lawyer exceeds authority in settlement negotiation "retains a viable remedy against the lawyer—both in terms of a malpractice suit and State Bar disciplinary action"). Thus, you should plan your moves to settle well within the reservation point. Unexpected issues may arise after an agreement in principle has been reached, making it a good idea to leave yourself some room for further give-and-take. On settlement authority, see §46.11.

Target Point. The target point should represent your client's optimistic goal for a settlement outcome. It should be a monetary amount (or a package that involves quantifiable and nonquantifiable elements) that lies somewhere between the reservation point and the opening offer or demand.

Opening Offer or Demand. The opening offer or demand is your client's offer or demand, *i.e.,* the position with which your side will begin the bargaining process. It should be even more optimistic than your target point to allow for concessions. On concessions, see §46.27.

For more on reference points, see A Litigator's Guide to Effective Use of ADR in California §§3.94-3.99 (Cal CEB 2005).

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§46.26 2. Making Opening Offers and Demands

Skilled negotiators disagree about whether it is more advantageous to make the first offer or demand, or to let the other side go first. Although the correct approach will likely vary from case to case, in the context of settling litigation, it is often advisable to have the other side open for the following reasons:

- You might undervalue your case if you lack complete information.
- The other side may surprise you with an unexpectedly favorable opening because it has undervalued its own case.
- You may underestimate what the other side will pay or accept.

On the other hand, there are some advantages to opening first. By making the first offer or demand, you may be able to take advantage of what is known as the "anchoring effect." Psychological studies have shown that when people are asked to give an estimate of value, their estimates are greatly influenced by the first number they see or hear, even if that number has no necessary connection to the thing being appraised. See Bazerman & Neale, Negotiating Rationally 23-30 (1992). In addition, starting the negotiation with a reasonable or even modest opening can go a long way toward building trust, healing a severed relationship, or projecting optimism about the possibility of settlement.

On special situations that favor going first, see A Litigator's Guide to Effective Use of ADR in California §§3.106-3.108 (Cal CEB 2005).

In general, if the overriding goal is to get the most money for your client, consider setting your opening offer or demand at the highest (or lowest) possible point that is reasonably supportable by reference to law, facts, or other arguments. On the other hand, if the parties are likely to have an ongoing business or personal relationship that might be adversely affected by continued litigation or if other considerations weigh against nickel-and-diming your counterpart, consider opening with a more modest amount. The key is to balance maximizing gain for your client with promoting a problem-solving process that keeps the other side interested.

On the advantages and disadvantages of opening optimistically, as well as situations that are not conducive to opening optimistically, see Effective Use of ADR §§3.110-3.120.

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§46.27 3. Concessions

Concessions are an inevitable part of any negotiation. The number and extent of the concessions that are made will vary from one situation to another. Nonetheless, it is useful to pay attention to the way that certain types of concessions can impart certain kinds of messages, and to the various strategic considerations involved in making concessions.

The number, type, and pattern of concessions can indicate to a skilled negotiator information such as your reservation point, what issues are important to you, and your level of seriousness about settling the case. For example, large concessions can often communicate to the other side that the issue or issues conceded were not important, while small concessions early on can give the impression that you are *unwilling* to budge and thus that you are not interested in settlement. Just as it is important to pay attention to verbal messages in a negotiation, so too is it important to consider the messages you send and receive through concessions.

In addition, give some thought to planning a concession strategy in advance of the negotiation. It is generally not a good strategy to "cut to the chase"; you will get better results by engaging in a bargaining process rather than by jumping to a conclusion based on your client's reservation point or even target point. It is also useful to consider concession patterns, such as progressively smaller concessions. It is generally not advisable to bid against yourself, *i.e.,* make more than one concession without a concession in return.

For more on the messages communicated by different types of concessions and concession strategies, see A Litigator's Guide to Effective Use of ADR in California §§3.122-3.138 (Cal CEB 2005).

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.28 4. Hard-Bargaining Tactics

§46.28 4. Hard-Bargaining Tactics

In the course of a negotiation, negotiators may be tempted to use some classic "hard bargaining" tactics, or may become the victim of such tactics. Although hard-bargaining tactics can be advantageous, in the long run they do not further a problem-solving approach to negotiation. Instead, their use risks escalating the conflict, leaving money on the table, and possibly creating unnecessary deadlock.

The following are examples of some common hard-bargaining techniques to watch out for—both in yourself and from your opponent—as well as suggestions for how to deal with such tactics in a constructive way:

- **Bluffing.** Bluffing tactics are often used to hide a party's motives for settling, or to make unimportant issues seem important and vice versa. This may lead to agreements that neither side truly wanted because each was so busy bluffing the other. Further, if your counterpart calls your bluff, you will be in a much weaker negotiating position and you may also earn a reputation for dishonesty.

NOTE: Negotiators may be liable for misrepresentation and certain types of nondisclosure during the course of a negotiation. See *Vega v Jones, Day, Reavis & Pogue* (2004) 121 CA4th 282, 291, 17 CR3d 26 (attorneys "may be liable to a nonclient for fraudulent statements made during business negotiations").

- **"Take-It-or-Leave-It" Approach.** "Take-it-or-leave-it" offers can be advantageous because they can place the offeror in the position of calling the shots. However, there are at least two disadvantages. First, they may be met with skepticism because the offeree does not necessarily know if the offeror is coming from an actual position of strength or merely posturing. Second, the offeree may be so offended by the manner in which the offer is presented that he or she will refuse even to consider its reasonableness. Related to "take-it-or-leave-it" offers are deadlines and walkouts, *e.g.,* "This offer will expire in 48 hours" or "We are prepared to settle for $200,000 today, but after this, all bets are off." These tactics take advantage of the "scarcity principle," *i.e.,* things appear more valuable when their availability is limited. Both tactics play on the fear of no deal. Counter this tactic by developing your litigation options; the clearer your picture of the risks, costs, and potential benefits of litigation, the more secure you will feel refusing a "take-it-or-leave-it" offer that leaves your client worse off. Another countering technique is simply to focus on your strategy and not let the hard bargainer shake you. Treat the "take-it-or-leave-it" offer as a normal offer and counter with your own.
- **Aggression, Threats, and Blame.** Aggression can manifest itself in many different ways, *i.e.,* from subtle put-downs or inconsiderate behavior to threats or some other type of open hostility. In whatever form, aggression is designed to play on your fears and shake you off course. One way to handle this tactic is to ask for a 5-minute break to collect your thoughts and plan your next move.
- **Pressure to Concede Equally.** When arguing over money, a common tactic employed by negotiators is to put pressure on the side that has conceded less by claiming that it is only "fair" for both sides to concede in roughly equal amounts. A variant of this strategy is the proposal to "split the difference" after you have negotiated for some time and then reached impasse. For tips on standing your ground when confronted with this tactic, see A Litigator's Guide to Effective Use of ADR in California §§3.144-3.145 (Cal CEB 2005).
- **No Authority to Settle.** In this ploy, the hard bargainer uses the negotiation to collect information about the case as well as about the other side's strengths, weaknesses, and reservation point, and when the negotiation comes to a head, the hard bargainer claims no authority. Alternatively, the hard bargainer states that any agreement reached will be only tentative because it requires approval from the board of directors or from an insurance adjuster. If you recognize or suspect a hard-bargaining tactic such as the claim of "no authority," name what you see; this gives you the opportunity to suggest a different way of negotiating that does not involve the use of hard-bargaining tactics.

PRACTICE TIP: If you fear this tactic will be used against you, determine the extent of your counterpart's authority before you begin discussing numbers. If you are caught by a "no authority" routine after reaching what you

thought was a final agreement, make it clear that you too reserve the right to withdraw or to propose further changes until final approval is forthcoming.

- **Last-Minute Terms and Costs.** Even after the main settlement terms are agreed on in principle, a skilled negotiator may find ways to extract more value by inserting onerous conditions or costs in the agreement. Had you known about the conditions earlier, you might have negotiated a different settlement amount. When you complain, your counterpart asks rhetorically, "Do you really want to undo our agreement over *this*?" To counter this tactic, always keep a clear view of your alternatives to settlement; the clearer your picture of the risks, costs, and potential benefits of litigation, the more secure you will feel refusing a last-minute condition that leaves your client worse off.

For further discussion of hard-bargaining tactics and countermeasures, including examples and practical tips, see Effective Use of ADR §§3.148-3.154.

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§46.29 D. Problem-Solving Approaches to Negotiation

Negotiations rarely proceed as smoothly or swiftly as we first envision. The difficulty stems in part from the fact that settling a case requires finding a result that satisfies both parties, yet litigators are trained to be zealous advocates for their clients and their clients alone. When one or both sides approach the negotiation with an adversarial mind-set, efforts to settle a case can quickly become stymied.

Instead of thinking how much you can get for your client relative to how much your counterpart can get for his or her own, try thinking in terms of how much more you could *both* get for your clients relative to their second-best alternative of litigating in court. See §46.3. This is the essence of a "win-win" solution, in which both sides do better than their likely and reasonable alternatives. True, one side may walk away with a larger share of the cooperative surplus than the other, but which is more important: getting more for your client in the absolute, or getting more for your client relative to what your counterpart got for his or hers? You will settle far more cases if you focus on the former rather than on the latter.

NOTE: A problem-solving orientation does not require you to compromise your client's position or give up more than you get back. It doesn't even mean you have to be nice! You can seek to maximize your client's fair share while still recognizing that you stand to gain more by working with the other side—not to help them, but to help both of you achieve better results.

The following problem-solving techniques may help you, your client, and your counterpart move the negotiation process forward when it appears to be stuck.

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§46.30 1. Focus on Interests More Than Positions

Positions are highly concrete, particularly expressions of what a party wants. The primary characteristic of a position is that it is nonnegotiable, *i.e.,* it can be satisfied only in one way or in a small number of ways. Interests are more general needs and desires that underlie particular positions, *e.g.,* economic well-being and recognition. If the negotiation remains on the level of each party's positions, the options for a truly satisfactory, comprehensive settlement are limited. The alternative is to probe below the level of positions, to identify the interests that motivate them. The key is to see if it is possible to satisfy each side's basic interests without necessarily satisfying the particular positions they have staked. This provides a way of getting *both* sides what they truly want, not what they claim they want.

Focus on Things Other Than Money. True, money is almost always involved; however, it is almost always *not* the entire picture. It is simply a convenient, indiscriminate way of addressing deeper interests such as security, recognition, well-being, or control. If money is an obstacle, try to find out what the parties seek to achieve with money, and use the negotiation to help them achieve those things without money exchanging hands. Look for value-creating opportunities made possible by shared interests or differences in resources and preferences. On value-creating opportunities and expanding the settlement pie, see §46.31.

Frame Interests in the Positive. The same interest can usually be characterized positively or negatively. Always focus on the positive formulation when reflecting back your understanding of the interest as part of your active listening (see §46.21) or when brainstorming solutions that address the interest (see §46.32).

Get the Clients Involved. Try to get the clients involved in settlement efforts. The client is in a superior position to understand its interests and to convey them in the most profound and nuanced way possible.

For more on interests and positions, including examples of positions and corresponding interests, see A Litigator's Guide to Effective Use of ADR in California §§3.156-3.170 (Cal CEB 2005).

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§46.31 2. Expand the Settlement Pie

Litigation is a "zero-sum" game: One party's gain is directly proportional to the other party's loss. Litigators often approach settlement as if it too were a zero-sum game. This is known as the "fixed-pie bias." The tendency is to assume that settlement negotiations are all about how to divide up a fixed pie (usually money) when in fact there may be numerous ways to make the pie bigger, *i.e.,* value-creating opportunities, before it is divided.

The following are some considerations and techniques that may help you find value-creating opportunities:

- **Identify Shared Aversion to Risk.** The settlement pie can sometimes be enlarged when both sides are risk averse, *i.e.,* they would each prefer to pay or accept a certain sum that is less than the more optimistic amount they expect to pay or receive by rolling the dice in court. By identifying a mutual desire to avoid risk, you may succeed in creating a bargaining zone that did not seem possible at first glance.
- **Identify Shared Interests.** Beneath the parties' opposing positions, you may discover interests that are surprisingly aligned. These shared interests can create opportunities that allow both parties to create value.
- **Identify Different Resources, Valuations, or Preferences.** Differences in the parties' resources, valuations, and preferences can provide opportunities for turning the dispute into a deal. On turning the dispute into a deal, see §46.14. Trades are usually possible only when one side prefers to give up something that the other side prefers to have. For example, trade-offs can be made when each side has different resources that the other wants, or when the parties have different priorities. In addition, the parties' different attitudes about when things need to happen can sometimes be exploited to harness more value for the settlement pie.
- **Aggregate Issues.** Think of resolving the dispute as one component of a larger deal. By aggregating other components into a settlement package, it is often possible to expand the zone of possible agreement. See §46.10. Related disputes or potential disputes can also be aggregated to create value.
- **Disaggregate Issues.** If aggregation doesn't help, try disaggregating issues to open up more avenues for settlement. For example, if there are numerous claims in the complaint and there is a sharp disagreement about only one or two of the claims, one possibility is to carve out or "disaggregate" the contested claims from the settlement package and leave them to be litigated or submitted to an expedited decision-making forum; meanwhile, you and your counterpart can work out a settlement for the balance of the case.

NOTE: A variant of disaggregating *issues* is to disaggregate *parties.* For example, if you represent the plaintiff in settlement negotiations with several defendants, you may find that settling with some defendants is within your reach but not with others. Settling with only some of the defendants may also give you a strategic advantage with respect to discovery or witness testimony if the case proceeds against the other defendants.

- **Reduce Transaction Costs.** Early settlement reduces transaction costs, *i.e.,* the costs of continuing to litigate. Such costs include attorney fees and court costs, time, lost-opportunity costs, and subjective costs, such as the psychological burden of continued litigation.
- **"Split the Difference" Only After Looking for Value-Creating Opportunities.** Negotiation is often equated with compromise or "splitting the difference." Although this is a perfectly reasonable way of negotiating a settlement, it should not be your preferred method of doing so. Look for creative ways to expand the pie *before* splitting it up so as not to miss crucial opportunities or leave significant amounts of money on the table.

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§46.32 3. Develop Creative Settlement Options

In the vast majority of cases, there are more options for settlement than meet the eye. Having more options on the table increases the likelihood of finding one that is mutually acceptable.

The key to finding more options is to separate the creative process of coming up with options from the rational process of evaluating, rating, or criticizing them. Think of developing options as a two-step process:

- Invent as many potential options as possible without prioritizing or evaluating them (the goal is quantity).
- Evaluate the potential options and sift through them to find the right fit (the goal is quality).

The following are some helpful techniques for inventing and then evaluating a wide range of settlement options:

Brainstorm Options. You can brainstorm options with your counterpart or separately with your client in preparation for the negotiation. On preparing for negotiation, see §§46.5-46.11.

PRACTICE TIP: Brainstorming with your counterpart is an opportunity for both sides to use your combined perspectives to come up with outcomes superior to what you could have generated on your own and may also help to move the negotiation forward by orienting both of you toward a common goal.

The golden rule in the brainstorming phase is that there should be no evaluation of the ideas whatsoever. Encourage and consider all options, even those that are far-fetched; they may eventually trigger an association to another idea that is more realistic or plausible. Explore as many options as possible, including unrelated options, *i.e.,* options involving parties or issues with no necessary connection or relevance to the case. If there are other ongoing or potential disputes between the parties, look at the bigger picture for opportunities to resolve all litigation globally.

Evaluate Options. After exhausting the brainstorming process, turn toward eliminating options that are not viable and testing those that are most viable to determine how well they meet the requirements of both sides. There are several benchmarks against which to evaluate options: How well do the options satisfy your client's underlying interests? How superior are they to your client's next-best alternatives? How well do they stand up to objective criteria? Are they superior to your client's reservation point?

Refine Options. As you evaluate the options, it is useful to select those that are most promising and begin to refine them. Consider options that are similar to, or variations of, those that are most promising. Or create a hybrid option that merges the best aspects of two or more options. For more on the refining process and an example applying refining techniques, see A Litigator's Guide to Effective Use of ADR in California §3.188 (Cal CEB 2005).

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4. Tips for Breaking Through Impasse

§46.33 a. Use Your Leverage

Leverage relates to how much power you or your counterpart possesses in the negotiation. The greater your leverage, the more you can dictate terms and influence outcomes.

Determining which side has more leverage is not always easy, for two reasons. First, leverage arises more from perception than from reality. A party who needs to settle litigation as soon as possible will have less leverage than one who can afford to wait; however, the first party can gain leverage if the other side does not know of the urgency or if an impression is conveyed that the party is in no hurry. Second, leverage is a dynamic concept. One party's relative leverage over another can change dramatically over the course of a negotiation as more information is exchanged, or as other events unfold.

There are two types of leverage: situational and personal. Situational leverage arises from having better alternatives to settlement than your counterpart. Personal leverage arises from your personality and negotiation skill relative to that of your counterpart. On the types of leverage, including examples, see A Litigator's Guide to Effective Use of ADR in California §§3.190-3.196 (Cal CEB 2005).

The worst thing to do is to use leverage like a blunt instrument by threatening what will happen if the case proceeds to trial, *e.g.,* who will win and who will lose, what tactics you will use, or what your witnesses will say. Instead of threatening, invite your counterpart to consider what would happen if the case did not settle. Plot out, step by step, the likely costs, risks, and outcomes of every pretrial motion you each plan to make, as well as of a full-blown trial. Factor in other concerns such as adverse publicity, the subjective costs of continued litigation, or the time to judgment that may weigh against each side. If you believe your litigation options are strong, couch your leverage in pragmatic terms ("If you cannot come up to our number, as a business matter it makes more sense for us to litigate") rather than in terms of superiority or liability ("Given the injury your client inflicted, we won't settle for less than $500,000"). There is a difference between considering the risks and benefits of continued litigation for purposes of assessing the likely alternatives and trying to convince your counterpart of your legal arguments. The latter will only increase the contentiousness of your negotiation and is of dubious benefit.

If leverage is related to the quality of your alternatives, you can improve your leverage by improving those alternatives. Gain whatever tactical advantages you can in discovery, on evidentiary issues, and through pretrial motions. This is true even if your client wants to avoid litigation and settle as quickly as possible. The stronger the case you build in litigation, the more leverage you will have at the settlement table.

Similarly, litigation and negotiation efforts need not be inversely related to each other. For example, starting or continuing settlement talks does not mean that discovery needs to be stayed or motions need to be postponed. If you can improve your position by continuing to litigate and if cost is not a looming concern, consider pursuing both litigation and settlement with equal energy.

PRACTICE TIP: When representing a client with little or no situational leverage, *e.g.,* one who was clearly guilty of wrongdoing or a plaintiff with a meritorious claim but with few resources with which to go after a large corporate defendant, consider ways of improving your client's position in the negotiation by emphasizing the uncertainty of the future and the advantage of settling now, using personal leverage and cautious bluffing.

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§46.34 b. Use Objective Standards

Negotiations often devolve into a contest of wills, in which the stronger and more assertive you are the more you seem to get. This may have clear advantages if you are the stronger party, but in most cases it simply raises the level of contentiousness and increases the chances of deadlock. The harder you push, the harder they resist and vice versa. One way to get out of this vicious cycle is to find a neutral, objective standard that can be used to evaluate each side's proposals. Examples of such benchmarks include reported jury verdicts, information about comparable settlements, or other neutral indicia such as fair market value or industry custom. The idea is to inject some rationality into the negotiation process so that it does not become a tug-of-war.

The objective standard should be acceptable to both you and your counterpart. A standard that is neutral, reliable, and relevant stands the best chance of being accepted by the other side. On negotiating with objective standards, see A Litigator's Guide to Effective Use of ADR in California §§3.213-3.216 (Cal CEB 2005).

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.35 c. Use Objective Procedures

§46.35 c. Use Objective Procedures

If you and your counterpart cannot agree on an objective standard, consider procedures that might lend objectivity to the negotiation process, such as:

- **One Cuts, the Other Chooses.** Let one side decide how to divide the pie and let the other side choose which piece of the pie to take. This gives the first party incentive to divide the pie as equally as possible.
- **Mediator or Neutral Third Party.** If all else fails, solicit the advice or judgment of a neutral third party. If you feel you need something stronger than a third-party opinion, you may wish to submit the entire dispute, or perhaps only certain issues, to arbitration. On mediation, see §45.11; on arbitration, see §§45.12-45.31.

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.36 d. Name the Dynamic

§46.36 d. Name the Dynamic

If the settlement discussion is not productive or moving forward, figure out why you feel this way and express your intuition to your counterpart. Express your concern in terms of your subjective experience of the dynamic—one that is open to correction—and not as an objective judgment.

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§46.37 e. Exchange More Information

You may need more information to settle the case if, *e.g.,* you skipped the information-exchange process because you believed that settling the case would be straightforward and that delving more deeply into the other side's perspectives, interests, and goals would be a waste of time, or if you sense that you don't know enough about what underlies the dispute between the parties. Ask the questions you need to ask or, alternatively, invite your counterpart to participate in a joint information-gathering session. On exchanging information, see §§46.18-46.23.

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§46.38 f. Take a Break and Reiterate Problem-Solving

If you notice yourself engaged in a battle about who is right and who is wrong, take a break and return to the table with a more constructive orientation. Taking a private break to collect your thoughts or adjourning the negotiation to another time can give you and your counterpart some much-needed space to reevaluate and plan your next move. When you return, invite your counterpart to approach your negotiation not as a dispute but as a deal, a deal that may leave both your clients better off than if they choose to take their chances in court. See §46.14.

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§46.39 g. Carve Out Issues That Cannot Be Negotiated

If there are intractable, discrete mini-disputes, consider disaggregating them for adjudication through a summary judgment or adjudication motion, or through arbitration. You might also enlist the aid of a mediator or other neutral third party to help resolve those disagreements. Meanwhile, focus on the other areas of the dispute that are amenable to negotiation. On disaggregating issues, see §46.31.

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§46.40 h. Reexamine Your Position

If you think you have reached impasse and believe it is all your counterpart's fault, think again. It takes two to tango. Perhaps this is a good opportunity to consider how things look from the other side's perspective.

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.41 E. Checklist: Negotiation

§46.41 E. Checklist: Negotiation

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The following checklist covers the important considerations in the negotiation process. Each of the topics is discussed in this chapter as noted.

- Keep in mind the overarching goal of a settlement negotiation: to find a result that places both parties in a better position than the one they could achieve through their next-best option—typically litigation—factoring in both the pros and cons of that option. See §46.3.
- Consider your opening to the negotiation. See §§46.12-46.17.
  - Determine the appropriate tone and how that tone can be most effectively conveyed. See §46.13.
  - Develop rapport with your counterpart. See §46.13.
  - Hear and acknowledge the other side. See §46.13.
  - Convey your client's sincerity and optimism about settlement. See §46.13.
  - Introduce a problem-solving orientation. See §46.14.
  - Articulate your client's intentions, needs, and perspective regarding a settlement. See §46.15.
  - Agree on the agenda, goals, and process for the negotiation with your counterpart. See §46.16.
  - Consider negotiation styles—understand your own style, identify your counterpart's style, and determine how to best interact. See §46.17.
- Exchange information with the other side. See §§46.18-46.23.
  - Consider how to structure the process of sharing information and reach agreement on the structure with your counterpart. See §46.19.
  - Consider the timing of information-sharing. See §46.19.
  - Use listening and questioning techniques, *e.g.,* active listening. See §§46.20-46.22.
  - Determine what information you should get, *e.g.,* information about underlying interests and assumptions, information about the other side's "reservation point." See §46.23.
  - Determine what information you should give. See §46.23.
  - Determine what information you should guard. See §46.23.
- Know the numbers and how you will negotiate with them. See §46.24.
  - Know your client's "reservation point," *i.e.,* bottom line. See §46.25.
  - Know your client's "target point," *i.e.,* optimistic goal. See §46.25.
  - Determine your "opening offer or demand." See §46.26.
    - Determine whether to make the first offer or demand. See §46.26.
    - Determine how to open optimistically. See §46.26.
  - Consider your concession strategy. See §46.27.
    - Consider the messages you and your counterpart communicate to each other through your concessions. See §46.27.
  - Be prepared to recognize hard-bargaining tactics and to deal with them. See §46.28.
- Think of problem-solving approaches. See §46.29.

- Focus on interests over positions. See §46.30.
- Expand the settlement pie, *i.e.,* look for value-creating opportunities. See §46.31.
- Develop creative settlement options. See §46.32.
- Brainstorm options first. See §46.32.
- Evaluate options later. See §46.32.
- Reflect on ways to break through impasse.
- Use your leverage, both situational leverage (having better alternatives to settlement than your counterpart) and personal leverage (your personality and negotiation skills relative to your counterpart). See §46.33.
- Point to objective standards to evaluate each side's proposals, *e.g.,* reported jury verdicts and fair market value. See §46.34.
- Name the dynamic that is creating the impasse and work with your counterpart to move the negotiation forward. See §46.36.
- Exchange more information—get the information you need to move forward or invite your counterpart to participate in a joint information-gathering session. See §46.37.
- Focus on finding ways for *both* parties to be better off than their alternative of litigation, not for one side to "win" relative to the other. See §§46.38, 46.40.
- Consider taking a break from the negotiation. See §46.38.
- Think about carving out intractable, discrete mini-disputes. See §46.39.
- Reexamine your position from the other side's perspective. See §46.40.

NOTE: Many of the concepts and strategies touched on in this checklist are derived from an extensive body of resources and research on negotiation, and in particular from certain highly influential sources included in the bibliography of A Litigator's Guide to Effective Use of ADR in California §3.223 (Cal CEB 2005).

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§46.42 IV. PREPARING THE SETTLEMENT AGREEMENT

Whether a resolution is reached through mediation or as a compromise after counsel's settlement negotiations, the process of preparing the settlement agreement documents—from the first draft to the final formal agreement—takes time, patience, and attention to detail. There is no magic form for final settlement documents; they are simply contracts that are subject to enforcement according to their terms. They must be carefully drafted, just as any contract should be, to reflect the precise terms and understanding of the parties and to avoid ambiguities and uncertainties that invite more disagreement and disputes. Counsel should be aware of the basic purpose and requirements of the agreement and of the terms that should be included for the agreement to be enforceable. For a sample settlement agreement and general release, see A Litigator's Guide to Effective Use of ADR in California §12.48 (Cal CEB 2005).

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.43 A. Common Terms of a Settlement Agreement

§46.43 A. Common Terms of a Settlement Agreement

The final settlement documents should contain all terms on which the parties have agreed. A settlement agreement is a contract, and as such its terms are fully negotiable and carry significance for the parties. Further, the settlement agreement must contain sufficient terms to be enforceable under CCP §664.6. See §§46.45-46.47. The following terms appear commonly in settlement agreements:

- **Parties.** The names of parties to the settlement must be clearly identified in the agreement. The agreement must make it very clear who is releasing whom.
- **Claims Being Settled.** The settlement agreement must specifically identify the claims that are being resolved and released by the agreement. The agreement could state that consideration paid is in:

Full settlement and compromise of this action and in release and discharge of any and all claims and causes of action made in this action, and in release and discharge of any and all claims and causes of action arising out of the events or incidents referred to in the pleadings in this action.

In contrast, the agreement could specify only certain claims that are being resolved and released by the agreement, such as:

- **Statement That Settlement Is Voluntary.** The settlement agreement should contain a statement that the parties have entered into the agreement voluntarily and without coercion. The parties must acknowledge in the agreement that they are aware of its contents, that counsel has explained to them its legal effect, and that the settlement document incorporates their entire understanding. For example, such a provision may state the following:

The parties acknowledge that they have entered into this settlement agreement voluntarily, on the basis of their own judgment and without coercion, and not in reliance on any promises, representations, or statements made by the other parties other than those contained in this agreement. This agreement incorporates the entire understanding of the parties and recites the sole consideration of the promises and agreements contained within it. The parties have read this agreement and are fully aware of its contents and legal effect.

- **Consideration.** The settlement agreement must identify the parties' respective rights and obligations. Generally, the defendant will be obligated to provide consideration to the plaintiff in exchange for the plaintiff's dismissing the action and releasing the defendant from any further actions based on the dispute. Consideration is most often in the form of monetary payment but can also take many other forms, *e.g.,* the performance of an act or refraining from the performance of an act, or a promise of confidentiality. The following is a standard example of a provision for consideration:

1. _ _[*Name*]_ _ shall pay to plaintiff(s) _ _[*name(s)*]_ _ the total sum of $_ _[*dollar amount*]_ _ in full settlement and compromise of this action and in release and discharge of any and all claims and causes of action made in this action, and in release and discharge of any and all claims and causes of action arising out of the events or incidents referred to in the pleadings in this action.

- **When Performance Will Occur.** If there is no escrow account established (on escrow accounts, see A Litigator's Guide to Effective Use of ADR in California §12.10 (Cal CEB 2005)) and the parties have decided to rely on each other's good faith for performance, plaintiff's counsel should ensure that the period for payment is clearly specified, *e.g.,* simultaneously, 10 business days, 30 calendar days. The simplest situation is one in which there is a unilateral release and dismissal of the lawsuit given by the releasing party in exchange for simultaneous payment of money by the party who is released. See Effective Use of ADR §12.26. When the exchange is not simultaneous, the settlement agreement should outline precisely, step-by-step, how and when the parties are to perform their respective obligations under the settlement. The following is an example of a provision for the timing of performance:

Releasees shall pay Plaintiff the sum of $400,000, which sum shall be made payable to Plaintiff or to any other person or entity as he directs. Releasees shall deliver said sum to Plaintiff within ten (10) days of the execution

of this agreement. On payment of the $400,000 by Releasees, Plaintiff shall physically surrender the insurance policy to counsel for Releasees within 10 days of receipt of the $400,000 payment.

NOTE: Once the case is settled, the party seeking affirmative relief must file written notice of the settlement with the court and serve notice on all parties and the arbitrator or court-connected neutral involved in the case. Cal Rules of Ct 3.1385(a). If a condition of the settlement is dismissal upon the completion of specified terms that are not to be performed within 45 days of the settlement, then a notice of conditional settlement must be filed and served, specifying the date by which the dismissal is to be filed. Cal Rules of Ct 3.1385(c). For Notice of Settlement form, see §46.50.

- **Release.** A release is a contract whereby one or more parties agree to abandon, relinquish, or give up rights or claims that otherwise could be pursued or enforced. Releases are commonly incorporated into settlement agreements, or can be prepared as stand-alone documents in connection with the settlement of claims in litigation. They are governed by the same principles of contract formation, interpretation, and enforceability that apply to all contractual agreements.

PRACTICE TIP: Settlement agreements typically apply to all known and unknown claims. However, "[a] general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." CC §1542. The best practice is to include an express waiver of unknown claims and rights under §1542, quoting the statute verbatim as part of the waiver. The following is an example of such an express waiver:

Each of the parties has considered the possibility that the number or magnitude of all claims against the other parties may not presently be known; nevertheless, each party assumes the risk of fully and finally releasing all such unknown claims and expressly waives the benefits of CCP §1542, which provides "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected the settlement with the debtor."

- **Covenant Not to Execute.** Parties may also want to include a covenant not to execute on any judgment obtained by the plaintiff in the lawsuit against the defendant. The following is an example of a covenant not to execute:

In consideration of this assignment, Party A, for himself, his heirs, executors, administrators, and assigns, agrees and covenants not to levy execution on any judgment, settlement, or recovery of any kind against Party B, his heirs, executors, administrators, or assigns in the underlying action or any other action or claim arising from the accident.

- **Dismissal of Pending Claims or Actions.** If the parties intend the settlement agreement to effect complete closure, it should specify which lawsuits or arbitrated matters are to be dismissed with prejudice. The following is an example of a provision for dismissal of the action:

Dismissal of Action. Within 1 calendar day of execution of this Agreement by the Parties, Plaintiff shall deliver to _ _[*insert name of counsel for the defendant*]_ _ an executed Request for Dismissal with Prejudice of _ _[*specify title of action, including case number and court*]_ _ in its entirety. Plaintiff acknowledges that _ _[*he/she*]_ _ authorizes _ _[*insert name of counsel for the defendant*]_ _ to file the Request for Dismissal with the court.

The Request for Dismissal is a separate document filed with the court. It is often made an exhibit to the settlement agreement, to ensure that the parties are in agreement on the form of the document to be filed. For discussion of voluntary dismissal, including a form Request for Dismissal (Judicial Council Form CIV-110), see §§39.95-39.125, 39.130.

- **Choice of Law.** It is customary to include a statement in the settlement agreement identifying which state's laws will apply. See Effective Use of ADR §12.14.
- **Restricted Disclosure.** A settlement agreement should also specify whether it is to be kept confidential by the parties. The following is a sample restricted-disclosure provision:

The terms of this settlement agreement and the amounts paid under it shall remain confidential. The parties shall not disclose these terms to anyone, except that disclosure of the agreement's terms and settlement amount may be made to the parties' attorneys, accountants, and spouses (subject to the same obligation of restricted disclosure); to taxing entities; as necessary for obtaining professional liability insurance; and as

otherwise required by law (including by subpoena or court order). The parties shall be allowed to state only that the claims described in the Court Action, more fully described in the recitals in this Agreement, have been settled and that the settlement terms are confidential.

- **Nonassignment of Claims.** Usually, the closing document will specify that any party releasing or giving up a right or claim still possesses it and has not assigned it away. The following is an example of such a provision:

  Plaintiff and Defendants each represent and warrant that they have made no assignment of any Subject Claim that is being released through this settlement agreement.

- **No Admission of Fault.** The settlement agreement should include a statement that neither its terms nor the negotiations that led to the agreement constitute an admission for any claim of liability or damages by any party. The following is an example of a provision for no admission of fault:

  _ _[*Name of plaintiff*]_ _ agrees that _ _[*name of defendant*]_ _'s entry into this Release is not to be construed as, and is not, an admission that _ _[*name of defendant*]_ _ (or any Released Party) violated any of its duties or obligations to him or treated him improperly, unlawfully, or unfairly in any manner whatsoever, or that it engaged in any unlawful conduct either in the manner alleged in the Lawsuit or in any manner. Neither this General Release nor the implementation thereof shall be construed to be, or shall be admissible in any proceedings as, evidence of an admission by _ _[*name of defendant*]_ _ (or any Released Party) of any violation of or failure to comply with any federal, state, or local law, common law, agreement, rule, regulation, or order.

- **No Interpretation Against Drafting Party.** Generally, because the settlement agreement represents a negotiated resolution with the parties' participation, it should state that there is no presumption or adverse interpretation against the drafting party. See Effective Use of ADR §12.18.
- **Remedies for Breach.** It is important to address the possibility of breach in the settlement agreement and to provide for specific remedies in the event that one party fails to timely fulfill its obligations under the agreement. Remedies for breach may include security and/or interest for late payments, dispute resolution procedures, and attorney fees. See Effective Use of ADR §§12.19-12.22. The following is an example of an attorney fee provision:

  In the event of any further dispute arising from or concerning the terms and conditions of this settlement agreement, the prevailing party in that dispute shall be entitled to an award of reasonable attorney fees and costs. Otherwise, each party shall be responsible for payment of its own attorney fees and other expenses in connection with the Subject Action and the negotiation of this settlement agreement.

- **Indemnification.** Often, settlement agreements contain special provisions that allow for indemnification of a party who pays for the release of a claim if that claim is reasserted against it in the future. The following is a sample indemnification provision:

  INDEMNIFICATION: _ _[*Plaintiff*]_ _ and his counsel hereby release, indemnify, and hold _ _[*Defendant*]_ _ harmless of and from any liability for the payment of any attorney fees, costs, or expenses of any and all attorneys who have at any time or are now representing _ _[*Plaintiff*]_ _ relating to the subject matter of this Release.

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§46.44 B. Executing a Settlement Agreement

After a resolution has been reached and the parties have prepared the final settlement papers memorializing the agreement, all that remains is for the parties to exchange the final settlement document (*i.e.,* release or settlement agreement or both) and a dismissal of any claims reflected in a lawsuit that is being resolved and dismissed.

Signature Requirement. The settlement agreement should include signature lines for each party, with lines below each signature for the party's name and affiliation to be printed legibly. The agreement should also provide lines for counsel to sign, indicating their approval of the document as to form. To be eligible for the summary enforcement procedures under CCP §664.6, a written settlement agreement must be signed by the parties themselves, not by their attorneys or representatives. *Levy v Superior Court* (1995) 10 C4th 578, 41 CR2d 878. In addition, *all* parties to the settlement must sign the agreement, not only those against whom enforcement is sought. *Sully-Miller Const. Co. v Gledson/Cashman Const., Inc.* (2002) 103 CA4th 30, 126 CR2d 400. For discussion of the requirements for summary enforcement under CCP §664.6, including the signature requirement, see §§46.45-46.46.

Simultaneous Exchange. The simplest procedure for completing the settlement process is to have the final settlement document drafted to contemplate a "closing" by the simultaneous exchange between the releasing party (releasor), who delivers the signed release or settlement agreement with the fully executed dismissal (usually with prejudice), and the party being released (releasee), who delivers a check or other instrument representing payment of the monetary consideration. If simultaneous exchange is not practical, the settlement documentation may be executed at different times and in different locations by the parties. See A Litigator's Guide to Effective Use of ADR in California §12.26 (Cal CEB 2005).

Mutual Settlement. Mutual settlement agreements are executory and contemplate that the parties have duties to be performed in the future, most commonly seen in the future obligation to pay.

Court Approval. Settlement agreements entered into in certain types of actions are subject to court approval, *e.g.,* class actions. When court approval is required, it is generally sought after the parties have agreed to the settlement terms and executed the settlement documents. It is also frequently recited in the agreement itself as a contingency that must be satisfied before the agreement can have full force and effect.

On special considerations for agreements reached during mediation, see Effective Use of ADR §§12.29-12.45.

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§46.45 V. ENFORCING THE SETTLEMENT AGREEMENT

After the parties have negotiated, memorialized, and executed their settlement agreement, the remaining issue is enforcing that agreement. There are two options for enforcing a stipulated settlement agreement:

- Statutory enforcement (under CCP §664.6), which provides the most efficient means of enforcing a settlement agreement, but also has the most rigid requirements (see §46.46); and
- Nonstatutory enforcement procedures, which are not as effective and may be more easily opposed than an agreement enforceable under CCP §664.6 (see §46.47).

It is important to keep in mind future enforcement issues while engaging in the negotiating and memorializing process. For example, for an agreement to be enforceable under CCP §664.6, it must contain all the material terms and must be signed by the parties themselves. *Hines v Lukes* (2008) 167 CA4th 1174, 1182, 84 CR3d 689. See §§46.44, 46.46.

In addition, CCP §664.6 does not allow a court to enforce a provision in a settlement agreement that is illegal, unjust, or contrary to public policy. See *California State Auto. Ass'n Inter-Ins. Bureau v Superior Court* (1990) 50 C3d 658, 664, 268 CR 284. When enforcing a settlement by summary judgment motion, the agreement must be sufficiently clear to prohibit the opposition from pointing to factual disputes on the terms of the agreement itself.

The court also retains jurisdiction under CCP §664.6 to enforce a settlement, but it does not have jurisdiction to reallocate settlement amounts to reduce the court-ordered payments of a medical expenses lien. *Espericueta v Shewry* (2008) 164 CA4th 615, 625, 79 CR3d 517.

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§46.46 A. Statutory Enforcement

Under CCP §664.6, the parties' stipulation on the material terms of a settlement, made in writing or orally before the court, may be entered and enforced as a judgment. This statute was enacted to provide a summary procedure for specifically enforcing a settlement contract without a new lawsuit.

Although CCP §664.6 provides an efficient means of enforcement, the statute has several specific requirements. If a settlement agreement fails to meet the required elements, the agreement will not be enforceable. Under §664.6, the elements required for enforcement of a settlement are (1) pending litigation and (2) a stipulation of the parties, either (a) in writing, if outside the court's presence, or (b) orally before the court.

A motion under CCP §664.6 is appropriate when the terms or binding nature of a settlement agreement are in dispute, because the court is empowered to resolve disputed issues and determine whether the parties have reached a binding accord on the material terms. *Marriage of Assemi* (1994) 7 C4th 896, 30 CR2d 265. See also *Lindsay v Lewandowski* (2006) 139 CA4th 1618, 1623, 43 CR3d 846 (stipulated settlement unenforceable because it was unclear what parties meant by "binding mediation"). Although the court may decide disputes concerning the terms of the settlement, the court may not create the material terms of the settlement. *Osumi v Sutton* (2007) 151 CA4th 1355, 1360, 60 CR3d 693.

Pending Litigation Requirement. There must be pending litigation at the time of agreement *and* at the time of enforcement. Section 664.6 cannot be used to *confer* jurisdiction; it can be relied on only when jurisdiction *already* exists in a pending case. Thus, the CCP §664.6 procedure is not available when an agreement is reached before the filing of litigation. *Housing Group v United Nat'l Ins. Co.* (2001) 90 CA4th 1106, 109 CR2d 497. Enforcement under §664.6 procedure also is unavailable when the underlying litigation has been dismissed, and is no longer pending. See *Hagan Eng'g, Inc. v Mills* (2003) 115 CA4th 1004, 9 CR3d 723. See also *Walton v Mueller* (2009) 180 CA4th 161, 172, 102 CR3d 165 (§664.6 does not apply after a judgment has become final). On the pending litigation requirement, see A Litigator's Guide to Effective Use of ADR §12.5 (Cal CEB 2005).

Parties' Stipulation Requirement. As provided in CCP §664.6, the parties must *themselves* have stipulated to the agreement (see §46.44 on signature requirement), and written and oral stipulations must contain all of the material terms of the agreement. *Gauss v GAF Corp.* (2002) 103 CA4th 1110, 1123, 127 CR2d 370. Written stipulations can be entered into outside the court's presence, but oral stipulations must be "before the court." See *1538 Cahuenga Partners, LLC v Turmeko Prop., Inc.* (2009) 176 CA4th 139, 143, 97 CR3d 552 (party who discussed and agreed to terms of settlement agreement in court's chambers stipulated to agreement "before the court" even though he was not present when his attorney later consented to agreement on the record).

Each of these requirements is discussed in Effective Use of ADR in California §§13.4-13.10. For a list of grounds for resisting enforcement under CCP §664.6, see Effective Use of ADR §§13.16-13.22.

For forms Notice of Motion for Judgment of Dismissal Under CCP §664.6 and Opposition to Motion for Judgment of Dismissal Under CCP §664.6, see Effective Use of ADR §§13.35-13.36.

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§46.47 B. Nonstatutory Enforcement

Settlement agreements not enforceable under CCP §664.6 may still be enforced by a summary judgment motion in a pending action, a separate suit in equity, or an amendment to the pleadings followed by proof at trial in a pending action. See *Levy v Superior Court* (1995) 10 C4th 578, 581, 41 CR2d 878. Which option is selected will depend on whether the dispute was in litigation and the proximity to the trial date.

Examples of cases in which courts grappled with settlement enforceability issues include *Pietrobon v Libarle* (2006) 137 CA4th 992, 40 CR3d 718 (when both parties had agreed to terms of agreement in open court and reaffirmed at trial, statute of frauds did not render settlement agreement unenforceable under CC §1624(b)(C)(3)), and *Elnekave v Via Dolce Homeowners Ass'n* (2006) 142 CA4th 1193, 48 CR3d 663 (settlement agreement unenforceable when agreement was not approved by board member or office of defendant homeowners association).

On nonstatutory means of settlement enforcement, see A Litigator's Guide to Effective Use of ADR in California §§13.27-13.34 (Cal CEB 2005).

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VI. FORMS

§46.48 A. Form: Sample Demand Letter—Wrongful Death Case

▶ To download **Word** version, right click and choose *Save Target As*

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[*Letterhead*]

_ _[*Date*]_ _

_ _[*Name and address of attorney or unrepresented party*]_ _

Re: _ _[*Case name*]_ _

Dear _ _[*name of, e.g., attorney for defendant*]_ _**:**

This will confirm your recent telephone conversation with my associate in which you stated that the total insurance coverage applicable to this case amounts to only $100,000.

On the basis of this statement, we have conferred with our clients and have obtained their authority to accept the sum of $100,000 in full settlement of their claim against your insureds for the wrongful death of our clients' son, Jeff Smith.

This offer is contingent on (1) your providing this office with proof of the limits of the applicable insurance policy or policies, (2) your confirming the unavailability of any insurance other than your policy or policies, (3) your submitting a statement verified by Mr. Jones showing his net worth, and (4) our receipt of payment in the amount of the policy limits within 60 days from the date of this letter. That is, our offer will remain open until Thursday, August 31, 2008, and your acceptance must be received at our office on or before 5:00 p.m. on that date.

As you know, this is a case in which your insureds are clearly liable. Joe Jones negligently and recklessly drove his vehicle over the center line of Highway 1 in Marin County, causing a head-on collision with the automobile driven by Jeff Smith. Joe Jones was cited by the California Highway Patrol for violation of Vehicle Code §21460(a) and was charged with vehicular manslaughter in the death of Jeff Smith.

We believe that this case is worth well over the stated policy limits of $100,000. At the time of his death, Jeff Smith was a healthy, 25-year-old serviceman stationed at Fort Honor, enjoyed an extremely close and loving relationship with his parents, and remained in frequent contact with them wherever he was stationed in the army.

The tragic nature of this young man's death is compounded by the fact that the Smiths lost another son in an accident shortly before Jeff's death and by the fact that Jeff's father, Jim, suffered a massive heart attack immediately after learning of Jeff's death. Jim is now permanently disabled and totally dependent on his surviving children for support. Given the close bond between Jeff and his father, there is no question that Jeff would have contributed substantially to his father's support for the balance of his life. Both parents have now been deprived of the support as well as the love, care, comfort, affection, society, and protection that Jeff would have provided them were he still alive.

The jury verdict potential in this case is evident from a review of recent California verdicts involving the wrongful death of a child. Our office, for example, recently obtained a jury verdict of $800,000 in the case of *Doe v Roe* (Fresno County Superior Court) for the wrongful death of a 4-year-old child. Given the circumstances surrounding the loss of the Smiths' 25-year-old son, if this case goes to trial in Marin County, it is reasonable to expect that the jury will reach a verdict in an amount at least similar to the award given in the *Doe v Roe* case.

As previously mentioned, this offer to settle within the applicable policy limits will remain open for 60 days from the date of this letter. If it has not been accepted by that time, this demand will be withdrawn, and we will proceed to trial.

As Mr. Jones's insurer, you have an obligation to consider his interests and to accept a reasonable settlement demand when there is a significant risk of a judgment exceeding policy limits. Because it is a virtual certainty that the probable verdict range is in excess of eight times your limits, my clients would not consider settling for the policy limit amount were it not for the fact that your insureds have no substantial assets against which we could execute. Should we obtain a favorable result at trial, we intend to pursue all other legal avenues to satisfy the judgment.

If your response to this offer is less than a complete acceptance, please furnish us with the written statement required by Insurance Code §790.03(h)(13), explaining the basis you are relying on in your policy, in relation to the facts and applicable law, for your denial or for any compromise offer you might make.

For your information, we have filed a lawsuit on our clients' behalf. A copy of the Complaint is enclosed. We will not have Mr. Jones served, pending your response to this demand.

I trust that you will agree that this is a case justifying a settlement of your full policy limit of $100,000. We look forward to hearing from you, and, in the meantime, we thank you for attention to this matter.

Very truly yours,

_ _[*Signature of, e.g., attorney for plaintiff*]_ _
_ _[*Typed name*]_ _

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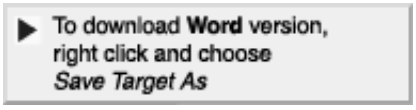
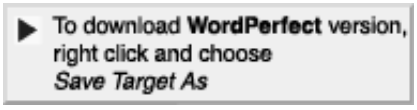
Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.49 B. Form: Sample Demand Letter--Personal Injury Case

§46.49 B. Form: Sample Demand Letter—Personal Injury Case





[*Letterhead*]

_ _[*Date*]_ _

_ _[*Name and address of attorney or unrepresented party*]_ _

Re: _ _[*Case name*]_ _

Dear _ _[*name of, e.g., attorney for defendant*]_ _**:**

In response to your request for a settlement demand in this case, I am enclosing documentation of Sandra Smith's injuries and damages.

The following is a brief summary of the facts pertaining to this claim:

LIABILITY

The accident occurred at approximately 11:30 a.m. on February 12, 2008, at the Central Shopping Center in Centerville, California. Sandra Smith and her husband, George, had gone to the shopping center to buy groceries. After parking their car, they were walking along the sidewalk when Mrs. Smith fell as a result of a depression in the sidewalk adjacent to the grocery store.

Our investigation has revealed that the depression was poorly marked (nearly all of its original paint had worn off) and was further obscured by an automobile parked in a designated parking space in front of it. We have also learned that other people had fallen at the same location before Mrs. Smith's accident.

Under these circumstances, there should be no question that the sidewalk was in an extremely hazardous and defective condition, resulting in a clear case of liability against your insured.

CLAIMANT'S PRIOR MEDICAL HISTORY

Sandra Smith underwent brain surgery in 1995, for removal of a benign tumor from the right parietal lobe, and subsequently developed a seizure disorder for which she takes anticonvulsive medication. Although her seizures are currently controlled by medication, she has required neurological and psychiatric care as a result of this condition and has been unable to work in her former occupation as a real estate sales representative since undergoing brain surgery.

Mrs. Smith states that she has suffered from intermittent neck pain for several years, apparently unrelated to any trauma or injury, and that she has sought periodic chiropractic treatment for this condition. Mrs. Smith also states that she had no prior problems involving her upper or lower extremities. There is no history of any prior injuries or accidents.

INJURIES AND TREATMENT

As a result of the accident, Sandra Smith sustained the following injuries:

1. Injury to right foot and ankle, including a severe sprain and possible fracture, as well as secondary venous damage;

2. Cervical strain;

3. Lumbosacral sprain/strain;

4. Injuries to both hands and wrists, including carpal tunnel syndrome of the right wrist;

5. Injuries to both knees; and

6. Meralgia paresthetica involving the right thigh.

Mrs. Smith twisted her right foot and ankle at the time of her fall, and fell forward into the sidewalk onto her hands and knees. Because she was unable to bear weight on her right foot, her husband assisted her to their home, where she rested for the remainder of the day.

Due to severe pain and swelling of her right foot and ankle, Mrs. Smith was seen in the emergency room of Centerville Community Hospital on February 13, 2008, where she was examined by the attending emergency room physician. X rays of the right ankle revealed a reported sliver fracture of the lateral malleolus, for which the emergency room physician applied a soft cast to the right leg and also gave Mrs. Smith crutches. He advised her to seek follow-up care at the Centerville Hospital Orthopedic Clinic.

On February 17, 2008, Mrs. Smith was seen in the Orthopedic Clinic by Thomas Anderson, M.D. Dr. Anderson noted swelling and tenderness over the right malleolus and lower fibula, and obtained X rays that demonstrated a possible fracture of the lower fibula. He reported his diagnosis as a sprain of the right ankle, with possible partial fracture of the lower fibula, and applied a short-leg walking cast to the right leg.

Mrs. Smith returned to the Orthopedic Clinic on February 22, 2008, for reinforcement of her cast, and on February 23, 2008, she was seen for further examination by Gloria Evans, M.D., in the Centerville Family Practice Clinic. Mrs. Smith's complaints at that time were of pain in her right ankle and neck as well as numbness and a burning sensation over her right lateral thigh.

In addition to the previously diagnosed problems involving her right ankle, Dr. Evans felt that Mrs. Smith had suffered a strain of her cervical spine. She also reported that Mrs. Smith was suffering from a condition known as meralgia paresthetica, which is a form of paresthesia involving the outer side of the lower part of the thigh in the area of distribution of the external cutaneous branch of the femoral nerve. Dr. Evans prescribed Tylenol for pain relief and advised Mrs. Smith to return for follow-up treatment.

On March 1, 2008, Mrs. Smith was seen by Clark Bradshaw, D.C., at which time she complained of pain in her neck and back as well as pain and numbness involving her right wrist and right leg. Dr. Bradshaw provided physical therapy and chiropractic manipulations on March 1, 3, 5, 15, 26, and 31, 2008. He reported his diagnoses as "acute lumbosacral musculo-ligamentous, sprain/strain with vertebral displacement and accompanying paresthesia and radiculitis into the right hip and leg, and cervical-dorsal vertebral displacement with accompanying radiculitis into the right wrist."

Mrs. Smith also continued to receive follow-up care at the Centerville Hospital Orthopedic Clinic, and on March 24, 2008, the cast was finally removed from her right leg.

On April 1, 2008, Mrs. Smith returned to see Dr. Evans in the Centerville Family Practice Clinic, at which time she complained of persistent pain and numbness involving her right leg and right wrist. Dr. Evans again reported that the right leg problems were due to meralgia paresthetica. She felt that Mrs. Smith's right wrist problems were due to carpal tunnel syndrome, which is caused by compression of the median nerve, and reported that this condition was due to inflammation in the wrist secondary to Mrs. Smith's fall of February 12, 2008. She provided Mrs. Smith with a wrist splint, which she used for approximately one month.

Mrs. Smith's next visit to the Centerville Family Practice Clinic was on April 22, 2008. By this time, her neck and wrist pain had subsided, but she continued to have problems with pain and swelling of her right foot. The examination revealed diffuse edema and tenderness of the right foot and ankle, and Dr. Evans reported that these symptoms were due to venous damage caused by Mrs. Smith's injury. The doctor prescribed Tylenol for the pain and advised her to exercise as tolerated.

Mrs. Smith returned to the Centerville Family Practice Clinic again on May 4 and 10, 2008, with ongoing complaints of pain and swelling of her right foot and ankle as well as bilateral knee pain. No particular

treatment was rendered on these occasions, and, because she was becoming increasingly concerned over her apparent lack of improvement, Mrs. Smith made an appointment to be seen by Gregory Shiffman, M.D., an orthopedic surgeon in private practice.

Mrs. Smith was examined by Dr. Shiffman on May 27, 2008. Although he apparently felt that there was some hysterical component to her complaints, he found some evidence of chondromalacia involving both knees, as well as evidence of reflex sympathetic dystrophy to the right foot (indicative of injury to a peripheral nerve). Dr. Shiffman applied an Ace wrap to Mrs. Smith's right foot and referred her to Constance Klein, R.P.T., for a program of physical therapy.

Mrs. Smith received physical therapy on June 2, 7, 9-10, 14, and 16, 2008, after which she noted significant improvement in the condition of her knees. However, she continued to suffer from pain and swelling of her right foot and ankle, for which she consulted John Marcel, D.P.M., on July 12 and 19, 2008. Dr. Marcel prescribed an Unna boot for the right foot, and advised Mrs. Smith to apply ice to her foot and ankle to reduce the swelling.

Please see the attached medical records and reports for further details.

SPECIAL DAMAGES

A. Medical and Related Expenses:

1.	**Centerville Community Hospital (ER, 2/13/06)**	**$ 195.00**
2.	**Centerville Hospital Orthopedic Clinic (PMC, 2/17, 2/22/06)**	**497.00**
3.	**Gloria Evans, M.D. (2/23, 4/1, 4/22, 5/4, 5/10/06)**	**293.00**
4.	**Clark Bradshaw, D.C. (3/1, 3/3, 3/5, 3/15, 3/26, 3/31/06)**	**475.00**
5.	**Gregory Shiffman, M.D. (5/27/06)**	**75.00**
6.	**Constance Klein, R.P.T. (6/2, 6/7, 6/9-10, 6/14, 6/16/06)**	**350.80**
7.	**John Marcel, D.P.M. (7/12, 7/19/06)**	**250.00**
8.	**Transportation to doctors and physical therapy visits (approximately 420 miles at $0.20 per mile)**	**84.00**
	TOTAL MEDICAL AND RELATED EXPENSES:	**$2219.80**

B. Wage Loss:

None claimed. As stated above, Mrs. Smith was unemployed at the time of the accident.

SETTLEMENT DEMAND

If the case can be settled at this time, based on the foregoing injuries and damages, I recommend that Sandra Smith accept the sum of $_ _ _ _ _ _ in full and final settlement of her claim against your insured.

Please let me hear from you at your earliest convenience concerning settlement of this matter.

Very truly yours,

_ _[*Signature of, e.g., attorney for plaintiff*]_ _
_ _[*Typed name*]_ _

Comment: See Marzani, *How to Prepare an Effective Settlement Brochure (With Forms),* 32 Prac Law 11 (Apr. 1986).

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Source: Civil Litigation/California Civil Procedure Before Trial/46 Negotiation and Case Settlement/§46.50 C. Form: Notice of Settlement of Entire Case (Judicial Council Form CM-200)

§46.50 C. Form: Notice of Settlement of Entire Case (Judicial Council Form CM-200)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
NOTICE OF SETTLEMENT OF ENTIRE CASE	CASE NUMBER: JUDGE: DEPT.:

NOTICE TO PLAINTIFF OR OTHER PARTY SEEKING RELIEF

You must file a request for dismissal of the entire case within 45 days after the date of the settlement if the settlement is **unconditional.** You must file a dismissal of the entire case within 45 days after the date specified in item 1b below if the settlement is **conditional.** Unless you file a dismissal within the required time or have shown good cause before the time for dismissal has expired why the case should not be dismissed, the court will dismiss the entire case.

To the court, all parties, and any arbitrator or other court-connected ADR neutral involved in this case:

1. This entire case has been settled. The settlement is:
   a. ☐ **Unconditional.** A request for dismissal will be filed within 45 days after the date of the settlement. Date of settlement:
   b. ☐ **Conditional.** The settlement agreement conditions dismissal of this matter on the satisfactory completion of specified terms that are not to be performed within 45 days of the date of the settlement. A request for dismissal will be filed no later than *(date)*:
2. Date initial pleading filed:
3. Next scheduled hearing or conference:
   a. Purpose:
   b. ☐ (1) Date:
      (2) Time:
      (3) Department:
4. Trial date:
   a. ☐ No trial date set.
   b. ☐ (1) Date:
      (2) Time:
      (3) Department:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY) (SIGNATURE)

Form Adopted for Mandatory Use
Judicial Council of California
CM-200 [Rev. January 1, 2007]

Cal. Rules of Court, rule 3.1385
www.courtinfo.ca.gov

Print

CM-200

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

PROOF OF SERVICE BY FIRST-CLASS MAIL
NOTICE OF SETTLEMENT OF ENTIRE CASE

(NOTE: You cannot serve the* Notice of Settlement of Entire Case *if you are a party in the action. The person who served the notice must complete this proof of service.)

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*

2. I served a copy of the *Notice of Settlement of Entire Case* by enclosing it in a sealed envelope with postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelope with the United States Postal Service.
   b. ☐ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Notice of Settlement of Entire Case* was mailed:
   a. on *(date):*
   b. from *(city and state):*

4. The envelope was addressed and mailed as follows:
   a. Name of person served:
      Street address:
      City:
      State and zip code:
   c. Name of person served:
      Street address:
      City:
      State and zip code:
   b. Name of person served:
      Street address:
      City:
      State and zip code:
   d. Name of person served:
      Street address:
      City:
      State and zip code:

   ☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

5. Number of pages attached _____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

Comment: The foregoing is the mandatory form of Notice of Settlement of Entire Case (Judicial Council Form CM-

200). If an entire case is settled or otherwise disposed of, each plaintiff or other party seeking affirmative relief must immediately file written notice of the settlement or other disposition with the court and serve the notice on all parties and on any arbitrator or other court-connected alternative dispute resolution neutral involved in the case. Each plaintiff or other party seeking affirmative relief must also immediately give oral notice to all of the above if a hearing, conference, or trial is scheduled to take place within 10 days. Cal Rules of Ct 3.1385(a)(1). See §46.43.

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47

Offers to Allow Judgment (CCP §998)

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I. INTRODUCTION

§47.1 A. Scope of Chapter

This chapter discusses offers for judgment under CCP §998. It defines a §998 offer and discusses actions in which the offer may be made (see §§47.3-47.4), the consequences of rejecting an offer (see §§47.5-47.8), and the use of the offer as evidence at trial (see §47.9). The chapter also covers the mechanics of making and accepting a §998 offer (see §§47.10-47.25). Finally, the chapter includes a discussion of entry of judgment after an offer is accepted and relief from the judgment (see §§47.26-47.29), as well as forms of an offer, acceptance, and request to enter judgment (see §§47.30-47.31).

Evaluating the settlement possibilities and an attorney's authority to settle on behalf in a client in a case are discussed in chap 46. Preparing for and attending settlement conferences are discussed in chap 41, while good faith determinations under CCP §§877 and 877.6 are discussed in chap 50. Sliding scale settlements and structured settlements are covered in chap 49.

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Source: Civil Litigation/California Civil Procedure Before Trial/47 Offers to Allow Judgment (CCP §998)/§47.2 B. Governing Law

§47.2 B. Governing Law

The requirements and procedures for making a statutory offer to compromise and the potential penalties for rejecting such an offer are governed by CCP §998.

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II. NATURE OF OFFER

§47.3 A. What Is a CCP §998 Offer?

Under CCP §998, a party may make a formal written offer to allow judgment or an award to be entered in accordance with terms specified by the party. A party who refuses to accept the offer and then fails to achieve a more favorable award at trial is subject to specified cost-shifting penalties. See §§47.5-47.8.

This statutory procedure for compromise of an action reflects the state's policy of encouraging settlements. *Poster v Southern Cal. Rapid Transit Dist.* (1990) 52 C3d 266, 270, 276 CR 321. The purpose of §998 is to:

> encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer.

Bank of San Pedro v Superior Court (1992) 3 C4th 797, 804, 12 CR2d 696. In interpreting the statute, the courts attempt to apply the statute's provisions in a manner that best promotes its purpose. *T.M. Cobb Co. v Superior Court* (1984) 36 C3d 273, 283, 204 CR 143.

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§47.4 B. Actions in Which Offer May Be Made

Generally, an offer under CCP §998 can be made in civil actions, including lawsuits in tort, such as personal injury actions, contract actions, business litigation, and other cases in which damages are sought. Section 998 offers can also be made in certain contractual arbitration and medical malpractice arbitration proceedings. CCP §998(b).

The §998 procedure is inapplicable in certain circumstances. For example, §998 does not apply to offers "made by a plaintiff" in eminent domain actions (CCP §998(g)(1)), though it is available to offers made by *defendants* in such actions. Settlement offers made by a plaintiff in eminent domain proceedings and whether the defendant is entitled to its litigation expenses, *i.e*., attorney fees and costs, are governed by CCP §1250.410(b). Inverse condemnation actions are not eminent domain actions for purposes of CCP §998(g). See *Goebel v City of Santa Barbara* (2001) 92 CA4th 549, 560, 111 CR2d 901. Further, offers under §988 do not apply to labor arbitrations filed under a memorandum of understanding under Govt C §3514. CCP §998(i). The §998 procedure is inapplicable to enforcement actions brought in the name of the People of the State of California by the attorney general, a district attorney, or a city attorney, acting as a public prosecutor. CCP §998(g)(2) (legislatively overruling *People v Fremont Gen. Corp.* (2001) 89 CA4th 1260, 108 CR2d 127, in which the court held that §998 applies to civil law enforcement actions brought by the People).

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§47.5 C. Consequences of Refusing Offer

The procedure for making an offer to compromise under CCP §998 is designed to encourage an adverse party to accept settlement on the offeror's terms. It does so through means of a cost-shifting mechanism under which, after a verdict or finding, an offeror who has obtained a judgment or award more favorable than the offer may recover the augmented costs permitted by §998. These include costs allowed under CCP §§1031-1032. CCP §998(a).

Costs available under CCP §1032 are listed in CCP §1033.5. Both attorney fees authorized by statute and recoverable under a contract are included. CCP §1033.5(a)(10). See *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 1112, 86 CR2d 614.

On costs generally, see California Trial Practice: Civil Procedure During Trial, chap 27 (3d ed Cal CEB 1995).

WARNING: The earlier the CCP §998 offer is made, the more substantial the postoffer attorney fees will be. A party subject to this statute faces a significant financial risk in rejecting the statutory offer.

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§47.6 1. Plaintiff Refuses Defendant's Offer

If a defendant in a civil trial makes a pretrial settlement offer that the plaintiff rejects and then the plaintiff does not obtain a more favorable judgment at trial or in contractual arbitration, the plaintiff may not recover any costs incurred after the offer was made and must pay the defendant's costs from the time of the offer. CCP §998(c)(1); *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 1112, 86 CR2d 614. On determining what is a "more favorable judgment," see §47.8.

More specifically, a plaintiff who rejects a defendant's (or a cross-defendant's) offer to compromise under CCP §998 and then fails to obtain a more favorable judgment is subject to the following consequences:

- The plaintiff does not recover postoffer costs and must pay the defendant's costs from the time of the offer (CCP §998(c)(1)) (this provision is mandatory).
- The court or arbitrator may require the plaintiff to pay a reasonable amount to cover the costs to the defendant of the services of expert witnesses, who are not employees of any party, actually incurred and reasonably necessary, in either or both preparation for trial or arbitration, or during trial or arbitration (CCP §998(c)(1)) (this provision is discretionary). Police officers are deemed to be expert witnesses for these purposes. CCP §998(f). The costs for services of expert witnesses at trial must not exceed those specified in Govt C §68092.5. CCP §998(h).

In *Thompson v Miller* (2003) 112 CA4th 327, 4 CR3d 905, the trial court abused its discretion under CCP §998(c) in refusing to award expert witness fees to defendants; defendants' pretrial settlement offer was reasonable, plaintiffs rejected it, and defendants prevailed.

The costs recoverable under CCP §998, from the time of the offer, are deducted from any damages awarded in favor of the plaintiff. If costs awarded to the plaintiff under §998 exceed the amount of the judgment, the net amount is awarded to the defendant and judgment is entered accordingly. CCP §998(e).

PRACTICE TIP: Early service of a CCP §998 offer assures the defendant of recovering a larger portion of costs from the plaintiff who fails to obtain a result more favorable than the offer. Some defense lawyers have served a §998 offer of $1, on the theory that doing so entitles the defendant to augmented costs in the event of a defense verdict at trial. The reasonableness of such an offer may be questioned. See §47.15.

Costs are also allowed under CCP §§1031-1032 to the defendant as the "prevailing party," to the extent these sections apply (CCP §998(a)). See CCP §1033.5 (listing costs allowable). Owing to the interaction among CC §1717 (attorney fees in contract actions), CCP §998, and CCP §1032, it is possible in a contract action that both parties can be the prevailing party for purposes of recovering costs under §1032.

In *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 1112, 86 CR2d 614, the plaintiff was entitled to preoffer costs under a contractual attorney fee provision because it was the prevailing party in the actual judgment (see CC §1717), but it was not entitled to postoffer costs under CCP §998 because it failed to obtain a judgment more favorable than the defendant's offer. Under CCP §998, the defendant was entitled to postoffer attorney fees, even though the plaintiff actually prevailed at trial by being awarded judgment. 20 C4th at 1113. See also *Duale v Mercedes-Benz USA, LLC* (2007) 148 CA4th 718, 726, 56 CR3d 19 (cost-shifting provisions of CC §1794 do not trump CCP §998); *Biren v Equality Emergency Med. Group, Inc.* (2002) 102 CA4th 125, 140, 125 CR2d 325 (defendant entitled to postoffer attorney fees because its settlement offer exceeded plaintiff's recovery). But see *Mangano v Verity, Inc.* (2008) 167 CA4th 944, 951, 84 CR3d 526 (FEHA does not permit prevailing defendant to recover attorney fees unless action was unreasonable, frivolous, or meritless); *Ford Motor Credit Co. v Hunsberger* (2008) 163 CA4th 1526, 78 CR3d 661 (CC §1717 precluded award of attorney fees to defendant).

Sureties are not relieved of the duty to pay attorney fees under §998 unless they were parties to the settlement offer and agreed to be bound by it. *Scott Co. v United States Fid. & Guar. Ins. Co*. (2003) 107 CA4th 197, 213, 132 CR2d 89, disapproved on other grounds in *Le Francois v Goel* (2005) 35 C4th 1094, 1107 n5, 29 CR3d 249.

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§47.7 2. Defendant Refuses Plaintiff's Offer

When a plaintiff (or cross-complainant) makes a written offer to allow judgment under CCP §998, but the defendant does not accept the offer and then fails to obtain a more favorable judgment at trial or arbitration, the plaintiff may recover the following costs:

- In personal injury actions, the plaintiff is entitled to prejudgment interest calculated at 10 percent annually after the date of the offer; interest accrues until the judgment is satisfied. CC §3291. See *Wilson v Wal-Mart Stores, Inc*. (1999) 72 CA4th 382, 85 CR2d 4. But see *Hess v Ford Motor Co.* (2002) 27 C4th 516, 531, 117 CR2d 220, 232 (plaintiff who obtained judgment more favorable than CCP §998 offer is not entitled to interest on the prejudgment interest portion of the judgment accrued under CC §3291). If multiple defendants are found liable for the judgment, they are jointly and severally responsible for the prejudgment interest; plaintiffs are not entitled under CC §3291 to collect prejudgment interest on the total judgment from each defendant. *Cadlo v Metalclad Insulation Corp.* (2009) 172 CA4th 1040, 1046, 91 CR3d 653. When the judgment is for personal injury as well as other claims, the plaintiff is entitled only to prejudgment interest on the personal injury portion. *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 661, 25 CR2d 109. Prejudgment interest may not be awarded on punitive damages in personal injury cases. 6 C4th at 662.
- In its discretion, the judge or arbitrator may award a reasonable amount to cover the cost to the plaintiff of the services of expert witnesses, who are not employees of any party, actually incurred and reasonably necessary, in either or both preparation for trial or arbitration, or during trial or arbitration (CCP §998(d)). Police officers are deemed to be expert witnesses for purposes of these provisions. CCP §998(f). The costs for services of expert witnesses at trial must not exceed those specified in Govt C §68092.5. CCP §998(h).
- Costs allowed under CCP §§1031-1032 may be awarded to the plaintiff as the "prevailing party" (see CCP §998(a)).

When there are two successive unaccepted §998 offers made by a successful plaintiff in a personal injury action, and the plaintiff obtains a recovery in excess of both offers, the prejudgment interest awarded under CC §3291 runs from the date of the first offer. *Ray v Goodman* (2006) 142 CA4th 83, 91, 47 CR3d 659 (applying the language of CC §3291, the date of the first offer controls even if an offer in a personal injury action is considered revoked or superseded under contract law).

On determining what is a "more favorable judgment," see §47.8.

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Source: Civil Litigation/California Civil Procedure Before Trial/47 Offers to Allow Judgment (CCP §998)/§47.8 3. Defining 'More Favorable Judgment'

§47.8 3. Defining "More Favorable Judgment"

Code of Civil Procedure §998 offers no definition of "more favorable judgment." It is generally silent on whether any particular item is to be included in or excluded from the verdict in calculating the amount of the award, with one important exception: In determining whether the plaintiff obtains a more favorable judgment at trial or arbitration than the defendant's offer, the court or arbitrator must exclude the plaintiff's postoffer costs. CCP §998(c)(2)(A). "Costs" that may not be included in the verdict under this provision include items allowed to the prevailing party by statute or contract, such as attorney fees. See *Heritage Eng'g Constr. Co. v City of Industry* (1998) 65 CA4th 1435, 1441, 77 CR2d 459.

Because the statute is largely silent, case law has attempted to fill the gap. The courts have determined that the following items, among others, must be considered in determining whether a judgment is more favorable than a party's CCP §998 offer:

- Preoffer prejudgment interest is included in the verdict; postoffer prejudgment interest is not. *Bodell Constr. Co. v Trustees of Cal. State Univ.* (1998) 62 CA4th 1508, 1512, 73 CR2d 450.
- Postoffer payments on contract debt are added to the verdict. *Mesa Forest Prods. v St. Paul Mercury Ins. Co.* (1999) 73 CA4th 324, 327, 86 CR2d 398 (trial court correctly added jury award to payment defendant had made to plaintiff on invoices due, after defendant's offer expired; sum of jury award plus payment was greater than offer to compromise).
- If the plaintiff refuses the defendant's offer, the plaintiff's preoffer costs are included in the verdict. CCP §998(c)(2)(A); *Heritage Eng'g Constr. Co. v City of Industry* (1998) 65 CA4th 1435, 77 CR2d 459. However, if the defendant refuses the plaintiff's offer, both preoffer *and* postoffer costs incurred by the plaintiff should be added to the verdict to determine the amount of the judgment. *Stallman v Bell* (1991) 235 CA3d 740, 748, 286 CR 755 (postoffer costs should be added to verdict because defendant has impeded §998's purpose by rejecting offer, thus allowing plaintiff to incur postoffer costs).
- Liens on the plaintiff's claims are not subtracted from the verdict. *Manthey v San Luis Rey Downs Enters.* (1993) 16 CA4th 782, 789, 20 CR2d 265.

In determining whether the plaintiff has actually obtained a more favorable judgment than defendant's CCP §998 offer, the court should not consider the worth to the plaintiff of winning a jury verdict against the defendant. In *American Airlines, Inc. v Sheppard, Mullin, Richter & Hampton* (2002) 96 CA4th 1017, 1056, 117 CR2d 685, plaintiff claimed that its primary purpose in suing defendants was to obtain a declaration of defendants' wrongdoing, not to obtain a money judgment. The court rejected evaluation of the worth of a finding of wrongdoing, stating that "[w]e cannot see how section 998 could retain any vitality [if] the plaintiff can attempt to argue that any judgment declaring wrongdoing by the defendant is worth more than the monetary amount offered in settlement."

There are two situations that require special treatment to value the award for purposes of determining whether it is more favorable than the offer:

- When the offer is for a structured settlement, such as a lump sum plus a monthly annuity (see chap 49), the offering party must prove the present value of the offer to enable the court to compare the trial award to the offer (*Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 409, 254 CR 840).
- When an award in a medical malpractice action is for more than $50,000, requiring the court to order periodic payments under CCP §667.7(f) to value the award for §998 purposes, the jury must determine "the amount in current dollars paid at the time of judgment that will compensate the plaintiff for future pain and suffering" (*Salgado v County of Los Angeles* (1998) 19 C4th 629, 643, 80 CR2d 46).

In determining whether a judgment is more favorable than the offer, there is a good faith requirement—the offer must have been reasonable. See, *e.g.*, *Pineda v Los Angeles Turf Club, Inc.* (1980) 112 CA3d 53, 169 CR 66 (plaintiffs sought $10 million, defendants offered $2500, jury found for defendant, but trial court refused to award defendant expert

witness fees because defendant's offer was not reasonable in that sole purpose of offer appeared to be to allow defendant to recover large expert witness fees). On the good faith requirement, see §47.15.

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Source: Civil Litigation/California Civil Procedure Before Trial/47 Offers to Allow Judgment (CCP §998)/§47.9 D. Use of Offer as Evidence at Trial

§47.9 D. Use of Offer as Evidence at Trial

An unaccepted CCP §998 offer cannot be used as evidence in a trial or arbitration to prove liability for the claim that the offer is an attempt to compromise. See CCP §998(b)(2). The offer may be admissible, however, for other purposes, such as to prove the bad faith of the offeror. See *White v Western Title Ins. Co.* (1985) 40 C3d 870, 888, 221 CR 509.

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III. PROCEDURES FOR MAKING AND ACCEPTING OFFER

§47.10 A. Time for Offer

Either party may serve a CCP §998 offer (see §§47.30-47.31 for forms) on any party to the action at any time from its commencement until 10 days before the start of trial or arbitration. CCP §998(b); *Barba v Perez* (2008) 166 CA4th 444, 452, 82 CR3d 715 (offer served with complaint was timely). If the CCP §998 offer is served by mail within the State of California, the time required is extended by 5 days under CCP §1013(a) and the offer must be served not less than 15 days before commencement of trial. *Lecuyer v Sunset Trails Apartments* (2004) 120 CA4th 920, 927, 16 CR3d 169. A trial or arbitration is deemed to start at the beginning of the opening statement or, if no opening statement is made, when the oath is administered to the first witness or evidence is introduced. CCP §998(b)(3).

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§47.11 B. Format of Offer

The offer must be in writing and allow judgment to be taken or an award to be entered in accordance with the stated terms and conditions. See CCP §998(b). An offer placed orally on the record does not satisfy the writing requirement. *Saba v Crater* (1998) 62 CA4th 150, 72 CR2d 401. The written offer must include a statement of the offer that contains the terms and conditions of the judgment or award, and a provision for the accepting party to sign a statement that the offer is accepted. CCP §998(b).

The offer should include a reference to CCP §998 so as to put the offeree on notice that certain consequences (such as costs and fees) may result from rejecting the offer. In *Stell v Jay Hales Dev. Co.* (1992) 11 CA4th 1214, 15 CR2d 220, disapproved on other grounds in *Citizens for Covenant Compliance v Anderson* (1995) 12 C4th 345, 366, 47 CR2d 898, the court held that an offer that made no reference to §998 was insufficient to support a costs award. The offer need not contain any "magic language" as long as the offer is clear. *Berg v Darden* (2004) 120 CA4th 721, 731, 15 CR3d 829 (offer valid if it is clear offer is made under CCP §998 and that, if accepted, offer will result in entry of judgment or its legal equivalent). On the penalties for rejecting an offer, see §§47.5-47.8.

The offer must be served on the opposing party. CCP §998(b). Because a judgment may be taken only as to parties over whom the court has jurisdiction, the offer may be served only on a party subject to the court's jurisdiction, *i.e.*, the party must have already been served with the summons or complaint or appeared in the action. Service on the party's liability insurer is ineffective. *Moffett v Barclay* (1995) 32 CA4th 980, 982, 38 CR2d 546.

An offer should not be filed with the court until it is accepted. Cal Rules of Ct 3.250(a)(23). On filing the accepted offer with the court, see §47.26.

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C. Terms of Offer

§47.12 1. Defendant's Offer to Plaintiff

The terms and conditions of the defendant's offer must be sufficiently definite that the offer can be valued. See, *e.g.*, *Valentino v Elliott Sav-On Gas, Inc.* (1988) 201 CA3d 692, 247 CR 483 (offer conditioned on release of certain claims whose value was uncertain made entire offer uncertain).

Instead of providing for entry of judgment based on an accepted offer, the defendant may condition the offer on the plaintiff's dismissing its claims and giving defendant a general release. *American Airlines, Inc. v Sheppard, Mullin, Richter & Hampton* (2002) 96 CA4th 1017, 1055, 117 CR2d 685 (entry of judgment in court is not strictly required; acceptance of offer to settle for $59,200, in return for plaintiff's dismissal with prejudice, is valid); *Goodstein v Bank of San Pedro* (1994) 27 CA4th 899, 32 CR2d 740. See *On-Line Power, Inc. v Mazur* (2007) 149 CA4th 1079, 1084, 57 CR3d 698 (prevailing party entitled to attorney fees).

If there is a lien on the plaintiff's claims, the offer should indicate whether it includes the amount of the lien, which will make it possible to determine whether a judgment is "more favorable" than the offer. See §47.8.

The offer should include provisions for fees and costs. If an offer is silent on these items, the plaintiff may move for contractual or statutory fees and costs on entry of the judgment. *Chinn v KMR Prop. Mgmt.* (2008) 166 CA4th 175, 184, 82 CR3d 586; *Ritzenthaler v Fireside Thrift Co.* (2001) 93 CA4th 986, 113 CR2d 579. In *Ritzenthaler*, defendant's CCP §998 offer encompassed "all damages and injunctive claims" asserted by plaintiffs, but failed to mention any claim for attorney fees that plaintiffs might have. The court concluded that attorney fees were not within the scope of the proposed compromise agreement and that plaintiffs did not waive their right to recover their attorney fees under CC §1717 by accepting defendant's §998 offer. 93 CA4th at 991.

NOTE: If the defendant in *Ritzenthaler* intended that its offer would encompass attorney fees, it could have made that clear by stating in its offer that each side would bear its own attorney fees. Courts cannot rewrite the parties' agreement—they can only interpret what the parties have written themselves.

A CCP §998 offer that includes an agreement to pay "reasonable attorney fees" is not too uncertain to be enforceable. *Elite Show Serv. v Staffpro, Inc.* (2004) 119 CA4th 263, 269, 14 CR3d 184 (failure to specify dollar amount of reasonable fees would not have precluded court from ascertaining offeror's obligations with reasonable certainty). If the offer presents two interpretations, the court must use the interpretation that would make the offer reasonable, fair, and just, and interpret uncertainty in the offer against the party who caused the uncertainty. *Chinn,* 166 CA4th at 184.

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§47.13 2. Plaintiff's Offer to Defendant

The amount or terms of the plaintiff's CCP §998 offer should normally be more than the predicted verdict value, but it need not be the minimum the plaintiff would accept. An offer that reflects savings of time and expenses of discovery that would result from prompt settlement may induce the defendant to accept.

NOTE: The plaintiff's offer may be a round figure (*e.g.,* $5000, rather than $4999.99) and, if the ultimate judgment is equal to the amount offered (*e.g.,* $5000), the defendant has failed to obtain a more favorable judgment and is thereby liable to reimburse certain of plaintiff's costs. CCP §998(d). See §47.7.

The plaintiff may not propose a different interest rate from the current statutory interest rate. Parties to a stipulated judgment do not have the discretion to establish an interest rate on the amount of the judgment different from the constitutional interest rate applicable at the time the judgment becomes enforceable. *John Sieble Assocs. v Keele* (1986) 188 CA3d 560, 233 CR 231. See CCP §685.010 (rate of interest on money judgment).

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§47.14 3. Nonmonetary Terms of Offer

A settlement offer conditioned on nonmonetary terms may be invalid under CCP §998. The nonmonetary terms must be sufficiently certain and capable of valuation for the court to determine whether the judgment is more favorable than the §998 offer. *Fassberg Constr. Co. v Housing Auth. of City of Los Angeles* (2007) 151 CA4th 267, 60 CR3d 375, modified at 152 CA4th 720 (offer conditioned on release from liability of extensive list of parties was sufficiently certain).

In *Barella v Exchange Bank* (2000) 84 CA4th 793, 101 CR2d 167, the plaintiff's §998 offer to compromise his defamation action included a confidentiality provision. After obtaining a more favorable monetary award at trial, the defendant sought its costs. The court of appeal held that it was impossible to determine whether the judgment was less favorable than the settlement offer, because a court could not determine the monetary worth of a person's chance to vindicate publicly his or her good name. See also *Valentino v Elliott Sav-On Gas, Inc.* (1988) 201 CA3d 692, 247 CR 483 (costs cannot be shifted under §998, because offer requires plaintiff to forgo claims other than those involved in case at trial; "To pinpoint the value of the various potential unfiled claims [plaintiff] might have had … would require the court to engage in wild speculation bordering on psychic prediction"). 201 CA3d at 699.

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§47.15 4. Good Faith Requirement

An offer under CCP §998 must be made in "good faith," *i.e.,* it must be realistically reasonable in the circumstances of the particular case, to be effective under the statute. *Jones v Dumrichob* (1998) 63 CA4th 1258, 74 CR2d 607. See also *People ex rel Lockyer v Fremont Gen. Corp.* (2001) 89 CA4th 1260, 1271, 108 CR2d 127. To be valid, an offer must represent "a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial." *Elrod v Oregon Cummins Diesel, Inc.* (1987) 195 CA3d 692, 241 CR 108. This assessment is based on information that is known or should have been known to the offering party at the time of the offer. An offer is not in good faith if it is based on significant information that the offeree does not know and that was not reasonably available to the offeree at the time of the offer. 195 CA3d at 699.

Token or nominal offers do not meet the good faith requirement. *Wear v Calderon* (1981) 121 CA3d 818, 821, 175 CR 566. However, in *Jones v Dumrichob, supra,* the defendant's offer to have judgment entered against him and to waive costs was deemed to be in good faith despite the absence of a net monetary sum.

Interests of an insurer may not be a factor in determining the reasonableness of a CCP §998 offer; a pretrial settlement offer must be served on "a *party* to the action, not to that party's insurer." *Arno v Helinet Corp*. (2005) 130 CA4th 1019, 1025, 30 CR3d 669 (emphasis in original). On the other hand, existence of insurance is a factor that the court may consider in evaluating whether a CCP §998 offer was made in good faith. 130 CA4th at 1026.

The burden is on the party rejecting the offer to show that it was not made in good faith. *Elrod,* 195 CA3d at 700. See also *Santantonio v Westinghouse Broad. Co.* (1994) 25 CA4th 102, 117, 30 CR2d 486. It is then within the trial court's discretion to make the good faith determination, which will not be reversed on appeal absent a clear abuse of discretion. *Nelson v Anderson* (1999) 72 CA4th 111, 136, 84 CR2d 753, 769, modified at 73 CA4th 41c.

Anything that may impact the reasonableness of the offer may be considered by the trial court in the exercise of its discretion for determining good faith. *Arno v Helinet Corp., supra* (trial court's discretion not restricted by considerations facing party's insurer or other codefendants; several factors justified finding that settlement offer made to party was made in good faith).

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§47.16 D. Joint Offers

A joint offer to compromise is an offer made by a single party to multiple parties or by multiple parties to a single party. Generally, courts have ruled that joint CCP §998 offers are invalid when they deprive the offeree of the ability to evaluate whether each party is more likely to receive a more favorable verdict at trial. See, *e.g., Gilman v Beverly Cal. Corp.* (1991) 231 CA3d 121, 126, 283 CR 17 (joint offers are void because "it is impossible to say that any one [of multiple plaintiffs] received a judgment more favorable than [each] would have received under the offer"). To be effective, a joint offer to multiple parties must be explicitly apportioned among the parties to whom it is made so that each party may accept or reject the offer individually. *Weinberg v Safeco Ins. Co.* (2004) 114 CA4th 1075, 1086, 8 CR3d 224; *Palmer v Schindler Elevator Corp.* (2003) 108 CA4th 154, 157, 133 CR2d 339.

Some courts, however, have refused to automatically apply the joint offer rule without examining whether the party seeking costs had actually obtained a more favorable judgment. See, *e.g., Stallman v Bell* (1991) 235 CA3d 740, 286 CR 755 (costs awarded when plaintiffs made joint offer and jury made unitary award of damages to both plaintiffs). In *Johnson v Pratt & Whitney Canada, Inc.* (1994) 28 CA4th 613, 34 CR2d 26, the court held that when there is a single joint cause of action that must be brought in one action, and "the judgment must be for a single lump sum even though the heirs share the damages in proportion to their loss," there is no reason to invalidate a joint offer. The *Johnson* court acknowledged that the results in *Stallman* and *Gilman* could not be reconciled, but found *Stallman* to be better reasoned. 28 CA4th at 630.

For detailed discussion of special problems when there is more than one offeror, or more than one offeree, see Reilly, *Section 998 Offers Involving Multiple Parties*, 13 CEB Civ Litigation Rep 55 (Mar. 1991).

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§47.17 1. One Defendant Making Offer to Multiple Plaintiffs

If there are two or more plaintiffs, the defendant should normally make a separate CCP §998 offer to each plaintiff. An offer that does not specify the amount offered to each plaintiff is invalid, even if the recovery by all plaintiffs is lower than the total offer, because a court cannot determine whether one plaintiff received a less favorable judgment. *Meissner v Paulson* (1989) 212 CA3d 785, 260 CR 826.

This general rule is inapplicable if an unallocated offer is made to a married couple asserting damage to a singular interest in community property. *Vick v DaCorsi* (2003) 110 CA4th 206, 1 CR3d 626. In *Vick*, the court held that the concerns addressed in *Meissner* do not apply when the plaintiffs are husband and wife; their suit arose from the purchase of community property; and their recovery would be community property. In such circumstances, the defendants could not allocate their §998 offer between the plaintiffs, because each had an equal, undivided half-interest in the claims and would have had an equal, undivided half-interest in settlement proceeds.

Courts have later distinguished *Vick* and held that the CCP §998 offers must be separately prepared and served on the spouses, in order to allow each to accept individually. *Menees v Andrews* (2004) 122 CA4th 1540, 1546, 19 CR3d 664 (husband and wife plaintiffs in medical malpractice action should have been served individually with individual settlement offers); *Weinberg v Safeco Ins. Co.* (2004) 114 CA4th 1075, 1087, 8 CR3d 224 (offer to compromise invalid because it was jointly made to husband and wife).

A plaintiff who asserts multiple capacities for multiple claims is considered a single party under CCP §998. *Peterson v John Crane, Inc.* (2007) 154 CA4th 498, 505, 65 CR3d 185 (widow asserted claims as successor in interest to husband's claims, individual, and legal heir).

An offer to more than one plaintiff must be unconditional and may not be contingent on acceptance by all plaintiffs. *Hutchins v Waters* (1975) 51 CA3d 69, 123 CR 819. When the plaintiffs are husband and wife asserting damage to community property, it is irrelevant that the offer is conditioned on acceptance by both plaintiffs because either can accept the offer on behalf of the community. *Vick,* 110 CA4th at 212.

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§47.18 2. Multiple Defendants Making Offer to One Plaintiff

Multiple defendants sued on a theory of joint and several liability may make a joint offer to compromise to a single plaintiff, with all defendants to be released on acceptance. Because under this theory each defendant is liable for the entire judgment, a joint offer by codefendants should be considered an offer by each. The plaintiff is entitled to costs and fees if either defendant fails to obtain a more favorable judgment than the offer. *Santantonio v Westinghouse Broad. Co.* (1994) 25 CA4th 102, 30 CR2d 486. See also *Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 23 CR3d 335 (joint offer by two defendants, stating that judgment in specific amount may be taken against each of them jointly and severally, is valid under CCP §998 even when defendants are not jointly and severally liable on all of plaintiff's claims).

It is unclear whether an unapportioned offer by several defendants is effective in cases subject to Proposition 51. *Taing v Johnson Scaffolding Co.* (1992) 9 CA4th 579, 584, 11 CR2d 820. On the provisions and impact of Proposition 51, see §50.7.

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§47.19 3. One Plaintiff Making Offer to Multiple Defendants

With two or more defendants, the issue arises whether the plaintiff should serve a joint CCP §998 demand on all, or a separate demand on each. A joint demand should be used only if, *at the time the §998 offer is made*, the defendants are clearly jointly and severally liable for any judgment, *e.g.,* if the defendants have already stipulated to joint and several liability. *Burch v Children's Hosp. of Orange County Thrift Stores, Inc.* (2003) 109 CA4th 537, 135 CR2d 404; *Steinfeld v Foote-Goldman Proctologic Med. Group, Inc.* (1996) 50 CA4th 1542, 58 CR2d 371 (unapportioned settlement offer is valid when defendants are jointly liable for plaintiff's injury and comparative fault is not issue); *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109.

When defendants are *not* jointly liable for the full amount of plaintiff's damages, an unapportioned settlement offer to multiple defendants is ineffective under CCP §998 because the offer has not informed each defendant of what each defendant must pay to settle the case. An unapportioned settlement demand in this situation would allow each defendant to argue that it had obtained a more favorable judgment even if the combined award against both exceeded the amount of the §998 demand. *Taing v Johnson Scaffolding Co.* (1992) 9 CA4th 579, 11 CR2d 820. By the same token, a single plaintiff's offer to settle with multiple defendants must be sufficiently specific to permit each defendant from whom the plaintiff later seeks to extract penalties to know the exact amount the plaintiff was seeking from that defendant. 9 CA4th at 586.

The facts in *Burch v Children's Hosp. of Orange County Thrift Stores, Inc., supra,* illustrate the potentially devastating effects to a plaintiff of an unapportioned demand on multiple defendants who are not jointly liable. In *Burch,* the plaintiff's CCP §998 demand for $50 million was not accepted by defendants and the jury awarded the plaintiff over $50 million, but the plaintiff was denied expert witness costs and prejudgment interest because the court found that her unapportioned §998 offer, made before defendants had stipulated to joint and several liability, was invalid.

Even an offer that is allocated among defendants is invalid if it is conditioned on acceptance by all defendants, because it is in the public interest that each defendant be given the opportunity to accept the offer made to him or her. *Wickware v Tanner* (1997) 53 CA4th 570, 577, 61 CR2d 790. There is a split of authority as to whether a joint offer that is not explicitly conditioned on acceptance by all defendants will be interpreted by the court as being so conditioned. In *Wickware v Tanner,* the court held that the offer, which was a single document addressed to all defendants, offering to take judgment against all defendants, and requiring that defendants in the plural accept the offer, was conditional and thus invalid. In so holding, the *Wickware* court expressly disagreed with the decision in *Santantonio v Westinghouse Broad. Co.* (1994) 25 CA4th 102, 112, 30 CR2d 486, which held that a §998 offer to compromise is unconditional unless it specifically provides that all offerees must accept the offer.

NOTE: To be on the safe side, plaintiffs' counsel should always serve separate offers on each defendant. There is no downside to doing so, but not doing so can have dire consequences.

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§47.20 4. Multiple Plaintiffs Making Offer to One Defendant

A joint offer by several plaintiffs that does not permit the court to determine whether each plaintiff obtained a more favorable judgment than his or her offer cannot serve as the basis for applying CCP §998 penalties. *Gilman v Beverly Cal. Corp.* (1991) 231 CA3d 121, 124, 283 CR 17. A court can easily determine whether each plaintiff obtained a more favorable judgment when the offer designates how the settlement would be divided among the plaintiffs. Without such a designation, the court may nonetheless make a more favorable judgment determination when it is "absolutely clear that [the individual plaintiff] received a greater amount in damages after trial than she would have received had [the defendant] accepted the joint offer even if the entire amount of the offer … is attributed to her." *Fortman v Hemco, Inc.* (1989) 211 CA3d 241, 263, 259 CR 311. See also *Deocampo v Ahn* (2002) 101 CA4th 758, 776, 125 CR2d 79 (plaintiffs' unapportioned offer is valid because it is clear that jury award exceeded amount requested in §998 offer).

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§47.21 E. When to Accept Offer

A CCP §998 offer must be accepted within 30 days after it is made or before trial or arbitration begins, whichever occurs first. The 30-day period for acceptance is extended by 5 calendar days under CCP §1013(a) if the offer is served by mail. *Poster v Southern Cal. Rapid Transit Dist.* (1990) 52 C3d 266, 272, 276 CR 321. If by the terms of the offer the offer expires before the statutorily prescribed duration, it does not function as a CCP §998 offer. *Marina Glencoe, L.P. v Neue Sentimental Film AG* (2008) 168 CA4th 874, 880, 85 CR3d 800.

If the offer is not accepted within 30 days, or before the trial or arbitration begins if that occurs first, the offer is deemed withdrawn. CCP §998(b)(2). On when the trial or arbitration is deemed to begin, see §47.10.

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§47.22 F. How to Accept Offer

Code of Civil Procedure §998 provides requirements for accepting an offer. Whether made on the document containing the offer or a separate document, the acceptance must be in writing, and signed by counsel for the accepting party or, if not represented by counsel, by the accepting party. CCP §998(b).

Code of Civil Procedure §998(b) also requires that the written offer contain a provision where the accepting party may sign a statement that the offer is accepted. For an offer that includes a provision for acceptance, see forms in §§47.30-47.31. The acceptance must be received before the 30-day period expires, after which the offer is deemed withdrawn. See *Hofer v Young* (1995) 38 CA4th 52, 58, 45 CR2d 27 (offer effective when fax copy received within 30 days, but mailed copy was not). On counsel's obligation to communicate written offers of settlement to the client, see Bus & P C §6103.5.

After the offer is accepted, the attorneys should decide how to make the settlement final, whether by means of release and request for dismissal or by entry of judgment or award. The offer, with proof of acceptance, must be filed with the court; the clerk or judge then "enters judgment accordingly." CCP §998(b). On the procedure for entry of judgment, see §47.26.

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§47.23 G. Revocation of Offer

The California Supreme Court has held that, as a rule, offers to compromise under CCP §998 are governed by contract law principles. *T.M. Cobb Co. v Superior Court* (1984) 36 C3d 273, 279, 204 CR 143. Consequently, an offer can be revoked as long as the offeree has not yet accepted. See *Gray v Stewart* (2002) 97 CA4th 1394, 119 CR2d 217 (plaintiff's offer to compromise was accepted, so plaintiff could not revoke offer). A revoked offer will not trigger the cost-shifting provisions of CCP §998. *Marcey v Romero* (2007) 148 CA4th 1211, 56 CR3d 402.

Under contract law principles, a second settlement offer, even if it is invalid, supersedes and extinguishes the first offer. *Palmer v Schindler Elevator Corp.* (2003) 108 CA4th 154, 133 CR2d 339 (under bright line rule, later §998 offer extinguishes any earlier offers, regardless of later offer's validity); *Wilson v Wal-Mart Stores, Inc.* (1999) 72 CA4th 382, 390, 85 CR2d 4 (plaintiff who obtained award higher than first offer, but lower than second offer, was not entitled to prejudgment interest or expert fees). But see *One Star, Inc. v STAAR Surgical Co.* (2009) 179 CA4th 1082, 1089, 102 CR3d 195 (defendant's first offer, which lapsed, was relevant figure for §998 cost-shifting analysis when defendant withdrew second offer before statutory period expired and plaintiff was awarded less than first offer at trial).

The courts have referred to general contract principles to interpret CCP §998 because the settlement and compromise process set forth in the statute is contractual and because the statute's language is unclear on what constitutes an acceptance, whether an offer may be revoked by the offeror before the period designated in the statute expires, and what effect a counteroffer has on an outstanding offer. *Poster v Southern Cal. Rapid Transit Dist.* (1990) 52 C3d 266, 270, 276 CR 321.

Principles of contract law do not necessarily resolve all the issues involved in interpreting CCP §998. They are invoked only when they "neither conflict with the statute nor defeat its purpose." *T.M. Cobb Co.,* 36 C3d at 280. In *T.M. Cobb,* the court applied the general contract principle that an offer may be revoked by the offeree any time before acceptance. Therefore, an unaccepted offer made under the statute could be revoked before the statutory period expired. The court reasoned that applying contract law in this instance would encourage parties to make offers to settle and would ensure that the offers were based on a complete understanding of the facts. 36 C3d at 278.

Nevertheless, the extent to which ordinary contract law principles apply is not entirely clear. While the supreme court's opinion in *T.M. Cobb* concludes that an offer may be revoked by the offeree before acceptance, the opinion does not appear to recognize ordinary contract law principles regarding a counteroffer. See §47.24. The court appeared to give no effect to a counteroffer that, under ordinary contract law, would be considered to be a rejection of the initial offer and, thus, a termination of that offer. See CC §1585.

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§47.24 H. Counteroffer and Rejection

Although CCP §998 offers are normally governed by principles of contract law (see §47.23), counteroffers are not. In *Poster v Southern Cal. Rapid Transit Dist.* (1990) 52 C3d 266, 276 CR 321, the court declined to apply ordinary contract principles when interpreting a counteroffer under §998. Rather, it determined that, contrary to ordinary contract principles, it would set forth a "bright line rule" that a §998 offer is not revoked by a counteroffer and may be accepted until expressly withdrawn. 52 C3d at 270. The court reasoned that negotiation during the 30-day statutory period is normal and should not affect the offeree's right to ultimately accept the offer. The application of contract principles while the parties negotiate during the 30-day period would discourage settlements. Moreover, if a counteroffer revoked a statutory offer, it would be unclear whether a communication from an offeree was a counteroffer that revoked the standing offer, an inquiry about the possibility of different terms, or an implied request for a better offer. 52 C3d at 272.

Similarly, in *Guzman v Visalia Community Bank* (1999) 71 CA4th 1370, 1377, 84 CR2d 581, the court held that general contract principles should not apply in determining whether an offer has been rejected. An unequivocal rejection is required to terminate a §998 offer. See §47.24. Thus, criticism of the offer as "insulting and demeaning" does not constitute a rejection, even if could be interpreted as a rejection under contract principles, because it is not unequivocal. Absent a clear and unequivocal rejection, the offer may be accepted by the offeree during the statutory period unless the offer has been revoked by the offeror. 71 CA4th at 1377.

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§47.25 I. Effect of Death of Offeror or Offerees

The death of either the offeror or the offeree automatically terminates a CCP §998 offer. See 1 Witkin, Summary of California Law, *Contracts* §158 (10th ed 2005) (death of offeror terminates power of acceptance; death of offeree removes only person able to accept offer).

The effect of a plaintiff's death on a defendant's CCP §998 offer was considered in *Estate of Watts v Dickerson* (1984) 162 CA3d 1160, 208 CR 846. Following the holding in *T.M. Cobb Co. v Superior Court* (1984) 36 C3d 273, 204 CR 143 (see §47.23), the court held that an offer under §998 is revocable and does not create an irrevocable option; under contract law principles, the offeree's death terminates a revocable offer. Inasmuch as general damages cannot be recovered in a personal injury action after a plaintiff's death, a defendant's unaccepted offer to compromise in the personal injury action, presumably including an amount for general damages, is terminated on the plaintiff's death unless the offer's terms make the offeree's personal representative an additional offeree. *Estate of Watts,* 162 CA3d at 1164.

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IV. ENTRY OF JUDGMENT AND RELIEF FROM JUDGMENT

§47.26 A. Entry of Judgment Based on Accepted Offer

After the CCP §998 offer is accepted, the attorneys should decide how to make the settlement final, whether by means of release and request for dismissal or by entry of judgment or award. If by entry of judgment, the offer with written proof of acceptance must be filed, and the clerk or the judge must enter judgment accordingly. CCP §998(b)(1); see *Gray v Stewart* (2002) 97 CA4th 1394, 119 CR2d 217. If the offer has been accepted in an arbitration, the offer with proof of acceptance must be filed with the arbitrator, who must promptly render an award according to the offer. CCP §998(b)(1).

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§47.27 B. Finality of Judgment

A judgment or an award entered under CCP §998 is deemed a "compromise settlement." CCP §998(f). It bars relitigation of the same causes of action between the parties but is not an admission of liability. However, without an affirmative agreement of the parties, a compromise settlement does not conclude matters incident to the judgment that were not part of the cause of the action (*e.g.,* the right to costs). *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 677, 186 CR 589. Because no issues were adjudicated for a compromise settlement, there is no collateral estoppel. See 7 Witkin, California Procedure, *Judgment* §§413-414 (5th ed 2008).

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§47.28 C. Motion for Relief From Judgment

After entry of the judgment, a party may move for relief from the judgment under CCP §473(b) on the grounds of mistake, inadvertence, surprise, or excusable neglect. *Zamora v Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 252, 121 CR2d 187 (plaintiff, whose CCP §998 settlement offer contained typographical error, may obtain relief under §473(b)); *Pazderka v Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 73 CR2d 242. In deciding a motion for relief under CCP §473 the inquiry is whether a reasonably prudent person, with no special skills or training, in the same or similar circumstances would have made the same error. Thus, §473 relief is not available when the parties merely fail to include attorney fee provisions in the settlement because that is not the type of error a person with no special training would make. *Premium Commercial Servs. Corp. v National Bank of Cal.* (1999) 72 CA4th 1493, 1497, 86 CR2d 65; *Pazderka,* 62 CA4th at 671. This conclusion is consistent with the California Supreme Court's mandate that settlements between the parties not be unraveled merely because of the attorneys' intrinsic mistakes, absent fraud or undue influence.

> [A] valid compromise agreement has many attributes of a judgment, and in the absence of a showing of fraud or undue influence is decisive of the rights of the parties thereto and operates as a bar to the reopening of the original controversy.

Folsom v Butte County Ass'n of Gov'ts (1982) 32 C3d 668, 677, 186 CR 589 (citing *Shriver v Kuchel* (1952) 113 CA2d 421, 248 P2d 35).

When no judgment has been entered, a motion for relief under CCP §473 is not the proper vehicle to obtain relief from an accepted CCP §998 offer to settle. See *Premium Commercial Servs. Corp.,* 72 CA4th at 1496 n4. Once the offer has been accepted, entry of judgment is merely an administrative act (*Saba v Crater* (1998) 62 CA4th 150, 153, 72 CR2d 401); thus, the parties must wait until entry of the judgment to challenge the settlement by motion for relief.

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§47.29 D. Appellate Review

A judgment based on a CCP §998 settlement is not appealable; the proper procedure to challenge the judgment is a motion for relief under CCP §473. *Pazderka v Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 73 CR2d 242. See §47.28. A trial court order's granting a motion for relief under §473 and setting aside a §998 settlement on the grounds of mistake, inadvertence, surprise, or excusable neglect may properly be raised on appeal, and a party need not first seek writ review of the order. *Premium Commercial Servs. Corp. v National Bank of Cal.* (1999) 72 CA4th 1493, 1499, 86 CR2d 65. However, a party may choose to petition for writ review to avoid going through an unnecessary trial.

Of course, parties may appeal a judgment entered after a trial when a CCP §998 offer has been rejected. When the appellate court is construing §998 under those circumstances (*e.g.*, to determine whether a judgment was "more favorable" than the compromise offer), the standard of review is de novo. With respect to the validity or reasonableness of a §998 offer, however, the standard of review is abuse of discretion. *Mesa Forest Prods. v St. Paul Mercury Ins. Co.* (1999) 73 CA4th 324, 327, 86 CR2d 398. An undertaking is required to stay enforcement pending appeal of a judgment consisting of expert witness costs awarded under §998. CCP §917.1(2); *Gallardo v Specialty Restaurants Corp.* (2000) 84 CA4th 463, 468, 100 CR2d 884. An offer to compromise under §998 is not extinguished by a judgment that is vacated by a subsequent order for a new trial. *Saakyan v Modern Auto., Inc*. (2002) 103 CA4th 383, 126 CR2d 674.

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V. FORMS

§47.30 A. Form: Defendant's CCP §998 Offer to Compromise, Plaintiff's Acceptance, and Request to Enter Judgment

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**OFFER TO COMPROMISE**
vs	)	**(CCP §998); ACCEPTANCE;**
	)	**REQUEST TO ENTER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**JUDGMENT**
	)	

To _ _[*name of plaintiff*]_ _**:**

Under Code of Civil Procedure §998, defendant, _ _[*name*]_ _**, offers to allow judgment to be taken in this action** _ _[*as specified below/as follows:* _ _[*Specify, e.g., Defendant,* _ _[*name*]_ _*, will pay to plaintiff,* _ _[*name*]_ _*, the amount of $*_ _[*dollar amount*]_ _ *in satisfaction of all claims, damages, costs, expenses, attorney fees, and interest claimed in this action*]_ _**.**

[*Add the following option if the offer does not include fees and costs, and the parties will bear their own*]

Each party will bear its own attorney fees and costs.

[*Continue*]

If you accept this offer, please date and sign the acceptance form below and file this paper with the court clerk, who will enter judgment accordingly.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

ACCEPTANCE

The undersigned accepts defendant's offer to allow judgment in this action to be entered as specified _ _[*below/above*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__

_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Add further signature lines if more than one defendant is offeree*]

REQUEST TO ENTER JUDGMENT

To court clerk (or judge):

Under Code of Civil Procedure §998 and the above signed offer and acceptance, please enter judgment in this action as follows:

1. _ _[*E.g., Defendant,* _ _[*name*]_ _*, will pay to plaintiff,* _ _[*name*]_ _*, the amount of $*_ _[*dollar amount*]_ _ *in satisfaction of all claims, damages, costs, expenses, attorney fees, and interest claimed in this action*]_ _**.**

[*Add the following option if the parties will bear their own fees and costs*]

2. Each party will bear its own attorney fees and costs.

[*Continue*]

[3]. _ _[*Continue with any other terms and conditions*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: The offeror's attorney may wish to prepare an original and at least four copies of this form. The original, accompanied by two copies, should be served on the offeree's attorney or on an unrepresented party. The offeror's attorney should keep one copy to file if the offer is not accepted and at least one office copy. Adverse counsel may accept by dating, signing, and filing the original and may notify the offeror by conforming a copy and returning it to offeror's attorney.

Comment: An offeror's attorney who prefers that adverse counsel prepare an acceptance form and request for entry of judgment should omit the "acceptance" and "request" sections of the form, specify the terms and conditions of the offer at the end of the first paragraph of the form, and reword the second paragraph, *e.g.*:

Judgment in accordance with this offer will be entered if, within the time allowed by Code of Civil Procedure §998, this paper and a written notice of acceptance are filed with the court clerk.

Use of a combined offer-acceptance form permits the offeree's attorney to obtain entry of the offered judgment by dating and signing the acceptance and filing the combined form with the court clerk. Making the acceptance part of the offer also ensures that the details of judgment entered will conform to the offer.

Customarily, only attorneys sign offers and acceptances. The offeror party, however, may also sign the offer to ensure that the offeree will not later claim that authority to settle was not given. See *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 212 CR 151. In *Norcal Mut. Ins. Co. v Newton* (2000) 84 CA4th 64, 78, 100 CR2d 683, the court of appeal held that a client who failed to act promptly to repudiate her attorney's demands for settlement and for arbitration ratified his act, even though it was initially unauthorized.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/47 Offers to Allow Judgment (CCP §998)/§47.31 B. Form: Plaintiff's CCP §998 Offer to Compromise, Defendant's Acceptance, and Request to Enter Judgment

§47.31 B. Form: Plaintiff's CCP §998 Offer to Compromise, Defendant's Acceptance, and Request to Enter Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**OFFER TO COMPROMISE**
vs	)	**(CCP §998); ACCEPTANCE;**
	)	**REQUEST TO ENTER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**JUDGMENT**
	)	
_____	)	

To _ _[*name(s) of defendant(s)*]_ _**:**

Under Code of Civil Procedure §998, plaintiff, _ _[*name*]_ _**, offers to allow judgment to be taken in this action** _ _[*as specified below/as follows: _ _[Specify, e.g., Defendant, _ _[name]_ _, will pay to plaintiff, _ _[name]_ _, the amount of $_ _[dollar amount]_ _ in satisfaction of all claims, damages, costs, expenses, attorney fees, and interest claimed in this action*]_ _**.**

[*Add the following option if the offer does not include fees and costs, and the parties will bear their own*]

[*Option: Fees and costs*]

Each party will bear its own attorney fees and costs.

[*Continue*]

If you accept this offer, please date and sign the acceptance form below and file this paper with the court clerk, who will enter judgment accordingly.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

ACCEPTANCE

The undersigned accepts plaintiff's offer to allow judgment in this action to be entered as specified _ _[*below/above*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Attorney for _ _[*name*]_ _

[*Add further signature lines if more than one defendant is offeree*]

REQUEST TO ENTER JUDGMENT

To court clerk (or judge):

Under Code of Civil Procedure §998 and the above signed offer and acceptance, please enter judgment in this action as follows:

1. _ _[*E.g., Defendant,* _ _[*name*]_ _**,** *will pay to plaintiff,* _ _[*name*]_ _*, the amount of $*_ _[*dollar amount*]_ _ *in satisfaction of all claims, damages, costs, expenses, attorney fees, and interest claimed in this action*]_ _**.**

[*Add the following option if the parties will bear their own fees and costs*]

2. Each party will bear its own attorney fees and costs.

[*Continue*]

[3]. _ _[*Continue with any other terms and conditions*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: See form in §47.30.

Comment: See Comment to form in §47.30.

Note: See Note to form in §47.30.

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48

Submitted Case and Consent Judgment

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I. INTRODUCTION

§48.1 A. Scope of Chapter

This chapter discusses submitted cases and consent judgments. In certain matters, parties may resolve a dispute by submission of an agreed case:

- Before a lawsuit is filed (see CCP §1138; see §§48.3-48.10); or
- After an action has been filed, a procedure recognized by case law (see *Towle v Sweeney* (1905) 2 CA 29, 31, 83 P 74) (see §§48.11-48.15).

Forms on submission of an agreed case appear in §§48.33-48.35.

A consent judgment, which is a nonstatutory procedure, enables parties to incorporate the terms of a settlement into a judgment that may then be entered and enforced like other judgments. See §§48.16-48.32. Forms on consent judgments appear in §§48.36-48.37.

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§48.2 B. Governing Law

Submission of an agreed case without filing an action is governed by CCP §1138. Submission after filing an action is the nonstatutory procedure by which the parties stipulate to all the facts of the case after the issues have been framed by the pleadings.

NOTE: Statutory and nonstatutory forms of submitted cases are rarely used, perhaps because opposing parties seldom agree on all of the facts in dispute.

Consent judgments are governed by case law and local rules. Some counties have specific rules for judgments under stipulation. See, *e.g.*, Sacramento Ct R 9.17.

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II. SUBMISSION OF AGREED CASE

A. Submission Without Filing Action

1. Prerequisites

§48.3 a. Controversies That May Be Submitted

For a matter that merits settlement in the public interest (see §48.4), parties without filing a civil action may agree to submit a statement of their case containing the facts on which the controversy depends, and present their submission to any court that would have jurisdiction if an action had been brought. See CCP §1138. If it appears, by affidavit, that the controversy is real and that the proceedings are in good faith, the court must then hear and decide the case, determining the rights of the parties and rendering judgment as if an action were pending. CCP §1138.

The plaintiff and the defendant must be "[p]arties to a question in difference, which might be the subject of a civil action." CCP §1138. This means that an actual case or controversy must exist and that the dispute must not be hypothetical, abstract, or contrived to obtain a determination of a matter in advance of a real controversy. *Collier v Lindley* (1928) 203 C 641, 266 P 526; *County of Colusa v Strain* (1963) 215 CA2d 472, 30 CR 415.

Code of Civil Procedure §1138 also assumes that the parties to an agreed case are the real parties in interest. See, *e.g., In re De Lucca* (1905) 146 C 110, 79 P 853; *Bailey v Johnson* (1898) 121 C 562, 54 P 80.

PRACTICE TIP: If the case is submitted before suit has been filed, the written submission should assert the court's jurisdiction. See form in §48.33. No pleadings should be filed. The court must base its decision on the facts stated in the submission and may not consider other evidence.

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§48.4 b. Matters Should Merit Settlement in Public Interest

Under the case law, for a controversy to be subject to judicial determination under CCP §1138, "the matter should be one which merits settlement in the public interest." *County of Colusa v Strain* (1963) 215 CA2d 472, 478, 30 CR 415 (action on agreed facts to determine constitutionality of county land-leveling ordinance affecting substantial segment of predominantly agricultural economy). Although no explanation for this requirement is provided by the cases, presumably the rationale is that a matter that raises questions of public interest is less likely to be a hypothetical or abstract dispute.

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§48.5 c. Declaration of Good Faith

An affidavit is required to prove that "the controversy is real and the proceedings in good faith." Under CCP §2015.5, a declaration in writing made under penalty of perjury may be substituted in place of an affidavit. An affidavit or declaration is insufficient when, instead of showing that the controversy is real, it states that "the statement of the case" is a "real controversy," and instead of stating that the proceedings are in good faith it states that the "contention" is in good faith. *White v Clarke* (1896) 111 C 425, 44 P 164.

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§48.6 d. Agreed Statement

The parties must "agree upon a case containing the facts upon which the controversy depends, and present a submission of the same" to the court. CCP §1138. A judgment on an agreed statement must be limited to the facts stated and admitted (*Crandall v Amador County* (1862) 20 C 72), so the parties should draft the statement of agreed facts carefully. At least one California court has expressed the view that a court should refuse to accept submission of a case when the agreed statement is inadequate. See *Division of Labor Law Enforcement v Brooks* (1964) 226 CA2d 631, 38 CR 284.

The statement presented to the court should also include questions of law submitted to the court for a ruling. The court is not bound by a stipulation limiting the questions of law that the court will determine (*San Francisco Lumber Co. v Bibb* (1903) 139 C 325, 73 P 864), nor is the court bound by an erroneous agreement on a conclusion of law (*People v Singh* (1932) 121 CA 107, 8 P2d 898).

To ensure that the papers submitted conform with the parties' actual agreement, the parties themselves, as well as their attorneys, should sign the submission.

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§48.7 e. Jurisdiction

The parties must submit the case to a court that "would have jurisdiction if an action had been brought." CCP §1138. An agreed case is ordinarily submitted to the trial, not the appellate, court. When a case is submitted to the court of appeal, the court may elect to treat the submission as an application for writ of mandate. *Northridge Park County Water Dist. v McDonell* (1958) 158 CA2d 123, 322 P2d 25.

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§48.8 2. Examples of Agreed Case

In one case, a school district and a water district resolved by agreed case a dispute over the water district's right to collect a fee for the school district's use of a sewer system and the school district's right to a refund of fees already paid. Because no facts were at issue, and presumably because the matter merited settlement in the public interest, the case was submitted to the trial court as provided for in CCP §1138. Note that the court's holding, *i.e.*, that one public entity may not impose a charge on another without specific legislative authorization, has been superseded by statute. See Govt C §54999 (revising holding in *San Marcos* case). *San Marcos Water Dist. v San Marcos Unified Sch. Dist.* (1986) 42 C3d 154, 228 CR 47. See also Govt C §§54999.1-54999.6.

Other examples of agreed or submitted cases include:

- *Heilbron v Sumner* (1921) 186 C 648, 200 P 409 (use of funds obtained by sale of bonds to construct a dam).
- *Panama-Pacific Int'l Exposition Co. v Panama Pac. Int'l Exposition Comm'n* (1918) 178 C 746, 174 P 890 (distribution of surplus of assets of a corporation).
- *Kobelin v Board of Retirement* (1970) 8 CA3d 1057, 88 CR 131 (calculation of retirement service credits and benefits).
- *Turnboo v County of Santa Clara* (1956) 144 CA2d 728, 301 P2d 992 (interpretation of reimbursement agreements for welfare assistance).

One case that according to the court should have been submitted as an agreed case and was not is *Fratis v Fireman's Fund Am. Ins. Co.* (1976) 56 CA3d 339, 128 CR 391. In this action, the only issue raised was whether an employee became an additional insured under his employer's automobile insurance policy. The court noted that because no facts were in dispute "[t]he lawyers in this action wasted public and private time and money in a cumbersome, five-day jury trial to try a question of insurance law which could have been submitted to the trial court as an agreed case. The record on appeal does not indicate which side demanded a jury trial, and we'd rather not know." 56 CA3d at 342 n3.

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§48.9 3. Comparison With Declaratory Relief

A case submitted before an action is filed is akin to an action for declaratory relief in that both require the existence of an actual case or controversy. See *County of Colusa v Strain* (1963) 215 CA2d 472, 30 CR 415. In the context of a submitted case, CCP §1138 uses the phrase "question in difference" to refer to an actual controversy.

NOTE: A submitted case is different from an action for declaratory relief in that in a submitted case the resulting judgment is enforceable by legal process and the nature of the relief is not limited to a declaration of the rights of the parties.

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§48.10 4. Judgment and Appeal

The court is bound to treat a submitted case as if the action were pending and to render a judgment based only on the agreed facts. Findings of fact are unnecessary because the only question before the court is the law applicable to the agreed facts. *City of Los Angeles v Gage* (1954) 127 CA2d 442, 274 P2d 34. The judgment is then entered without costs for any proceeding prior to the trial. CCP §1139. The judgment may be enforced in the same manner as if it had been rendered in an action of the same jurisdictional classification in the same court. CCP §1140.

A judgment rendered on an agreed case is appealable in the same manner as a judgment rendered in an ordinary action of the same jurisdictional classification. CCP §1140. The judgment roll for purposes of review consists of the case, the submission, and a copy of the judgment. CCP §1139. The appellate court is not bound by the findings of the trial court and must determine the applicability of the statutes to the agreed and uncontradicted facts. *People ex rel Dep't of Transp. v Harris* (1982) 128 CA3d 264, 180 CR 148.

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B. Submission After Filing Action

§48.11 1. Nature and Characteristics

Submission after filing an action is the nonstatutory procedure by which the parties stipulate to all the facts of the case after the issues have been framed by the pleadings. Because no issue of fact exists, this procedure eliminates the need to present evidence on the facts submitted and eliminates the need for a jury trial. See *Division of Labor Law Enforcement v Brooks* (1964) 226 CA2d 631, 38 CR 284. See also *Faust v City of San Diego* (1931) 115 CA 277, 1 P2d 543 (finding of fact, unnecessarily made by trial court, may be disregarded on appeal). Like a case submitted before an action is filed, a case submitted after filing an action does not require findings of fact, because the statement of agreed facts suffices as findings of facts. *Robinson v El Centro Grain Co.* (1933) 133 CA 567, 24 P2d 554; *Ackley v Maggi* (1927) 86 CA 631, 261 P 311. Unlike a case submitted before an action is filed, however, a court may consider evidence substantiating the facts set forth in the agreed statement since the agreed statement is but a "substitute for evidence." *Towle v Sweeney* (1905) 2 CA 29, 31, 83 P 74.

PRACTICE TIP: A submission of an agreed case filed after a complaint and answer have been filed need not show jurisdictional facts nor frame issues. The court's findings and conclusions may be based on issues framed in the pleadings and on evidence and other matters of record, unless the submission restricts the matters the court is to consider.

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.12 2. Comparison With Motion for Judgment on Pleadings

§48.12 2. Comparison With Motion for Judgment on Pleadings

The key difference between a motion for judgment on the pleadings and a case submitted after filing an action is that a judgment on the pleadings is based only on the facts in the pleadings. In a submitted case, the judgment is based on all the facts to which the parties agree, including facts not in the pleadings that could have been asserted in an amended or a supplementary complaint or at trial.

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.13 3. Stipulation

§48.13 3. Stipulation

The crux of a submission after an action is filed is a stipulation or agreed statement setting forth the facts on which the case will be tried. Because the legal issues have already been framed by the pleadings, this agreed statement, unlike the statement required under CCP §1138, need not include questions of law submitted to the court for determination and need not be supported by an affidavit that the controversy is real and in good faith. The stipulation should include an acknowledgment by both parties that this action will be tried without a jury and that the statement of agreed facts serves as a substitute for evidence of those facts.

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§48.14 4. Procedural Considerations

A stipulation as to agreed facts may be presented to the court at a hearing on a demurrer or as part of a motion for summary judgment. A motion for new trial is inappropriate when a case is submitted after filing an action because it would be idle to grant a new trial to reexamine a question of fact when the facts are expressly agreed on. *Quist v Sandman* (1908) 154 C 748, 99 P 204.

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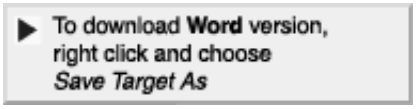
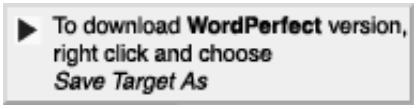
Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.15 C. Checklist: Procedure for Submission of Case

§48.15 C. Checklist: Procedure for Submission of Case





No action filed

- Court would have had jurisdiction if a formal action had been brought (see §48.7)
- Parties agree to facts and submit an agreed statement supported by affidavit that the controversy is real and in good faith (see §48.6)
- Hearing as to issues of law
- Judgment rendered based solely on agreed facts and entered without costs for any proceedings prior to trial (see §48.10)
- Appeal (see §48.10)

Action filed

- Jurisdiction established and issues framed by pleadings (see §§48.11-48.14)
- Parties stipulate to all facts that could have been asserted in an amended or supplementary complaint or at trial
- Hearing as to issues of law
- Judgment
- Appeal

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III. CONSENT JUDGMENTS

A. General Principles

1. When to Use Consent Judgment

§48.16 a. Settlement Calls for Future Performance

Entry of a consent judgment facilitates enforcement of settlements that call for a future performance, *e.g.,* the payment of money in installments. The advantage of a consent judgment over a mere agreement or a promissory note is that it embodies, in a judgment, the defendant's obligation to perform. The party seeking to enforce performance can obtain an abstract of judgment, record the judgment as a lien against specific property to secure payment of the settlement, and enforce the settlement by levy of execution on the judgment. When no judgment is entered, the party seeking to enforce performance is limited to a cause of action for breach of contract.

When the terms of a settlement can be performed immediately (*e.g.,* by payment of money), a consent judgment may not be necessary, and the settlement may be concluded by dismissal and a release.

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.17 b. Using Conditional or Delayed Entry

§48.17 b. Using Conditional or Delayed Entry

A consent judgment need not be entered immediately after settlement. The parties' settlement agreement or stipulation can specify that the agreed-on judgment will be entered only on certain conditions, such as the defendant's failure to meet the terms of the settlement or if some other event occurs that the parties have agreed would trigger the judgment. See §48.26.

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2. Effects of Consent Judgment

§48.18 a. Res Judicata

A judgment entered by consent of the parties has the same effect as one in an action tried on the merits. A consent judgment, therefore, is res judicata on all claims that were or could have been raised (*Avery v Avery* (1970) 10 CA3d 525, 529, 89 CR 195) and precludes collateral attack on all the issues contained within the stipulation (*Sohn v California Pac. Title Ins. Co.* (1954) 124 CA2d 757, 767, 269 P2d 223). On later litigation of issues not covered in the stipulated judgment, see *Ellena v State* (1977) 69 CA3d 245, 260, 138 CR 110. See also *Louie v BFS Retail & Commercial Operations, LLC* (2009) 178 CA4th 1544, 1559, 101 CR3d 441 (consent decree providing for class injunctive and declaratory relief and attorney fees for claims under Americans with Disabilities Act did not preclude individual claim for damages under California's Disabled Persons Act).

A stipulated judgment may be given collateral estoppel effect. *California State Auto. Ass'n Inter-Ins. Bureau v Superior Court* (1990) 50 C3d 658, 664, 268 CR 284 (insurer that signed stipulation, on which judgment was entered, in which insured admitted liability estopped to same extent as insured).

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§48.19 b. Appealability

Because consent to a judgment constitutes a waiver of errors by the party consenting to it, a consent judgment prevents a consenting party's attack on appeal. *Morrow v Learned* (1926) 76 CA 538, 540, 245 P 442. A consent judgment is appealable when the judgment entered does not conform exactly to the stipulation (see §48.28) or when consent was given to facilitate appeal after adverse determination of a crucial issue. See *Building Indus. Ass'n v City of Camarillo* (1986) 41 C3d 810, 817, 226 CR 81. But see *Four Point Entertainment, Inc. v New World Entertainment, Ltd.* (1997) 60 CA4th 79, 83 n5, 70 CR2d 82, which views *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804, as implicitly overruling *Camarillo* on this point. In *Tudor Ranches, Inc. v State Compensation Ins. Fund* (1998) 65 CA4th 1422, 1429, 77 CR2d 574, the court reasoned that *Morehart* prevents review of a stipulated judgment in which the parties intended that their remaining claims be dismissed without prejudice to later prosecution, although it allows a party to appeal from a stipulated adverse judgment with prejudice on all claims. Based on the reasoning in *Tudor*, the court in *City of S. San Francisco v Mayer* (1998) 67 CA4th 1350, 1353 n2, 79 CR2d 704, permitted a party to appeal from an adverse judgment entered under a stipulation with prejudice on all its claims. See also *Villano v Waterman Convalescent Hosp., Inc.* (2010) 181 CA4th 1189, 1203, __CR3d __ (under *Tudor*, plaintiff permitted to appeal from consent judgment that she requested after court indicated adverse rulings on motions in limine).

The parties may, of course, stipulate that one of them may appeal from the judgment with the stipulated amount to be paid if the appeal is unsuccessful. See *Holmes v Roth* (1992) 11 CA4th 931, 934, 14 CR2d 315.

Appellate review of a consent judgment assumes the existence of a properly filed motion for the appellate court to review. *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 120, 94 CR3d 109 (to create appellate review of threshold issues, parties stipulated that trial court would grant motion for summary judgment if one were brought; judgment affirming stipulation reversed and remanded).

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§48.20 c. Bankruptcy Discharge

A consent judgment may be dischargeable in bankruptcy. See *Larsen v Beekmann* (1969) 276 CA2d 185, 192, 80 CR 654.

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§48.21 3. Attorney's Authority to Consent

As a rule, an attorney cannot enter into a stipulation or consent to a judgment without the client's knowledge and express consent. *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 212 CR 151; *Preston v Hill* (1875) 50 C 43, 51. Even when a client has given the attorney authority to settle on specific terms, the attorney's signature alone is insufficient to compel enforcement of the settlement under CCP §664.6, if the client is not available to sign a stipulation for entry of judgment. *Levy v Superior Court* (1995) 10 C4th 578, 41 CR2d 878. See *Burckhard v Del Monte Corp.* (1996) 48 CA4th 1912, 56 CR2d 569 (*Levy* held retroactive). See also *Harris v Rudin, Richman & Appel* (1999) 74 CA4th 299, 87 CR2d 822 (plaintiffs could not use summary procedure to enforce proposed settlement under §664.6 when not all defendants had signed counsel's letter setting forth terms of settlement, but plaintiffs could use other enforcement procedures, such as action for breach of contract); *Davidson v Superior Court* (1999) 70 CA4th 514, 82 CR2d 739 (judgment was void when based on settlement signed by judge and attorneys for both sides but not by defendants).

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§48.22 B. Drafting Agreement or Stipulation

When parties agree to be bound by a consent judgment, one of them should prepare a written stipulation for judgment (see §48.36). The stipulation can spell out the terms of the settlement, or it can incorporate the written agreement by reference if a formal settlement agreement was prepared. If the parties consented in open court to entry of judgment, no written stipulation is necessary.

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.23 1. Suggested Terms

§48.23 1. Suggested Terms

The terms of settlement agreements and stipulations for judgment vary according to the nature of the case and the circumstances under which consent judgment will be entered. A comprehensive stipulation, however, should contain the following provisions:

- A description of the action being settled;
- The terms of payment and the method of payment; and
- The terms for entry of judgment.

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§48.24 a. Claims and Actions Covered

A plaintiff may want assurance that the defendant will not allow judgment and then sue for malicious prosecution, abuse of process, or on a cause of action relating to the basis of the settled lawsuit. But see, *e.g., California Coastal Comm'n v Tahmassebi* (1998) 69 CA4th 255, 81 CR2d 321 (defendant who enters into stipulated judgment is judicially estopped from later taking inconsistent position to detriment of other party). A defendant may want assurance that the plaintiff will not dismiss or take judgment on the present action under the settlement and then file a new action on a related cause of action or one arising from the same event or transaction. For sample clauses of claims and actions covered, see §48.36.

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.25 b. Terms of Payment

§48.25 b. Terms of Payment

The terms of payment and the method of payment could include the commencement date, interest, amount of each installment, place of payments, and whether the payments should be made to the attorney in trust for the client so the attorney can know immediately of any default. For a sample clause of terms of payment, see §48.36.

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§48.26 c. Terms of Entry of Judgment

A settlement agreement and stipulation may provide that the consent judgment shall not be filed, or that the court will not be asked to render judgment, or that the execution on the judgment will not be levied, until defendant defaults or some other event occurs. See §48.17.

WARNING: Sometimes parties wish to agree to postpone entry of judgment or execution on a judgment entered, but also wish to specify that at a later time the judgment will be entered for an amount greater than is necessary to pay the debt. Such a provision could be held to be an unenforceable forfeiture (see *Chambreau v Coughlan* (1968) 263 CA2d 712, 716, 69 CR 783) unless the stipulation recites a factual basis justifying judgment for the larger sum and also states that the disputed debt could be satisfied by paying a smaller amount within the prescribed time.

An agreement or a stipulation that provides for a conditional entry of judgment should specify the means for entry of judgment. The agreement might provide that the plaintiff must proceed by noticed motion to obtain an order for entry of judgment, that judgment may be entered by ex parte application, or that a court commissioner may act as temporary judge to authorize entry of judgment. *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 360, 110 CR 353.

For sample clauses in an agreement concerning the terms of entry of judgment, see §48.36.

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§48.27 2. Interpretation as Contract

A stipulation should be unambiguous. If the terms of the stipulation require interpretation before a judgment can be entered, the stipulation will be treated as a contract and construed in accordance with principles of contract law.

A stipulation is not treated like a contract for all purposes, however, and is not subject to the contract rule permitting rescission for breach of a condition on which the consent was based. *Stevens v Stevens* (1968) 268 CA2d 426, 435, 74 CR 54. A stipulation may be challenged only on the same grounds as a judgment rendered after trial, *i.e.,* by a motion to vacate the judgment. *Stevens v Stevens, supra*.

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C. Entry of Judgment

1. Procedure

§48.28 a. Required Papers

When a written stipulation contains all the terms of the judgment agreed to by the parties, judgment may be entered on noticed motion or on ex parte application (if the right to a noticed motion is expressly waived in the stipulation). *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 370, 110 CR 353; *Heller v Dyerville Mfg. Co.* (1897) 116 C 127, 47 P 1016. But if the stipulation leaves open for later determination any essential element of a complete judgment, judgment cannot be entered until the missing elements are proved or stipulated to. *Rooney v Vermont Inv. Corp., supra.* The stipulation and proposed judgment should be attached to the motion papers as exhibits.

The filing of a written stipulation that sets forth all terms of the judgment agreed to by the parties is normally a sufficient basis for entry of judgment. *Rooney,* 10 C3d at 368.

Attaching a judgment form to the stipulation helps to ensure that there will not later be a dispute over whether the judgment conforms to the stipulation.

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§48.29 b. Entry by Clerk

After obtaining the judge's signature on the judgment, the attorney must be sure that it is returned to the court clerk and that the clerk enters it in the judgment book, noting the date and place of entry on the judgment. A consent judgment must be entered in the judgment book by the court clerk to be enforceable as a judgment; merely filing the stipulation or settlement agreement is not sufficient. *Old Settlers Inv. Co. v White* (1910) 158 C 236, 245, 110 P 922.

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§48.30 c. Local Variations

Attorneys preparing consent judgments should consult local rules. Some courts have specific rules for judgment under stipulation. See, *e.g.*, Sacramento Ct R 9.17 (when parties enter into written stipulation for judgment, the form of proposed judgment to be signed and filed must be a separate document; a copy of the judgment may be attached as an exhibit or incorporated in the stipulation). But see Cal Rules of Ct 3.20, 2.100(a) (Judicial Council rules of court preempt local rules on form and format of papers and other specified matters), discussed in §11.2.

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§48.31 2. Function of Judge

A judge asked to render judgment under a stipulation must do so in exact conformity with the stipulation. It is beyond the court's jurisdiction to add to the decree provisions that are not the subject of the agreement. *Jones v World Life Research Inst.* (1976) 60 CA3d 836, 840, 131 CR 674. When the consent judgment differs from or exceeds the terms of the stipulation, the judgment may be attacked by a motion for a new trial or by appeal. See 60 CA3d at 843 (judgment may be appealed or collaterally attacked).

If the entry of judgment depends on an event, the occurrence of which must be proved, or if the stipulation fails to specify when or on what proof judgment is to be entered, the judge may order entry of judgment only after a noticed hearing or receipt of further stipulation. *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 369, 110 CR 353. If a condition is mentioned in the stipulation, the court must be fully apprised of the circumstances surrounding the occurrence of the condition and must be satisfied that it has, in fact, occurred. This may require some form of hearing unless the stipulation also contains an express and explicit waiver of the right to a hearing. *S.E.P. Assocs. v Peto* (1975) 49 CA3d 305, 308, 122 CR 514.

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.32 3. Vacating Consent Judgment

§48.32 3. Vacating Consent Judgment

A consent judgment may be vacated and set aside in the same manner as any other judgment. See California Trial Practice: Civil Procedure During Trial §§25.72-25.77 (3d ed Cal CEB 1995).

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/ IV. FORMS/ A. Submission of Agreed Case/§48.33 1. Form: Submission of Agreed Case

IV. FORMS

A. Submission of Agreed Case

§48.33 1. Form: Submission of Agreed Case

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**SUBMISSION OF AGREED**
vs	)	**CASE**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	[*In limited civil case, add:* **Amount demanded** _ _[*exceeds/does not exceed*]_ _ **$10,000**]
_____	)	

The parties to this submission ask that the Court resolve questions in difference between them and enter judgment embodying the Court's decision as provided under Code of Civil Procedure §1138.

The parties agree on the following facts:

1. _ _[*Name*]_ _ **is** _ _[*identify first party, briefly indicating nature of claim or position*]_ _**.**

2. _ _[*Name*]_ _ **is** _ _[*identify second party, briefly indicating nature of claim or position*]_ _**.**

3. This Court would have jurisdiction of an action between these parties in that _ _[*state basis for jurisdiction*]_ _**.**

4. _ _[*In series of numbered paragraphs, continue to state facts on which court is to base its decision*]_ _**.**

The question(s) in difference submitted for determination _ _[*is/are*]_ _ **as follows:**

1. _ _[*State questions (perhaps framed in terms of parties' contentions) in series of numbered paragraphs or, if appropriate, state single ultimate question*]_ _**.**

[*Add if appropriate*]

All parties agree that this matter may be assigned to and judgment may be entered by a commissioner or judge pro tem of this Court.

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature of party*]__
_ _[*Typed name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

__[*Signature of party*]__
_ _[*Typed name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); one copy for each party; __ office copies.

Comment: See §48.11.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.34 2. Form: Declaration Supporting Submission of Agreed Case

§48.34 2. Form: Declaration Supporting Submission of Agreed Case

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	**ATTORNEYS** _ _[*NAME*]_ _
	)	**AND** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**SUPPORTING SUBMISSION OF AGREED CASE**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
_____	)	**Dep't:** _ _[*number*]_ _

_ _[*Name*]_ _ **and** _ _[*name*]_ _ **declare:**

1. We are the attorneys for _ _[*names*]_ _**, parties of record to the question in difference, which is submitted to this Court without action on an agreed statement of facts.**

2. We have read the agreed facts and questions in difference stated in the Submission of Agreed Case and declare that the controversy in this proceeding is real and that this proceeding is instituted in good faith to determine the rights of the parties.

3. _ _[*Continue declarants' statements*]_ _**.**

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); one copy for each party; ___ office copies.

Comment: See §48.11.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed

with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/48 Submitted Case and Consent Judgment/§48.35 3. Form: Stipulation to Agreed Facts in Pending Action

§48.35 3. Form: Stipulation to Agreed Facts in Pending Action

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**STIPULATION TO AGREED FACTS**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

The undersigned agree (1) that this action may be tried by this Court _ _[*or by a commissioner or judge pro tem of this Court*]_ _ **without a jury and (2) that judgment may be rendered on pleadings filed in this action and on the following statement of agreed facts, which serve as a substitute for evidence of those facts:** _ _[*State agreed facts*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature of party*]__
_ _[*Typed name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

__[*Signature of party*]__
_ _[*Typed name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §48.13.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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B. Consent Judgment

§48.36 1. Form: Stipulation for Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**STIPULATION FOR JUDGMENT**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

Plaintiff, _ _[*name*]_ _, defendant, _ _[*name*]_ _, and their attorneys of record stipulate and agree as follows:

1. The Court will enter judgment in this action, pursuant to this stipulation, on request of any party without notice to the other parties as follows:

a. _ _[*Name*]_ _ will pay _ _[*name*]_ _ the sum of $_ _ _ _ _ _ in full settlement of all claims between them described in the preceding paragraph. Payment shall be made as follows: $_ _ _ _ _ _ per month, payable on the first day of each month, plus interest at the rate of _ _ percent from _ _[*date*]_ _ to date of payment.

[*Specify claims and actions covered*]

[*Option 1: agreement settles and concludes claims arising from specific event or transaction*]

b. This agreement settles and concludes all claims between _ _[*name*]_ _ and _ _[*name*]_ _ arising from _ _[*describe event or transaction*]_ _ including, but not limited to, action number _ _ now pending in the _ _ _ _ _ _ Court of _ _ _ _ _ _ County and all claims between them for costs and attorney fees. The parties hereby waive any causes of action arising out of the commencement or conduct of that lawsuit.

The signing of this agreement does not constitute an admission either of liability or that any claim or action is without merit.

[*Option 2: claims covered may be specified by reference to a settlement agreement*]

b. The judgment so entered will conclude all claims between the parties described in the settlement agreement executed by them on _ _[*date*]_ _, a copy of which is attached to and incorporated in this stipulation by this reference, including all costs and attorney fees.

[*Continue*]

[*State other terms of entry of judgment*]

[*Option 1*]

c. The parties will execute a stipulation for judgment consistent with the terms of this settlement agreement to be entered in the action described in paragraph _ _. Judgment under that stipulation will be entered _ _[*at* _ _[*name*]_ _*'s request/describe conditions, e.g., default in payments, under which judgment may be entered*]_ _. Execution on the judgment may be levied immediately on entry and an abstract of judgment may be recorded in any county in this state.

[*Option 2*]

c. In the event of default of any amount due under this agreement, on _ _ days' notice, _ _[*name*]_ _ may declare the entire remaining balance due and payable.

In addition to nonpayment, a default will be deemed to occur if _ _[*name*]_ _ is adjudicated a bankrupt, files for reorganization or other proceeding, seeks relief under the bankruptcy laws of any jurisdiction, or enters into any arrangement or plan with creditors.

If it is necessary to execute on the judgment provided for in this agreement, or otherwise to enforce _ _[*name*]_ _'s rights against _ _[*name*]_ _, _ _[*name*]_ _ will be entitled to a reasonable attorney fee from _ _[*name*]_ _ and all other costs reasonably incurred.

[*Continue*]

2. On entry, this judgment will become final and execution may be levied on it immediately.

Date: _ _ _ _ _ _

__[*Signature of party*]__
_ _[*Typed name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

__[*Signature of party*]__
_ _[*Typed name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Add if desired*]

ORDER

Good cause appearing,

IT IS ORDERED that judgment be entered in favor of _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, and against** _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, as follows:** _ _[*State terms*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original (submit to judge); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§48.22-48.27. Some lawyers append an order form to the stipulation for judgment.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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§48.37 2. Form: Judgment Pursuant to Stipulation

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _, **Defendant(s)**	**No. _ _ _ _ _ _** **JUDGMENT** **(Pursuant to Stipulation)**

Pursuant to the stipulation for judgment filed in this matter _ _[*and after a hearing on* _ _[*date*]_ _**, at which** _ _[*name*]_ _ **appeared as attorney for** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, and** _ _[*name*]_ _ **appeared as attorney for** _ _[*e.g., defendant*]_ _**,** _ _[*name*]_ _]_ _**,**

IT IS ORDERED that judgment be entered in favor of _ _[*e.g., plaintiff*]_ _ **and against** _ _[*e.g., defendant*]_ _ **as follows:**

1. _ _[*State terms in numbered paragraphs, as in stipulation for judgment*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Judgment entered on __[*date*]__**, in Book of Judgments No. _ _, page _ _.**

__[*Signature*]__
Clerk

By __[*Signature*]__
Deputy Judge

Copies: Original (present to judge for signature); ___ copies for service (one for each other party); ___ office copies.

Comment: It is normally more convenient to submit to the court a separate form of judgment with the stipulation. This method presents less opportunity for later dispute over whether the judgment conforms to the stipulation.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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49

Sliding Scale and Structured Settlements

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- B. Governing Law §49.2

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I. INTRODUCTION

§49.1 A. Scope of Chapter

This chapter discusses sliding scale settlements (see §§49.3-49.25) and structured settlements (see §§49.26-49.59).

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§49.2 B. Governing Law

Sliding scale settlement agreements, also known as "Mary Carter" agreements, are impliedly authorized by CCP §877.5, which refers to "sliding scale recovery agreements." Structured settlements are not directly governed by statutory law, although some tax statutes, which provide for economic advantages, may be applicable. See, *e.g.,* IRC §104(a)(2). See discussion in §49.49.

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II. SLIDING SCALE SETTLEMENTS

§49.3 A. Defined

A "Mary Carter" or sliding scale settlement agreement is one in which the plaintiff settles with one or more, but not all, of the defendants, and the amount the settling defendant ultimately owes the plaintiff is affected by the amount the plaintiff recovers against nonsettling defendants. CCP §877.5(a)-(b); *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 869 n9, 239 CR 626; *Alcala Co. v Superior Court* (1996) 49 CA4th 1308, 1312, 57 CR2d 349. A sliding scale settlement includes, but is not limited to, agreements in the form of a loan from the agreeing tortfeasor defendant or defendants to the plaintiff or plaintiffs that is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant or defendants. CCP §877.5(b); *United Servs. Auto. Ass'n v Superior Court* (2001) 93 CA4th 633, 641, 113 CR2d 328.

NOTE: Under such an agreement, a settling defendant guarantees the plaintiff a specified total recovery at the conclusion of the entire litigation. Sliding scale agreements typically provide that if the plaintiff recovers more than the guaranteed amount from the other defendants, the settling defendant will owe nothing. If the plaintiff ultimately recovers less than the guaranteed amount, however, the settling defendant must pay the difference up to the amount guaranteed.

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§49.4 B. Effect of Good Faith Sliding Scale Agreement

Sliding scale agreements, like conventional or "straight" settlements, present distinct advantages, disadvantages, and risks for plaintiffs and defendants. The form and terms of sliding scale agreements may be varied to meet the demands of particular situations, but these agreements are subject to the "good faith" requirements of CCP §877.6. See *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 213 CR 256; *Abbott Ford, Inc. v Superior Court, supra* (both discussed in §49.5).

PRACTICE TIP: In settlements involving fewer than all joint tortfeasors, the settling defendant is relieved from liability to the nonsettling defendants for indemnity or contribution only if the settlement was entered into in good faith. CCP §§877-877.6. See chap 50. Because the primary incentive for a defendant to enter into a sliding scale settlement agreement is relief from liability for contribution or indemnity, a settling joint tortfeasor should enter into a sliding scale settlement only if it appears possible to obtain a judicial determination of good faith.

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§49.5 C. Good Faith Standards: *Tech-Bilt* and *Abbott Ford*

In *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 213 CR 256, involving a conventional settlement, the supreme court held that for a settlement to be in good faith, the amount of the proposed settlement must be within the "reasonable range" of the settling defendant's proportional share of comparative liability for the plaintiff's total injuries. In applying the "reasonable range" test, *Tech-Bilt* delineated several factors to be considered by the trial court, including (38 C3d at 499):

> [A] rough approximation of plaintiff's total recovery and the settler's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settler should pay less in settlement than if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of the nonsettling defendants.

For discussion of these factors and cases construing them, see chap 50.

The good faith standard enunciated in *Tech-Bilt* applies to sliding scale agreements. *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 239 CR 626. Thus, settling parties should be certain that the sliding scale settlement agreement meets not only the requirements of *Tech-Bilt* and its progeny, but also the special good faith requirements applicable to sliding scale settlements. If the sliding scale settlement does not meet these standards and the agreement is found not to be in good faith, the settling defendant will not avoid liability to the nonsettling defendants for indemnity or contribution. 43 C3d at 875.

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§49.6 1. Value of Consideration Given

A conventional settlement is in good faith if the amount of the settlement payment is within the settling defendant's proportional share of comparative liability for the plaintiff's injuries. *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256. For sliding scale settlements, the total amount paid by the settling defendant cannot be determined until the conclusion of the litigation with all defendants. Indeed, in a sliding scale settlement, the amount ultimately paid by the settling defendant may range from zero to the full amount of the guaranty.

Before *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 239 CR 626, courts had struggled with defining the amount of consideration given in a sliding scale settlement. Some decisions suggested that because a settling defendant may ultimately pay nothing under the agreement, there was no consideration paid, or there was no settlement for purposes of CCP §877. See, *e.g., Pease v Beech Aircraft Corp.* (1974) 38 CA3d 450, 473, 113 CR 416.

The *Abbott Ford* court recognized that the "value of consideration paid" by the settling defendant lies somewhere between the minimum and the maximum amount that the settling defendant may ultimately pay. *Abbott Ford, Inc.,* 43 C3d at 878. Thus, as with conventional settlements, for a sliding scale agreement to be in good faith, the value of consideration given must, at a minimum, fall within the "ballpark" or "reasonable range" of the settling defendant's proportionate share of comparative liability for the plaintiff's damages. 43 C3d at 879; see *United Servs. Auto. Ass'n v Superior Court* (2001) 93 CA4th 633, 640, 113 CR2d 328.

NOTE: The value of a sliding scale settlement is neither the *guaranteed* (or maximum) amount nor the minimum "unconditional" amount to be paid by the settling defendant. The ballpark amount is not a specific figure, but a *range,* while the *value* of the agreement is a specific amount that must fall within the ballpark.

The "value" of consideration given in a sliding scale settlement is important to both the settling and nonsettling defendants. The "trade-off" for the nonsettling defendant's loss of indemnity and contribution rights is an offset against an ultimate verdict against the nonsettling defendant. CCP §877(a). The amount of this offset is equal to the amount of the "consideration" or "value" given by the settling defendant. *Abbott Ford, Inc.,* 43 C3d at 877.

The parties to a sliding scale agreement must determine its value, and the agreement must specifically declare the value of consideration. 43 C3d at 878.

NOTE: The court in *Abbott Ford* stated that trial courts "should not be burdened with the obligation of determining the 'actual' value of such an agreement by the use of actuarial or other valuation methods." 43 C3d at 879. Rather, the parties to the agreement must determine this figure, since they are in the best position to assign a value to the agreement and have the burden of establishing the value.

Many factors affect the value of a sliding scale agreement. For example, as the likelihood that the settling defendant will be required to pay the full amount of the guaranty increases, so too does the value of the agreement. Similarly, if the settling defendant advances portions of the guaranteed amount as periodic, no-interest loans to the plaintiff throughout the course of the litigation, the agreement becomes more valuable, since the plaintiff receives the benefit of the use of the money. See §§49.13-49.19.

The monetary value of a sliding scale settlement determines the amount of the nonsettling defendants' offset—the amount by which the plaintiff's claims against the nonsettling defendants are reduced following an award at trial. 43 C3d at 877. The amount of the settling defendant's obligation after trial is the difference between the guaranteed amount, on one hand, and the award against the nonsettling defendant less the value of the sliding scale settlement, on the other.

EXAMPLE: A sliding scale settlement guarantees the plaintiff a recovery of $100,000, and the parties have assigned to it a value of $60,000. If the verdict against the nonsettling defendant is $130,000, the settling defendant is still obligated to the plaintiff on the guaranty after trial. Subtracted from the $130,000 award is the nonsettling defendant's offset of $60,000, the amount of the value of the agreement. Thus, the nonsettling defendant must pay $70,000 and the settling defendant must pay the balance of the guaranteed amount, $30,000, to the plaintiff. For the settling defendant to escape paying anything on the guaranty, and for the plaintiff to obtain more at trial

than the amount he or she was previously guaranteed by the settling defendant, the amount of the verdict would have to exceed $160,000.

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§49.7 2. Conduct of Nonsettling Defendants

An additional factor that a trial court may consider in determining the good faith of a sliding scale settlement is the unreasonable or bad faith conduct of the nonsettling defendant. If a defendant has been especially recalcitrant in refusing to negotiate with the plaintiff, that defendant's conduct may make it impossible for the other defendants to settle the litigation with the plaintiff, who may not wish to release any of the joint tortfeasors individually unless sure to recover the minimum amount believed to be just compensation for the injuries. When a defendant acts unreasonably in settlement negotiations and this conduct threatens to frustrate the settlement efforts of the other defendants, "such a defendant may be on shaky equitable grounds when it thereafter seeks to attack the 'good faith' of a sliding scale agreement that has been occasioned by its own recalcitrance." *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 881, 239 CR 626. In such cases, a court may approve a sliding scale settlement whose value would otherwise be considered too low. Such a sanction, however, "should not be so out of proportion to the holdout defendant's conduct as to be unduly coercive." 43 C3d at 883.

WARNING: A "holdout" defendant should take a codefendant's threats to enter into a sliding scale settlement seriously, evaluate the plaintiff's damages and defendants' liability shares, and promptly communicate this evaluation with a reasonable settlement offer to the plaintiff. If the settling parties negotiate a low guaranteed amount and the trial court approves a low-value offset because of the holdout defendant's recalcitrance, the risk of the nonsettling defendant's paying a greater amount than his or her proportionate fair share following the verdict is substantially enhanced.

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§49.8 3. Factors Considered in Determining Good Faith

Factors considered in determining the good faith of a settlement, discussed more fully in chap 50 and applicable to sliding scale agreements, include:

- Rough estimates of the plaintiff's total recovery and the settling defendant's proportionate liability;
- The amount of the settlement;
- The allocation of the settlement proceeds among the plaintiffs;
- A recognition that a settling defendant should pay less in settlement than he or she would if found liable at trial;
- Financial condition, including insurance policy limits, of the settling defendant;
- The existence of fraud, collusion, or tortious conduct aimed to injure the interests of the nonsettling defendants;
- Whether any veto provision is limited only to settlements that would require the earlier settling defendant to bear more than its fair share of liability for plaintiff's damages;
- Whether the nonsettling defendant has engaged in any unreasonable or bad faith conduct that impeded the settlement process and led to the sliding scale agreement;
- The amount the nonsettling defendant sets as the total value of the plaintiff's case for settlement purposes; and
- The amount the nonsettling defendant stands ready to contribute toward an overall settlement.

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D. Entering Into Sliding Scale Settlement

§49.9 1. Types of Cases

Generally, sliding scale agreements are appropriate in all types of litigation, and in particular when a conventional settlement with all defendants may be difficult to obtain.

A sliding scale settlement is appropriate when one or more defendants refuse to contribute a reasonable amount toward a total settlement, while another defendant is willing to pay his or her proportional share. In such a case, the plaintiff may be reluctant, for strategic reasons, to settle separately with the willing defendant for fear that the recalcitrant defendants will escape liability.

NOTE: The plaintiff's concerns may be particularly valid when the recalcitrant defendants are peripheral defendants whose exposure may be increased by the mere presence of the target defendant at trial. A sliding scale agreement with the target defendant tends to obviate these concerns, provided that the guaranteed amount would represent a reasonable, minimum recovery even if the recalcitrant defendants defeat liability.

Sliding scale settlements are also appropriate for both plaintiffs and defendants when there is an appreciable risk that the plaintiff will recover substantial damages, particularly when the potential recovery would exceed a defendant's insurance policy limits or personal financial resources. By entering into a sliding scale agreement, the plaintiff is insured a minimum recovery without forfeiting the potentially large recovery against the remaining defendants. Similarly, the settling defendant protects itself by capping its liability at the guaranteed amount, but retains the possibility that it may ultimately pay nothing under the agreement in the event that the plaintiff recovers substantial damages against the nonsettling defendants.

PRACTICE TIP: It has been observed that a sliding scale settlement is more appropriate (and the likelihood of a good faith determination greatest) when the settling defendant's proportionate liability is low and the plaintiff's chance of success against all defendants is high. There is even a chart in which different values are assigned to certain of the *Tech-Bilt* factors according to the facts of an individual case, thus transforming the determination of whether a sliding scale settlement is appropriate into a mathematical analysis based on the probability of a good faith determination. See CCP §§877-877.6; *The Settlement Game in the Ballpark That Tech-Bilt*, 13 Pepperdine L Rev 823, 854 n157 (1986). A party considering entering into a sliding scale settlement may wish to make a similar analysis based on the facts of the case and the factors delineated in §49.8.

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§49.10 2. Timing

There are no statutory or judicially imposed limitations on when the parties can enter into a sliding scale agreement. As a basic rule, however, the parties should not enter into a sliding scale agreement until they are able to fully evaluate essential terms of the agreement, such as the amount of the guaranty and the "value of consideration" to be assigned for purposes of establishing the offset to which the nonsettling defendants will be entitled. Additionally, because sliding scale settlements are often appropriate when conventional settlements are unavailable, sliding scale agreements are typically negotiated only after all of the parties' settlement positions have been communicated and explored.

Parties that enter into a sliding scale settlement as a last resort, because of recalcitrant defendants' unreasonable refusal to settle, should first warn the nonsettling defendants that a sliding scale settlement is imminent.

NOTE: The mere threat of a sliding scale settlement may induce the recalcitrant defendants to reevaluate their settlement position and increase their settlement offers. Additionally, advance warning to the nonsettling defendants may enhance the parties' chances of obtaining the court's determination of good faith under CCP §877.6.

Such advance warning may be important evidence to negate a claim by a nonsettling defendant that the settling parties acted collusively and may show that the settlement was entered into as a last resort because of the nonsettling defendant's recalcitrance. See *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 881, 239 CR 626.

If the parties are negotiating a sliding scale settlement close to the time of a scheduled settlement conference, the parties may wish to finalize their agreement before a settlement conference judge, especially when the sliding scale settlement was occasioned by the nonsettling defendant's unreasonable failure to participate in settlement negotiations. In *Abbott Ford,* the court noted that a trial court may consider whether the sliding scale settlement resulted from the efforts of a settlement judge in evaluating the reasonableness of the nonsettling defendant's negotiating conduct. 43 C3d at 881 n24. Moreover, the fact that a sliding scale agreement was negotiated before a settlement judge might negate the specter of collusion and enhance the parties' chances of obtaining a good faith confirmation.

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§49.11 3. Impact of Fair Responsibility Act of 1986 (Proposition 51)

Sliding scale agreements in cases governed by the Fair Responsibility Act of 1986 (CC §§1431-1431.5, also known as Proposition 51) involve additional risks for settling and nonsettling parties, particularly in the context of motions for good faith under CCP §877.6. The Act abolishes joint liability for noneconomic damages, so that, in cases involving multiple tortfeasors, each defendant's liability for noneconomic damages is directly proportional to the defendant's percentage of fault. However, the Act did not abolish or modify joint and several liability for economic damages. For further discussion of the Act and its impact on settlement, see chap 50.

The Act may directly affect some of the essential provisions of a sliding scale agreement.

First. The parties to a sliding scale settlement agreement should allocate separate amounts for economic and noneconomic damages. In moving for a good faith determination under CCP §877.6, the moving party should analyze separately its exposure for economic and noneconomic damages. Because the Act abolishes joint and several liability for noneconomic damages, the settling parties, particularly the plaintiff, have an incentive to allocate payments under the settlement agreement to the plaintiff's noneconomic damages, thereby leaving the remaining, nonsettling defendants exposed to joint and several liability for economic damages.

In applying the "reasonable range" standard in determining the settlement's good faith, the court may focus on whether the amount allocated to plaintiff's economic damages is "unreasonably low" in view of the proportional liability of all defendants.

EXAMPLE: Assume that a plaintiff who has sustained $1 million in economic damages makes a joint settlement demand of $2 million to all of four defendants. Defendants *A, B,* and *C,* whose total proportionate liability is 50 percent, refuse to settle. Defendant *D,* who alone is 50 percent at fault, enters into a sliding scale agreement that guarantees the plaintiff a total recovery of $1 million, with $800,000 allocated to noneconomic damages and $200,000 allocated to economic damages. In cases not governed by the Act, a court probably would uphold the good faith of the hypothetical settlement, inasmuch as the $1 million guaranty, 50 percent of the plaintiff's joint settlement demand, is within the reasonable range of defendant *D*'s proportional liability. Under the Act the settlement is arguably "unreasonably cheap" because the remaining defendants, whose combined liability is only 50 percent, remain jointly and severally liable for 80 percent of the plaintiff's economic damages. Under the Act, then, *A*, *B,* and *C* could oppose a motion for good faith determination on grounds that either or both the total guaranteed recovery, or the allocation between economic and noneconomic damages, are "unreasonably cheap."

Second. Settling parties should allocate settlement amounts under sliding scale agreements between economic and noneconomic damages for purposes of determining the "monetary value" or "amount of consideration" of the settlement. (See §49.6 for discussion of value of consideration.) Because the Act abolishes joint and several liability for noneconomic damages, the remaining, nonsettling defendants should not be entitled to a credit for amounts paid by the settling defendant toward the plaintiff's noneconomic damages. Therefore, the monetary value or "consideration" assigned by the settling parties to the sliding scale agreement should take into account any payments for economic damages but exclude payments for noneconomic damages. Otherwise, the settling defendants would receive a credit for the entire amount of the settlement when they would not otherwise be entitled to an offset for noneconomic damages paid by the settling defendant. See Klein & Day, *Prop*. *51 and the House That Tech-Bilt*, 6 Cal Law 25 (Nov. 1986).

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§49.12 E. Terms of Sliding Scale Settlement Agreement

The specific provisions of a sliding scale settlement agreement significantly affect the good or bad faith of the agreement. For example, if the amount of the guaranty is so low that it does not reflect the settling defendant's proportional share of comparative liability for plaintiff's damages, the agreement may not be in good faith, since the value of consideration paid must fall within the ballpark of the settling defendant's share of liability for plaintiff's damages, and the value is always less than the guaranteed amount. *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256; see §49.6. Similarly, certain "veto provisions" (see §49.16) may unduly prevent settlement with the nonsettling defendants so as to render the settlement agreement in bad faith. The following sections discuss common provisions of sliding scale settlement agreements and examine ways in which these provisions may be drafted to increase the likelihood of a good faith determination.

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§49.13 1. Amount of Guaranty

A sliding scale settlement agreement must contain a term that fixes the amount the settling defendant guarantees the plaintiff will recover. This figure, then, represents the maximum amount the settling defendant may ultimately pay, and the minimum amount the plaintiff will recover in the litigation. In negotiating the amount of the guaranty, the settling parties should consider the settlement value of the entire litigation and the relative liability of the settling defendant. Although the parties may include a variety of terms that make the settlement more or less valuable to the plaintiff and that may require an upward or downward adjustment of the guaranteed amount, in many cases the amount of the guaranty represents a low-end settlement value of the entire case regarding all defendants, since this amount is the minimum the plaintiff will accept as compensation for his or her damages. In cases in which the relative liability of the settling defendant is low, however, the amount of the guaranty may represent only a fraction of the total settlement value of the case. See, *e.g., Rogers & Wells v Superior Court* (1985) 175 CA3d 545, 548, 220 CR 767, review granted and court of appeal opinion directed to remain published and citable; case later dismissed as moot (settling defendants' guaranties totaled $3.9 million; plaintiffs' claims against all defendants exceeded $90 million). Thus, the amount of the guaranty largely hinges on the settling defendant's share of liability for the plaintiff's damages.

The guaranteed amount, of course, typically represents more than a fair settlement regarding the settling defendant only, or the plaintiff would have no incentive to enter into a sliding scale settlement instead of a straight settlement. In exchange for the benefit that it ultimately may pay nothing on the guaranty, the settling defendant, then, must guarantee a greater amount than its share of the plaintiff's total damages.

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§49.14 2. Value of Consideration Given

The concept of the "value of consideration given" is discussed at length in §49.6, in the context of the good faith requirement. This section examines practical problems parties may face in drafting such a term.

A sliding scale settlement agreement must contain a provision declaring the "value" of the consideration given by the settling defendant for the settlement. *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 879, 239 CR 626. This value is the amount of the nonsettling defendant's offset against any subsequent verdict. 43 C3d at 877.

The parties to the sliding scale agreement have the burden of proving its value. 43 C3d at 879. The court in *Abbott Ford* observed that placing the burden of declaring the agreement's value on the settling parties should produce a reasonable valuation (43 C3d at 879):

> [S]ince the plaintiff and the settling defendant are likely to have somewhat different, and somewhat conflicting, interests in placing a value on the agreement—the plaintiff would prefer the value to be on the low side to reduce the amount that its claims against the other defendants will be reduced; the settling defendant will want the value to be high enough to assure that the agreement is found to be within its *Tech-Bilt* "ballpark" so as to relieve it of liability for comparative indemnity or contribution.

Generally, joint valuation by the settling parties will produce a fair result; however, it is not always true that the plaintiff and the settling defendant have competing interests. Since the amount the settling defendant owes after trial is the difference between the total damages awarded against the nonsettling defendant, reduced by the agreement's value, and the guaranteed amount, a high value will increase the likelihood that the settling defendant ultimately will pay a greater amount to the plaintiff than if the value were lower. Thus, in some cases, both the plaintiff and the defendant would prefer the value to be on the low side. This may not present a concern in most cases, however, since both the plaintiff and settling defendant want the agreement to be found in good faith, especially if the agreement contains a provision voiding the agreement if the declared value of agreement is not accepted by the court. See §49.18.

PRACTICE TIP: For nonsettling defendant. If the declared value of the agreement appears unreasonably low, point out to the court that the settling parties may not have had competing interests in determining the value. If the judgment at trial seems likely to exceed the guaranteed amount plus the value, it may be that the settling parties have attempted to injure nonsettling defendant's interests by the low value, since both the plaintiff and the settling defendant will benefit from a low valuation.

PRACTICE TIP: For settling parties. Because the value of the agreement can significantly affect the amount the settling defendant pays on the guaranty and the amount of the plaintiff's total recovery, valuation should be a key point of negotiation. Unless the parties consider the likely verdict against the nonsettling defendants and whether the verdict will greatly exceed the guaranteed amount, they will not have adequately explored the full impact of the recited value. Remember that the recited value must fall within the settling defendant's comparative liability ballpark for there to be good faith. Additionally, because valuation is such a critical term, the parties should include a provision voiding the agreement if the declared value is not accepted by the court. See §49.18 on drafting such a term.

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§49.15 3. Minimum Unconditional Payment

The settling parties may include a provision fixing a minimum amount the defendant agrees to pay irrespective of the amount the plaintiff ultimately recovers from the nonsettling defendants. This amount is commonly referred to as the "minimum unconditional payment."

Although sliding scale settlement agreements that provide no minimum unconditional payment are not necessarily in bad faith, parties should seriously consider not fixing the minimum amount at zero. In determining whether the agreement was in good faith and in evaluating the declared monetary value of the agreement, courts focus on the minimum and guaranteed amounts. Fixing the minimum amount at zero may significantly lower the value of the agreement and reduce the likelihood that the settlement will be found in good faith.

PRACTICE TIP: In many cases, the agreement provides for no minimum unconditional payment, although the settling parties realize that in all likelihood the settling defendant ultimately will be required to pay a substantial part of the guaranteed amount. This is especially true in cases in which the settling defendant is primarily liable for plaintiff's injuries, because it is unlikely that the plaintiff will recover the full amount of the guaranty plus the nonsettling defendant's setoff from a defendant whose liability is low. In such cases, there is little reason for the settling parties not to provide a minimum unconditional payment. Such a term only increases the likelihood that the agreement will be found in good faith and is not likely to have any effect on the total amount the settling defendant ultimately pays to the plaintiff.

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Source: Civil Litigation/California Civil Procedure Before Trial/49 Sliding Scale and Structured Settlements/§49.16 4. Veto and Settlement Sharing Provisions

§49.16 4. Veto and Settlement Sharing Provisions

One risk often present in a sliding scale settlement is that the plaintiff will not vigorously pursue his or her case against the remaining defendants, or will settle with them too cheaply, ultimately resulting in the settling defendant paying most or all of the guaranteed amount at the conclusion of the litigation. This risk increases as the guaranteed amount approaches the settlement value of the entire litigation. Understandably, settling defendants wish to retain some control over the way in which the balance of the case, including settlement with the remaining defendants, is conducted.

Provisions that limit the plaintiff's ability to settle with the remaining defendants are commonly referred to as "veto provisions," since they purport to give the settling defendant the right to veto a subsequent settlement that the plaintiff intends to enter into with the nonsettling defendants. The supreme court has recognized that the settling defendant has a legitimate interest in ensuring that the plaintiff diligently prosecutes his or her claim against the nonsettling defendants, provided that the settling defendant does not attempt to discourage reasonable settlements between the plaintiff and the remaining defendants. Thus, such provisions are valid only if the veto is confined to subsequent settlements that will require the settling defendant to bear more than its fair "ballpark" share of damages. *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 883, 239 CR 626.

Veto provisions, although legitimate and often desirable to settling defendants, are closely scrutinized by courts. The settling defendant's attorney must attempt to remove the plaintiff's incentive to settle for an unreasonably low amount with the remaining defendants, but must be sure that the veto provision is not so overreaching as to defeat the good faith of the settlement. Since veto provisions may take a variety of forms, the parties should use the least restrictive veto provision possible that adequately protects the settling defendant.

EXAMPLE: A veto provision may simply require the plaintiff to use its best efforts to prosecute the remaining claims, or to pursue the litigation with the same diligence and effort as would have been employed in the absence of the settlement. Such a provision generally will be sufficient if the guaranteed amount is much less than the total settlement value of the case (as when the settling defendant is merely tangentially liable) and will probably not present a point of controversy at the good faith determination proceedings. A more stringent veto provision might require the written consent of the settling defendant before the plaintiff enters into a settlement that would require the settling defendant to pay a specified sum (the settling defendant's ballpark share of damages).

Identifying such a dollar amount may be difficult and may decrease the likelihood that the settlement is found to be in good faith. For example, if the agreement proscribes settlements below the recited value of the agreement, the nonsettling defendant may have ground to argue that the agreement discourages subsequent settlement and thus violates public policy, especially if the nonsettling defendant also challenges the recited value of the consideration paid. However, since the ballpark figure is actually a range, a veto provision is likely to survive a challenge if it concerns only those settlements below the low end of the ballpark figure.

An alternative approach that may obviate a challenge that the agreement discourages settlement with the remaining defendants is a provision that shares future settlement proceeds that exceed a certain amount with the settling defendant. In *Abbott Ford,* the supreme court implicitly authorized sharing of settlement proceeds. 43 C3d at 884. See also Pollack, *Sliding Scale Recovery Agreements After Tech-Bilt*, 8 CEB Civ Litigation Rep 121, 127 (June 1986).

EXAMPLE: A plaintiff enters into a sliding scale settlement agreement with defendant *A,* one of two defendants in a case in which the settlement value of the entire action is roughly $100,000. The reasonable range of defendant *A*'s share of the plaintiff's damages is between $40,000 and $60,000, and the agreement guarantees a recovery of $100,000. To avoid discouraging a subsequent settlement with the nonsettling defendant while providing the plaintiff with an incentive to settle for the greatest amount possible, the parties agree to split subsequent settlement proceeds as follows: Settlement amounts below $40,000 are credited entirely to defendant *A,* since such a settlement would require defendant *A* to pay more than $60,000, its maximum ballpark share of the plaintiff's damages. If settlement with defendant *B* is between $40,000 and $60,000, defendant *A* is credited with

25 percent of the settlement proceeds. Settlements that exceed $60,000 are credited entirely to the plaintiff. Thus, if the plaintiff later settles for $60,000 with the nonsettling defendant, defendant *A,* instead of owing $40,000 on the guaranty, receives a credit in the amount of $15,000 (one quarter of the subsequent settlement), reducing the total amount paid by defendant *A* to $25,000. After the settlement proceeds have been divided, the plaintiff's total recovery is $85,000.

The provision for sharing of subsequent settlement should not be designed to provide the first settling defendant with a profit if subsequent settlements are sufficiently high, because a court may view such a term as undermining the fair apportionment goal of CCP §§877-877.6. Additionally, such a provision should not credit to the first settling defendant any portion of the settlement proceeds that exceeds the high end of that defendant's ballpark range, since the provision may discourage settlement at an amount that would not require the first settling defendant to pay more than his or her fair share of the plaintiff's damages.

A provision that shares later settlement proceeds is desirable to a plaintiff because it provides the plaintiff with greater freedom in conducting the balance of the litigation. For example, if a plaintiff decides to settle for a low amount because he or she needs a quick cash payment or no longer wishes to pursue the litigation, the plaintiff's wishes will not be frustrated by the first settling defendant.

An alternative provision that has the same effect as a sharing provision but does not require actual sharing of subsequent settlement proceeds is one that reduces the guaranteed amount as the amount of settlement with the nonsettling defendant decreases.

EXAMPLE: A settling defendant could guarantee $100,000, but if the plaintiff later settles with the nonsettling defendant for less than $50,000 but more than $25,000, the guaranteed amount would be reduced to $75,000, and if for less than $25,000, to $50,000. Depending on the facts of an individual case, such a provision could be more or less cumbersome than a "settlement sharing" provision. Finally, parties using a declining guaranty provision should never allow the guaranteed amount to dip below the declared value, since the agreement could be challenged as impermissibly discouraging subsequent settlements.

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§49.17 5. No-Interest Loans

A no-interest loan term provides for either an up-front lump sum, or a series of periodic advances, as loans to the plaintiff that are to be paid back exclusively from any settlement from, or judgment against, the nonsettling defendants. Such provisions are favored, especially when the plaintiff is indigent, because the plaintiff is provided an opportunity to pursue his or her claims against the remaining defendants. See Pollack, *Sliding Scale Recovery Agreements After Tech-Bilt*, 8 CEB Civ Litigation Rep 121 (June 1986). See also *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 239 CR 626. Additionally, no-interest loans increase the value of the agreement, since the plaintiff receives the benefit of the time value of money.

Parties occasionally base the entire sliding scale settlement on a no-interest loan premise whereby a large loan, in the amount of the settlement value of the entire litigation, is advanced to plaintiff in exchange for plaintiff's release and promise to give the settling defendant all amounts later received by plaintiff from the nonsettling defendant, whether by settlement or after trial. Because such agreements are tantamount to sliding scale settlements, courts will evaluate such no-interest loan agreements according to the same standards applicable to sliding scale settlements. See 43 C3d at 877 n21. Such an agreement should state its value.

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§49.18 6. Good Faith Requirement

The parties to a sliding scale agreement may wish to provide for the contingency that following a motion to determine the good faith of the settlement, the trial court refuses to uphold the settlement's good faith. Such a provision is especially important to the settling defendant, because if the settlement is not in good faith, the agreement is not otherwise necessarily void; instead, the settling defendant may simply lose the substantial benefit of relief from liability to the nonsettling defendants for contribution or indemnity.

Although the settling parties may wish to declare the entire agreement void in the event it is not found in good faith, the parties should consider including one of at least two types of provisions that tend to preserve the settlement. First, the parties may provide that while the entire agreement is void in the event that the trial court does not uphold the good faith of the settlement, the parties will engage in good faith negotiations to amend the agreement to correct any deficiencies disclosed during the good faith proceeding. The parties should exercise caution before including a provision that voids only certain provisions (such as the value recitation or the maximum guaranteed amount clause) in an effort to preserve the agreement to enter into a sliding scale settlement, because depending on the evidence presented in opposition to the good faith motion by the nonsettling defendant, the parties may not thereafter wish to settle the case by sliding scale settlement.

Another method of addressing the failure of a determination of good faith is to provide a "straight" settlement alternative.

EXAMPLE: Parties to a sliding scale agreement that guarantees $1 million, with a minimum unconditional payment of $250,000 and a value of $600,000, could provide that in the event the agreement is not found to be in good faith, the parties agree that the settling defendant will pay a straight (*i.e.,* nonsliding scale) settlement of $750,000 in exchange for a full and final release.

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§49.19 7. Other Provisions

A sliding scale settlement agreement should also contain provisions normally included in a conventional settlement, such as a provision binding the agents, assigns, and successors of the settling parties; warranties of authority to enter into settlement; and a confidentiality provision (subject to CCP §877.5).

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F. Procedural Requirements

§49.20 1. Notify Opposing Counsel and Court

The settling parties are required to promptly inform the court of the existence of the agreement and its terms and provisions. CCP §877.5(a)(1).

PRACTICE TIP: The settling parties may wish to serve the notice of intent simultaneously with a motion to determine good faith, to avoid giving the nonsettling defendants an extended opportunity to analyze and challenge the good faith of the agreement.

No sliding scale recovery agreement is effective unless a notice of the settling parties' intent to enter into it has been served on all nonsignatory alleged defendant tortfeasors at least 72 hours before the agreement was entered into, although a judge or court may allow a shorter time. Failure to give this notice is not good cause to delay commencement of trial. CCP §877.5(c).

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§49.21 2. Motion for Good Faith Determination

There is no time limit within which a motion for a determination that a settlement was in good faith must be brought. *Greshko v County of Los Angeles* (1987) 194 CA3d 822, 829, 239 CR 846. A trial court generally evaluates the good faith issue on only those facts known at the time the settlement was entered into. *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 874, 239 CR 626; *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256.

However, if the parties delay in bringing a good faith motion and this delay prejudices the nonsettling defendant, the settling parties may face claims of laches, waiver, or estoppel by the nonsettling defendant. See *Greshko v County of Los Angeles, supra.*

NOTE: If significant facts pointing to the liability of the settling defendant are "discovered" between the time of the settlement and the good faith motion, the court may find that the settling parties *should have known* of such facts and evaluate the settlement in light of such subsequently discovered facts.

A nonsettling defendant can challenge a sliding scale settlement in two ways. First, the nonsettling defendant can accept the value of the agreement (declared by the settling parties) and attempt to show that because the assigned value is not within the *Tech-Bilt* ballpark, the settlement is not in good faith. Second, the nonsettling defendant can attempt to show that the assigned value is too low and that a greater offset is actually warranted. *Abbott Ford, Inc.,* 43 C3d at 879.

These two methods of challenging a sliding scale settlement do not readily lend themselves to argument in the alternative. The first challenge is generally used by a nonsettling defendant who believes the settling parties have grossly misevaluated the relative liability of the defendants or underestimated the settlement value of the plaintiff's case. The second challenge is used when the relative liabilities of the defendants are only somewhat misevaluated, or the agreement is actually more valuable than the settling parties claim. In such cases, the nonsettling defendant generally agrees that the guaranteed amount represents roughly the settlement value of the entire case.

WARNING: Nonsettling defendants should be careful not to make the common mistake of challenging the guaranteed amount as too low. Rather, proper focus is on the declared value (the amount of the offset) of the agreement.

A recalcitrant nonsettling defendant may find himself or herself in an extremely difficult position in opposing a good faith determination, in that the first challenge is often unavailable to a recalcitrant defendant.

EXAMPLE: Plaintiff enters into a sliding scale settlement with defendant *A,* one of two defendants in an action in which the settlement value of the entire case is roughly $1 million. Before the good faith settlement, defendant *B,* the recalcitrant, nonsettling defendant, has steadfastly refused to contribute more than $10,000 to a total settlement. The relative liability of the defendants is roughly equal. The sliding scale settlement guarantees $1 million and provides for a minimum unconditional payment of $250,000. The parties determine the value of the agreement to be $600,000. In such a case, defendant *B* cannot reasonably argue that the value is not within the settling defendant's ballpark, because such an argument requires defendant *B* to claim, on the one hand, that the total value of the plaintiff's case is substantially greater than $1 million, but requires the defendant to explain, on the other hand, why he or she failed to offer more than $10,000 to settle such a valuable case. Such an argument could be made only by a recalcitrant defendant who believes he or she has no liability to the plaintiff.

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§49.22 3. Burden of Proof

The burden of proof of establishing the good faith of a sliding scale settlement rests initially on the moving party, who is required to file a "bare bones" motion setting forth the ground of good faith, accompanied by a declaration setting forth a brief factual background of the case. *City of Grand Terrace v Superior Court* (1987) 192 CA3d 1251, 1259, 238 CR 119. The parties to the agreement also bear the burden of establishing the monetary value of the agreement. *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 879 n22, 239 CR 626. This may be shown by declarations by counsel for the plaintiff and the settling defendant that describe the way in which they reached the monetary value recitation in the agreement and point out any provisions of the agreement that affect its value, such as a no-interest loan provision or a substantial minimum unconditional payment.

After this initial showing, the burden of proof on the issue of good faith shifts to the nonsettling defendant to demonstrate the lack of good faith. 43 C3d at 879; *City of Grand Terrace v Superior Court* (1987) 192 CA3d 1251, 1261, 238 CR 119. See CCP §877.6(d). The settling party is then required to file responsive counterdeclarations to negate the nonsettling defendant's claims. 192 CA3d at 1262.

PRACTICE TIP: Since it is often difficult to anticipate whether the nonsettling defendant will attack the good faith of the motion by attempting to show that the assigned value is too low and a greater offset is warranted, or that the value is so low that the settlement is not in good faith, the party seeking a good faith determination should be sure the initial motion is indeed "bare bones" and includes no greater analysis of the agreement than is necessary for a minimum showing of good faith. The parties can then expand their analysis in a reply brief.

In deciding whether the declared value is accurate and appropriate, a court often does nothing more than "make its best estimate, taking into account the size of the guaranty figure and the likelihood that the settling defendant will actually have to pay out either that amount or some lesser sum." *Abbott Ford, Inc.,* 43 C3d at 879 n23 (nature and extent of evidence received at good faith proceeding left to discretion of trial court; nonsettling defendant not, however, entitled to mini-trial on valuation issue).

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§49.23 4. Discovery

The nonsettling defendant is entitled to conduct discovery on the issue of good faith. See chap 50. Since the financial condition and insurance policy limits of the settling defendant are relevant areas of review in good faith proceedings, the nonsettling defendant may conduct discovery into such areas. *City of Grand Terrace v Superior Court* (1987) 192 CA3d 1251, 1265, 238 CR 119.

The nonsettling defendant may move for a continuance of the hearing on the good faith motion to enable it to conduct necessary discovery. 192 CA3d at 1265. However, a court may, in its discretion, deny a motion for a continuance to conduct discovery. See *County of Los Angeles v Guerrero* (1989) 209 CA3d 1149, 1159, 257 CR 787.

NOTE: Generally, the settling and nonsettling parties may not depose their adversaries' attorneys to establish, for example, recalcitrance of the nonsettling defendant. *Spectra-Physics, Inc. v Superior Court* (1988) 198 CA3d 1487, 1494, 244 CR 258. Rather, depositions of opposing counsel are allowed only if (1) there are no other means available to obtain the information sought and (2) the information sought is not privileged, is relevant, and is "crucial to the preparation of the case."

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§49.24 5. Review of Good Faith Determination

The nonsettling defendant may petition for a writ of mandate within 20 days of notice of the court's determination. CCP §877.6(e). If the motion for good faith is denied, the plaintiff and the settling defendant may similarly petition for a writ of mandate. See chap 50.

Additionally, if the good faith determination results in a judgment dismissing the nonsettling defendant's cross-complaint for indemnity, as is usually the case, the nonsettling defendant may appeal the good faith determination. *County of Los Angeles v Guerrero* (1989) 209 CA3d 1149, 1152 n2, 257 CR 787. A good faith determination is left to the discretion of the trial court and must be upheld if supported by substantial evidence. *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 987, 229 CR 513.

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§49.25 G. Trial Considerations

Code of Civil Procedure §877.5(a)(1) requires disclosure of sliding scale agreements to prevent the settling defendant from secretly aligning himself or herself with the plaintiff and, at trial, admitting the liability of all of the defendants.

Similarly, if the action is tried before a jury, CCP §877.5(a)(2) also requires the court, on motion of a party, to disclose to the jury the existence and content of the agreement, unless the court finds that such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The jury disclosure required by CCP §877.5(a)(2) need be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

These provisions of CCP §877.5 apply only to actions based on acts or omissions occurring after December 31, 1987. In jury trials based on acts or omissions occurring before January 1, 1988, the jury disclosure required need be no more than is necessary to be sure that the jury understands (1) the essential nature of the agreement, but not including the amount paid, or any contingency, and (2) the possibility that the agreement may bias the testimony of the alleged tortfeasor or tortfeasors who entered into the agreement.

Presumably, an instruction by the court under CCP §877.5 should preclude the attorney for the nonsettling defendant from further cross-examination of the settling defendant on the issue of bias created by the existence of the sliding scale settlement agreement.

Because the court has the discretion to decline to give the jury instruction when disclosure would create substantial danger of undue prejudice, confusing the issues, or misleading the jury, the plaintiff may want to move in limine for an order precluding any reference to the settlement agreement. See *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 229 CR 513 (court did not abuse its discretion by deciding not to disclose settlements to jury when there was little opportunity for manipulation of evidence because of substantial depositions taken before execution of settlement).

PRACTICE TIP: Additionally, if the plaintiff's attorney calls the settling defendant as a witness at trial, the attorney should carefully consider whether to raise the existence of the settlement on direct examination. Arguably, if the settling defendant testifies to the existence of the settlement agreement on direct examination, the nonsettling defendant's attorney should have the right to cross-examine the witness on the terms of the agreement, subject to the court's control of the proceedings.

The attorney for the nonsettling defendant should carefully consider whether to request an instruction as soon as the settling defendant is called as a witness by the plaintiff or whether to request a jury instruction at the close of evidence.

If the trial court denies the motion in limine of the settling parties, the nonsettling defendant may wish to argue the possibility of bias and collusion during opening statement (to the extent the trial judge would permit) or during final argument. See Tompkins, *Explaining "Mary Carter" to a Jury,* 31 For the Defense 12 (1989).

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III. STRUCTURED SETTLEMENTS

§49.26 A. Defined

Basically, a structured settlement is an agreement under which a plaintiff compromises a personal injury claim in exchange for a promise of periodic payments for a specified period, usually in addition to an immediate cash payment. The future payments are often funded by a single premium annuity purchased by the defendant.

NOTE: Structured settlements are sometimes referred to as "annuity settlements," but this term is not a wholly accurate description of the transaction, and it should not be confused with the "settlement annuity" discussed in §49.28.

A typical structured settlement plan consists of an immediate payment of cash by the defendant—typically between 35 and 65 percent of the defendant's total expenditure on the settlement—with the balance used to fund future payments. Although an annuity is usually purchased to fund future payments, sometimes the funding assets are United States Treasury bonds. Occasionally, there is no prefunding arrangement; the plaintiff simply relies on the long term reliability of the defendant or defendant's liability insurer.

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§49.27 B. When Structured Settlement Used; Parties' Objectives

Structured settlement proposals are more the rule than the exception when the settlement value of the case exceeds $250,000, are generally appropriate when a lump-sum settlement would exceed $100,000, and may be used to good effect in cases of much lower value. Either the plaintiff or the defendant may propose a structured settlement.

A defense attorney offering a structured settlement as a possible alternative to a lump-sum settlement normally emphasizes the benefits of the settlement to the plaintiff. Defense counsel may argue that a particular structure will give the plaintiff important tax advantages, a guard against too-early dissipation of a lump sum, and better overall financial performance than investing a lump sum. A plaintiff may seek, or agree to accept, a structured settlement for such tax "spendthrift" and financial performance advantages.

Among the questions that the plaintiff's attorney should ask when evaluating a structured settlement proposal are the following:

- Is the future payment plan highly reliable?
- Is the annuity that the defense proposes to purchase to fund future payments competitive, *i.e.,* will it generate the highest possible future benefits consistent with acceptable reliability?
- If the plaintiff may have a reduced life expectancy, is the proposal based on a competitive age rating?
- How effectively will the proposed settlement address the specific future financial needs of the plaintiff and those who are financially dependent on the plaintiff?
- How will the proposed settlement affect the plaintiff's estate plan?

The defense attorney's objective—settlement at the lowest outlay possible—may be achievable only if the plaintiff is persuaded of the value of one or more of the economic advantages described in §§49.39-49.44. Among the techniques used in "selling" structured settlement proposals are to:

- Make offers in writing.
- Use specialists in structured settlements to present proposals. (The touted benefits of a structured settlement may be viewed with less suspicion when explained by someone other than adverse counsel.)
- Address specific future financial needs that the plaintiff is likely to face.

NOTE: Including periodic payments in the settlement may make plaintiff's covenants, such as indemnification agreements, more enforceable.

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C. Economic Characteristics

§49.28 1. Settlement Annuities

For purposes of this chapter, a settlement annuity is a contract promising future payments issued by a life insurance company. The product, called a "settlement annuity," has features that distinguish it from other types of annuities. For example, it is designed for ownership by an institution, not by the recipient of the payments. Also, the cost of lifetime benefits may be discount-priced if the medical circumstances of the injured party indicate a reduced life expectancy. This form of annuity cannot be purchased after a settlement.

A settlement annuity is not a tax-free investment, as are municipal bonds. Income is realized by the institutional owner of the annuity. See IRC §72.

Each settlement annuity contains four designations or "roles":

- An *owner* (a defendant or defendant's liability insurer, or—in the event of an assignment of the future payment obligation—the assignee);
- An *annuitant* (the individual who is the "measuring life," usually the injured party or, in wrongful death cases, one or more of the decedent's heirs);
- A *payee* (the person who receives the checks from the issuer of the annuity); and
- A *beneficiary* (the person or entity to receive the payments on the death of the payee; a specific individual or individuals or, if better from an estate planning standpoint, the estate).

Normally, the plaintiff has no right or interest in the annuity. See §49.49. One exception now available through some participants in the structured settlement marketplace is a security interest, granted by an assignee in the funding annuity under a 1988 amendment to IRC §130. See §49.50.

Aside from the foregoing exception, the owner of a settlement annuity (*e.g.,* defendant's insurer) has all rights in the contract, including the right to change the payee or the beneficiary. Rev Rul 79-220, 1979-2 Cum Bull 74. Annuity owners often separately agree not to change a payee designation, but this is not an incident of the annuity itself. Thus the annuity company is generally not directly obligated to the plaintiff. As a result, reliability usually arises from the presence of a strong future payment obligor that owns the annuity and is directly liable to the plaintiff. That is why, for example, in some structured settlements involving annuities issued by Executive Life Insurance Co. (ELIC), the injured parties continued to receive payment; the liability insurers who owned the worthless ELIC annuities were obligated to make the future payments.

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§49.29 2. Independent Settlement Annuity Marketplace

About 20 annuity companies have been active in the field at any given time since structured settlements came into common use in the late 1970s and early 1980s. These companies sell through independent, licensed life insurance agents who are usually appointed by several different life insurance companies. On life insurance companies that offer settlement annuities only if an affiliated liability insurer is involved, see §49.32. It is futile to approach most life insurance companies about settlement annuities because they do not offer this product.

Settlement annuities are issued by life insurers that, generally, pursue quite conservative investment practices. A consequence of this is considerable convergence in pricing.

EXAMPLE: For a plan that would provide monthly benefits to the injured party for 30 years certain, perhaps one-fourth of the companies would quote about the same price, with variations of only 1 or 2 percent. Farther back in the competition, another one-fourth to one-half of the companies might be 3 to 8 percent above the best price. Remaining companies would quote so much higher a price as to be effectively out of the market.

Commonly, the largest two or three companies—those with the highest ratings and strongest reputations—do not aim to have the most competitive price. In effect, they expect the customer to pay a bit more for the greater strength they believe they offer.

Rarely does a single annuity company offer the lowest rates across the range of common payment formats. For example, on a given day, Company A may offer the best rates on lifetime benefit plans for males, ages 18-40; Company B may be best on "college plans" for settlements involving young children; and Company C may have the lowest price on various annuities certain.

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Source: Civil Litigation/California Civil Procedure Before Trial/49 Sliding Scale and Structured Settlements/§49.30 a. Structured Settlement Brokers

§49.30 a. Structured Settlement Brokers

The annuities issued by the 15 to 20 annuity companies who are active in the independent marketplace are sold (or "placed") by life insurance agents, who may refer to themselves as structured settlement "brokers" or "consultants."

From the inception of the industry, most brokers have followed a policy of making settlement annuity quotes available only to defense representatives. Some brokers have advertised this. At times, the defense-only restriction was imposed on the life agents by the life insurers, who refused to appoint a structured settlement professional unless the latter agreed not to provide offers or pricing information to plaintiffs' counsel.

NOTE: The defense-only approach has become less common in California, for several reasons: The passage of Proposition 103 (the Insurance Initiative) in 1988 cast doubt on whether such practices—even in an industry that is exempt from the antitrust law—would withstand judicial scrutiny. Also, in recent years, lawsuits have made many life insurers and settlement brokers leery of enforcing such practices against plaintiffs' lawyers in California. Nevertheless, a properly configured structured settlement requires the participation of the defendant or its insurer because of the requirement that one of them promise to make fixed and determinable periodic payments. Thus, even if plaintiffs achieve full access to annuity quotes, it will still be impossible for a plaintiff to directly purchase a settlement annuity. This product exists only in the context of a consensual agreement between the opposing parties, except in medical malpractice cases or suits against certain public entities in which the court may enter a judgment for periodic future payments. See discussion in California Tort Damages §§15.16-15.20 (2d ed Cal CEB 2002).

Structured settlement brokers develop proposals using printed rate sheets or computer disks. Settlement annuity rates fluctuate according to changes in the bond markets. Consequently, no quotation from an annuity issuer should be relied on for more than two weeks. The broker should always specify the expiration date. Counsel must make no settlement offer that will be open longer than the annuity quote is valid.

The more common structured settlement proposals (not including ones involving reduced life expectancy of the plaintiff) can be formulated by a broker in a matter of hours. However, it is prudent for counsel to allow two days for the process in order to reduce the possibility of error.

NOTE: Counsel should not conclude a structured settlement without considering many factors other than cost, *e.g.,* choice of future payment obligor, choice of annuity issuer, and estate planning questions.

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§49.31 b. Economists and Valuation Services

In response to obstacles encountered in learning about market annuity rates and available product, many plaintiffs' counsel have turned to independent services to (1) estimate the cost and value of defense-generated settlement proposals and (2) create alternative proposals for periodic payments, which can be offered on the plaintiff's behalf. Ordinarily, such services are performed by persons who are not settlement annuity agents or who have been appointed with just one or two annuity companies; they charge a flat or hourly fee, rather than earning a commission by placing an alternative plan.

NOTE: These services are not always able to use conventional present value calculations to achieve an accurate estimate of the cost to the defendant of a given annuity-funded plan, particularly if age-rating is a factor, because age-rating is done on a case-by-case basis. Thus, a plaintiff's lawyer who wants to know how much a proposed plan would cost the defendant must often make a considerable effort to obtain actual cost figures, but it should be done whenever possible in order to avoid overreaching by the defense and incorrectly calculating the contingent fee.

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§49.32 c. Affiliated Life Insurance Company Programs

Several insurance company families have adopted the practice of negotiating structured settlements in which the property and casualty company (*i.e.,* the defendant's insurer) uses an annuity issued by an affiliate life insurer. Generally, these programs have tried to use the influence of the property and casualty company—which controls the money to be spent on the settlement—to direct the annuity business to the affiliate. Depending on the companies, this policy may be pursued with more or less zeal.

From a practical standpoint, the most important consequence arising from the participation of such "in-house" structured settlement operations relates to pricing. It is difficult for any life insurance company to stay highly competitive on each of several different popular payment formats. The result is that when the liability insurer pushes too hard to steer business to its affiliate life insurer, the in-house structured settlement proposal is often uncompetitive. Also, some in-house programs involve companies whose reliability—as judged by the major independent rating services—may be a notch or two below that available in the independent marketplace.

PRACTICE TIP: Plaintiff's counsel should always ask for the identification of the proposed annuity issuer when receiving a settlement offer from the defense. It may be necessary to seek a different annuity issuer to maximize benefits and a different obligor to heighten reliability.

For defense counsel, there is some potential for a conflict of interest with affiliate programs. The liability insurer may wish to keep the annuity premium "in the family," but the insured has no particular interest in which life insurer issues the annuity.

Most programs involving life insurance affiliates face the greatest difficulty in cases in which the plaintiff has a reduced life expectancy. The affiliate may not offer a substantially reduced price regardless of how much the life expectancy of the plaintiff has been compromised. See §49.42 on "rated-age annuities."

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3. Common Payment Formats

§49.33 a. Lifetime Benefits

The usual structured settlement format involves monthly payments for the lifetime of the plaintiff with several years of the payments being "guaranteed" or "certain."

EXAMPLE: Plaintiff settles her case for monthly payments for life, 20 years guaranteed. If plaintiff were to die 12 years later, 8 years' worth of payments remain to be paid to her successors. If she were to die 31 years after the settlement, the payments would cease on her death.

It is common for lifetime benefits to be guaranteed for 20 or 30 years. Shorter guaranteed periods are typical with elderly claimants or others who do not have long life expectancies. It is rare for a settlement to provide lifetime benefits only, with no guaranteed payment period, unless the plaintiff's life expectancy is quite short.

WARNING: It is generally best to use some guaranteed period if possible. Otherwise, if plaintiff dies soon after the settlement is concluded, payments cease quite soon after having begun, giving a windfall to the annuity company and leaving little or no estate for the successors. Normally, the additional cost of providing a substantial guaranteed period is relatively small.

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§49.34 b. Annuity Certain

Another payment option is the "annuity certain"—a monthly or annual payment plan for a fixed term. Such a plan can be useful to support a plaintiff until the expected restoration of earning capacity or until other sources of income can be tapped, as when a pension, social security, or a retirement plan begins to pay. Otherwise, the typical plaintiff becomes at least somewhat dependent on the payments for the regular costs of living and finds it difficult to adjust after the payment stream stops.

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§49.35 c. Providing for Inflation

Settlement annuities are designed to fund obligations involving fixed and determinable future periodic payments, ruling out variable yield annuities. Good financial planning provides for the effects of inflation. Many monthly benefit arrangements include "escalator" provisions, which increase the regular benefit on the anniversary date of the start of the payments. The most common escalator is 3-percent per annum, but 4-, 5-, and 6-percent escalator provisions are available.

NOTE: Even a 6-percent escalator would not have been sufficient to offset the effect of cost-of-living increases in some years during the last decade. A 3-percent escalator is not likely to keep the benefit stream increasing at a rate equal to increases in the cost of living over a period of a decade or more. For this reason, escalator provisions are only part of the financial planning response to inflation.

Even a low annual escalator affects the overall cost of the projected payments.

EXAMPLE: A male, age 45, of normal life expectancy is to receive monthly benefits for life, 20 years certain. One proposed payment plan provides a 3-percent per annum escalator, while a second plan offers a 6-percent annual increase. Under the 6-percent plan, the initial monthly benefit would be only 68 percent of the initial monthly benefit under the 3-percent escalator plan. Of course, the 6-percent escalator provision would cause the monthly benefit to grow at a faster rate, but it would not produce as large a monthly benefit as the 3-percent plan until 15 years had elapsed.

The phenomenon of very low initial benefits when using higher escalators tends to reduce the appeal of such proposals. Nevertheless, at times large cost-of-living escalators must be used. Occasionally, the need for spendthrift protection is so great that other options are precluded.

In some cases the sum available for the structured settlement is so small that stingier approaches to hedging against inflation must be considered. The "stairstep" or "step" plan uses monthly payments that stay level for a period of time, then take one step up and stay level for a similar period, then take another step, and so forth. (A simple example would be, *e.g.,* $2000 per month in the first 5 years; $2200 in the next 5 years; $2400 in the next 5 years.) A stairstep plan typically offers very modest protection from inflation.

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§49.36 d. Future Lump Sums

A sound approach for countering inflation, as well as for achieving other objectives, is the use of future lump sums.

EXAMPLE: In addition to paying a monthly benefit, the defendant or liability insurer might undertake to pay $25,000 after 5 years, $50,000 in the 10th year, $100,000 in the 15th year, and $150,000 in the 20th.

Such future lump sums are nearly always guaranteed, so that they will be paid to a successor if the plaintiff dies before a payment falls due. The sums provide reinvestment opportunities; if over time the plaintiff's buying power is reduced by high inflation, interest rates would usually also have increased, and the plaintiff could use some or all of a future lump sum to invest in high-yielding debt instruments. See §49.40 on conservation of funds. Future lump-sum payments provide a kind of forced savings plan for the plaintiff.

PRACTICE TIP: Many defense counsel and claims professionals prefer to substitute future lump sums in a structured settlement proposal for higher periodic payments or escalators because the total apparent payout is thereby boosted at a modest cost. However, too great reliance should not be placed on lump sums to be paid, *e.g.,* 35, 40, or more years in the future. The farther in the future a payment is to be made, the less buying power it will have, and the plaintiff will lose the ability to invest sums paid sooner.

A popular structure for minor plaintiffs includes lump sums paid during the college years with a final lump sum payable at age 25 or 30.

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Source: Civil Litigation/California Civil Procedure Before Trial/49 Sliding Scale and Structured Settlements/§49.37 e. Deferred Payments

§49.37 e. Deferred Payments

Occasionally, a plaintiff is well served by a plan that defers the start of monthly benefits.

EXAMPLE: Monthly benefits can be deferred to the retirement date of a plaintiff who has made a good recovery, can still work, and is able to generate adequate income, but who has an inadequate pension.

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Source: Civil Litigation/California Civil Procedure Before Trial/49 Sliding Scale and Structured Settlements/§49.38 f. Other Funding Vehicles

§49.38 f. Other Funding Vehicles

United States Treasury obligations are used, instead of an annuity, as funding assets in some structured settlements. The structured settlement obligor (always an assignee under IRC §130; see §49.50) owns the bonds, but the plaintiff receives a security interest in the assets. Periodic payments funded by Treasury bonds usually provide level income. It remains uncertain whether it is workable, from the standpoint of the obligor's tax treatment, to use zero coupon bonds or individual coupons from a regular Treasury bond as funding assets. When the bonds mature, a large lump sum is paid to the plaintiff. Most payment plans of this type run for 20 or 30 years.

NOTE: A few companies offer a product in which the future payment obligation is assigned to a trust. Before accepting such a product, the attorney would want convincing answers to questions about the constructive receipt and economic benefit doctrines (see §49.52) and the income taxation of trusts.

A plaintiff's attorney should not accept general creditor arrangements but should require that the Treasury bonds be set aside as security for the future payments. Such a security arrangement became permissible under 1988 tax legislation. See §49.49 on amendments to IRC §130. With a security interest, the plaintiff can reach the Treasury bonds if the owner becomes insolvent; thus there is a potential for ultimate reliability. See §§49.53-49.55.

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Source: Civil Litigation/California Civil Procedure Before Trial/49 Sliding Scale and Structured Settlements/§49.39 4. Economic Advantages of Structured Settlements

§49.39 4. Economic Advantages of Structured Settlements

The economic advantages of a tax-free structured settlement may be considered under three main headings: conservation of funds, tax savings, and rated-age annuities. In practice, the concept of conservation of funds often has a corollary—elasticity of lifetime benefits—which is also discussed separately in §49.44. In addition, a structured settlement may have particular utility in cases involving injuries to minors. Thus it is useful to consider the five different aspects of financial benefit that can be derived from a structured settlement. Many cases present more than one such favorable aspect.

A structured settlement is rarely an all-or-nothing proposition. Usually some periodic payments—even if they will cost only 10 or 20 percent of the amount spent by the defendant on the compromise—will have some advantage to the plaintiff, particularly with respect to that part of the plaintiff's financial future in which a conservative approach is indicated.

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§49.40 a. Conservation of Funds

The concept of conservation of funds includes spendthrift protection—against the rapid and improvident dissipation of a recovery—and extends to issues related to the achievement of long term financial goals by individuals who are not reckless with money but find it easier to spend than to save. Many structured settlements result from advice by the plaintiff's lawyer to the injured party based on the attorney's belief in the benefits of conservation of funds.

A challenge facing any plaintiff who receives an all-cash settlement is not only to invest sensibly and manage the investments, but also to reinvest—time and again—a substantial portion of the interest, dividends, and gains arising from the original investment. Few persons who suffer substantial injuries are experienced in living on the investment of wealth, as opposed to earning a living. A structured settlement can shift part of the burden of accomplishing sound investment, management, and reinvestment of funds.

The following are some arguments that either counsel may wish to employ, according to the circumstances, in trying to bring about a structured settlement:

- Achieving financial security requires both sound initial investments and continuing restraint on consumption.
- Even well-educated individuals may lack the consistent resolve needed for successful investment for long term income production.
- Large sums of money tend to attract friends and relatives, many of whose proposals for how the plaintiff should "invest" will be unduly risky, although difficult to reject, causing offense or bad feelings.
- A disabled plaintiff may experience pressure, stemming from fear and insecurity, to spend lavishly in order to ensure the kindness or attention of other individuals.
- Children may grow up to be less than fully responsible, thrifty adults; and many capable adults will become less competent.

It is important to maintain a balanced perspective about the value of payments due in the future. Although the benefit of conserving funds is substantial, a sum payable in the future must be evaluated differently from the same amount presently due.

EXAMPLE: A badly injured young woman is offered a substantial monthly income, together with guaranteed future lump sums of $200,000 in 5 years; $250,000 in 10 years; $300,000 in 15 years; and $400,000 in 20 years. The total payout is calculated to be $1,150,000. (This amount is more than 2.5 times the $400,000 or so it would cost the liability insurer to fund the payments.) It would not be accurate to say that this plan is "worth" over $1.15 million; it has a present value equal to its cost. The purchasing power of, *e.g.,* $300,000 15 years from now is likely to be much less than today. On the other hand, accepting such a settlement ensures that the plaintiff will have sums to use at important times in the future. She need not, in the meantime, worry about investing sensibly, reinvesting diligently, or resisting the importunities of well-meaning relatives and friends.

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Source: Civil Litigation/California Civil Procedure Before Trial/49 Sliding Scale and Structured Settlements/§49.41 b. Tax Savings

§49.41 b. Tax Savings

A structured settlement of a personal injury claim involving physical injury or physical sickness can be configured so that each periodic payment will be received free of income tax by the plaintiff. See IRC §104(a)(2). Note, however, that since enactment of the Small Business Job Protection Act, which included an amendment to IRC §104(a)(2), all punitive damages in tort cases are now taxable, as are emotional distress damages in cases not involving physical injury or sickness (*e.g.,* defamation, insurance bad faith, wrongful termination). A settlement annuity generates taxable income, but that income is recognized and reported by the annuity owner. Both the initial amount expended by the defendant and the income it earns in the funding asset can be made to flow through to the plaintiff in a stream of tax-favored periodic payments.

EXAMPLE: A structured settlement includes periodic payments costing $200,000 to fund through the purchase of a settlement annuity, with a projected payment to the plaintiff of $500,000. The annuity owner recognizes income under IRC §72, using an "exclusion ratio." The single premium amount is the numerator, and the expected payout is the denominator. The exclusion ratio is $200,000 divided by $500,000, or 40 percent. For each dollar paid to the plaintiff, the owner recognizes 60 cents as ordinary income. (For reasons that need not be addressed here, this is not a negative feature of structured settlements for defendants, liability insurers, or assignees.) But each dollar of the $500,000 payout is received by the plaintiff free of income tax. Note that periodic payment settlements may be desired in some cases involving *taxable* recovery. The reason is that deferred recognition of income, or recognition in lower income years (*e.g.,* during retirement), can result in substantial tax savings.

As a result of this form of "tax subsidy," structured settlements have consistently produced better after-tax yields than are available through other forms of conservative investment for long term income production. Structured settlement yields may rise or fall in parallel to the yields on high-grade and municipal bonds, but because the structured settlement in effect converts income buildup to tax-free periodic payments, the structured settlement consistently offers a higher yield.

Sometimes a plaintiff is so severely injured that the likely expense of medical care in the postsettlement years will mean that much of the plaintiff's income will be sheltered. On the other hand, many serious cases do not involve heavy future medical expenses.

NOTE: Structured settlement yields fluctuate as a function of the yields available in the marketplace on high-grade debt securities. In general, as the yield on long term United States Treasury obligations increases or decreases, the yields on structured settlements follow.

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§49.42 c. Age-Rated Annuities

An important feature of structured settlements is age-rating of lifetime benefits. This is a commonplace practice in very serious injuries. A rated-age annuity offers lifetime benefits at a reduced price (compared to standard rates), based on the annuity company's evaluation that the annuitant has a life expectancy lower than the statistical average for his or her age and sex. Sometimes phrases such as "substandard life expectancy," or "rate up" are used to describe these cases.

An age rating is the process by which the annuity company's medical underwriter, a doctor experienced in evaluating life expectancies, reviews the plaintiff's two or three most significant medical reports and formulates an assumed or hypothetical age, which is higher than the plaintiff's actual age. This assumed age is used to calculate a lower premium for a lifetime payment plan.

Parties tend to overlook the rated-age approach unless the injuries are catastrophic. But there are other cases—often involving medical conditions not related to the accident—that deserve consideration for a structured resolution based on medical underwriting. Examples of such conditions are gross obesity, diabetes, and heart disease.

EXAMPLE: A 2-year-old boy sustained serious brain damage in a near drowning. At the time of settlement, he was 12 years old. Although the normal life expectancy for 12-year-old males is about 60 years, this boy was rated up to age 65 by an annuity company, which means that the company believed his life expectancy to be equivalent to that of the typical 65-year-old male, or about 14 years. For a normal life expectancy, the cost of providing benefits for life, with the first 10 years certain, would be $141,200. With a rate-up, however, the cost would be $102,100, or about 28 percent less. Alternatively, the boy could have been provided with a lifetime payment stream, also guaranteed for 10 years, which would start at $1000 a month, increasing 3 percent per year thereafter. Without the rate-up the cost would be $207,300, and with the rate-up the cost would be $121,400, a differential of 41 percent.

There is particularly keen competition among life insurers in the field of rated-age annuities. It is best to obtain quotes from several different annuity companies; otherwise, the parties to the settlement may miss a bargain.

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§49.43 d. Yields on Minors' Compromises

Settlements of minors' claims often use future payments, even when the amount needed to fund such payments is as low as $15,000. Otherwise, a minor's settlement would normally be placed in a blocked account until the minor reached the age of majority. Most of the money placed in blocked accounts goes into demand accounts or short term certificates of deposit, which earn comparatively low interest. In addition, since 1986 it has been the general rule that a minor is taxed on all income in excess of $1000 per year (adjusted for inflation for tax years starting after December 31, 1995) at the top marginal tax rate of the parent(s). IRC §1(g). For taxable years after December 31, 2005, IRC §1(g) applies to a child who has not attained the age of 18 before the close of the taxable year. IRC §1(g)(2). Thus, blocked-account interest may be subject to substantial taxation.

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§49.44 e. Elasticity of Lifetime Benefits

Another financial advantage offered by structured settlements is elasticity of the relief. Benefits continue to be paid even if the plaintiff lives to a very great age. Unlike lump-sum settlements and verdicts, relief expands according to the postsettlement circumstances actually occurring in the plaintiff's life.

NOTE: Some elderly persons experience diminishing ability in managing money. It becomes unduly burdensome for them to seek out good investment advice, remember and apply the advice, and avoid overreaching by untrustworthy counselors.

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Source: Civil Litigation/California Civil Procedure Before Trial/49 Sliding Scale and Structured Settlements/§49.45 5. Economic Limitations of Structured Settlements

§49.45 5. Economic Limitations of Structured Settlements

Sensible planning requires the plaintiff and plaintiff's counsel to anticipate two financial problems that may arise:

- A period of inflation substantially greater than the rate prevailing at the time of the settlement (see §49.45); and
- A large, unexpected economic burden, such as a medical emergency (see §49.46).

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§49.46 a. Inflation

A climate of sharply increasing inflation over a prolonged period could substantially reduce the buying power of anyone who is living on a fixed stream of benefits. As noted in §§49.35-49.36, escalators and future lump sums may help address this problem, but even these arrangements may prove inadequate.

NOTE: A plaintiff who receives all cash may attempt investment strategies to counter the possibility of future inflation. For example, the plaintiff could invest in high-grade bonds that mature at intervals, creating a reinvestment opportunity on each of the maturity dates. If the cost of living had risen, the interest paid on high-grade bonds would also normally be higher, and it would be possible to reinvest sums received on maturity of the bonds at the higher interest rates. Great discipline—reinvestment of all but needed income—would be required. Another plaintiff might invest in common stocks or mutual funds that over the long term—*i.e.,* 10 to 20 years or more—have consistently outperformed conservative debt instruments. However, high-quality bonds are generally regarded as safer than the majority of stock investments, and there is no guaranteed yield with common stocks. If the plaintiff runs into financial difficulties, it may be necessary to sell stock in an adverse market. In sum, it may be the unusual personal injury victim who is able to successfully pursue one of these inflation-fighting strategies.

Although protecting against inflation is an important objective of any financial plan, it is not the only potential pitfall facing plaintiffs, and it may not be the most important one.

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§49.47 b. Financial Emergencies

Most structured settlement obligors refuse to commute a structured settlement into cash. Also, an assignment of the future payment stream to secure a loan is discouraged, partly for tax reasons. See §49.41. Consequently, the receipt of *only* structured payments, without any cash recovery, may result in unacceptable inflexibility.

Everyone faces some risk that a large, unanticipated financial demand will arise. Illness within the family or extended family, a large uninsured property loss, or other unusual circumstances can create a financial emergency. Persons who have suffered personal injuries may be at an even greater risk of these eventualities than the general population. One solution is to avoid a settlement for the plaintiff that relies only on periodic payments. A proper use of the "up-front" portion of any structured settlement is to give the plaintiff a reserve against unexpected adversity.

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§49.48 6. Other Considerations

Factors that may affect the thinking of parties deciding whether to propose or enter into a structured settlement, in addition to those discussed in §§49.39-49.47, include the following:

- The defendant may prefer a structured settlement when the plaintiff has given a promise, *e.g.,* to indemnify, that is to be performed in the future. A settlement that provides future payments makes such promises more enforceable because the plaintiff will probably not become judgment-proof.
- A structured settlement involves some risk that the periodic payment obligor will become insolvent and not make future payments. A properly configured structured settlement makes this risk negligible but does not eliminate it.
- Governmental entity defendants may favor structured settlements on public policy grounds to reduce the possibility that a seriously injured individual will become a public charge after dissipating an all-cash settlement.

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D. Tax Treatment of Structured Settlements

§49.49 1. Basic Authorities

A structured settlement is, in part, a tax-driven transaction. Because misconceptions abound, both the law and certain myths are discussed in this and the following sections. Internal Revenue Code §104(a)(2) generally excludes from taxable income any recovery on account of personal *physical* injury or *physical* sickness, other than punitive damages, whether the recovery is by suit or agreement and whether as lump sum or periodic payments. Pub L 104-188, §1605(a), 110 Stat 1755, 1838. The exclusion does not apply to recovery on account of previously deducted medical expenses. IRC §104.

Emotional distress is not treated as a physical injury or physical sickness for purposes of IRC §104(a)(2) except to the extent of payments for medical care described in IRC §213(d)(1)(A)-(B) that are attributable to emotional distress. IRC §104. Therefore, the exclusion does not apply to damages for defamation or wrongful termination that are accompanied by emotional distress. If an action has its origins in a physical injury or sickness, however, all damages (other than punitive damages) that flow from the injury are excludable, even if the recipient is not the injured party. For example, loss of consortium due to physical injury of the recipient's spouse is excludable.

Amendments to IRC §104 in 1996 that eliminated the exclusion for damages received for nonphysical injury or nonphysical sickness and for all punitive damages apply to amounts received after August 20, 1996. IRC §104(d)(1). The amendments do not apply to amounts received under a written binding agreement, court decree, or mediation award in effect on September 13, 1995. IRC §104(d)(2).

Earlier amendments to IRC §104(a) made punitive damages recovered on account of nonphysical injuries (*e.g.,* in tort claims for defamation, wrongful termination) taxable if the claim arose after July 10, 1989 (Pub L 101-239, 103 Stat 2379 (1989)).

In 1979 the Internal Revenue Service issued Rev Rul 79-220, 1979-2 Cum Bull 74, the seminal ruling in the field of structured settlement law. It is a model; it enunciates basic principles for proper configuration of structured settlements and defines what is out of bounds. Its features were later codified in IRC §104(a)(2).

In Rev Rul 79-220, the IRS considered a transaction in which a liability insurer, *M,* settled a personal injury claim for a sum of "up-front" cash and two promises. First, *M* promised periodic payments to the plaintiff, *A,* of $250 per month for life, 20 years guaranteed. The second promise was that *M* would buy and own an annuity from which payments would flow in the precise amounts promised to *A*. The annuity would be subject to *M*'s general creditors. *A* was named the payee, but *M* retained all rights of ownership in the annuity, including the right to change the payee. The ruling said that *A* could exclude each of the checks issuing from the annuity from income under IRC §104(a)(2). Also, if *A* died during the first 20 years, his successors in interest would receive the remaining (*i.e.,* guaranteed) payments free of income tax.

Under IRC §130, and Rev Rul 79-220, there must be a promise by the defendant or liability insurer of fixed and determinable periodic payments. In general, California law does not permit a court to impose a periodic payment obligation on a tortfeasor.

WARNING: A plaintiff cannot achieve the same result by negotiating to obtain a cash settlement with the idea that a structured settlement could then be purchased. At least part of the periodic payments would be taxable as investment income.

For a time after promulgation of Rev Rul 79-220, many defense professionals resisted the idea of committing their clients to undertaking a future payment obligation. This problem was resolved in early 1983 by new legislation. It added IRC §130 to allow the assignment of future payment obligations. Pub L 97-473, 96 Stat 2605 (1982). Now defense counsel frequently negotiate structured settlements in which the long term obligation created by the defendant's promise is transferred. However, it is still generally true that there cannot be an assignment of a structured settlement obligation unless that obligation first comes into existence by virtue of a voluntary promise by the defense.

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§49.50 2. Assignments Under IRC §130

Internal Revenue Code §130 permits structured settlements to be used in cases involving small liability insurers or self-insured defendants that otherwise would not be good candidates to serve as obligation holders for obligations that could extend over decades. A requirement for favorable tax treatment imposed by Rev Rul 79-220 is that the annuity be subject to the general creditors of the promisor. If the promisor is not a strong financial institution, there is an unacceptable risk of its insolvency, the annuity payments' being swept into the bankrupt estate, and plaintiff's receiving less than 100 percent. Internal Revenue Code §130 allows an assignee of a structured settlement obligation to receive favorable tax treatment if the assignment complies with certain requirements, making it a "qualified assignment."

Section 130 contemplates that the assignee will receive the amount needed to purchase the funding annuity or other funding asset. It will own the asset and be liable for the periodic payments. In most instances, the settlement agreement provides that the assignor—*i.e.,* the initial promisor, the defendant, or liability insurer—is released from the future payment obligation, although it may also be agreed that the original obligor is to remain liable.

For an assignment to be a qualified assignment, it must be of "a liability to make periodic payments as damages (whether by suit or agreement), or as compensation under any workmen's compensation act on account of personal injury or sickness (in a case involving physical injury or physical illness)." IRC §130(c). The periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient, and the assignee's obligation on account of the personal injuries or sickness cannot be greater than the obligation of the person who assigned the liability. Moreover, the periodic payments must be excludable from the gross income of the recipient under IRC §104(a)(1) or (a)(2). This last requirement limits the use of IRC §130 assignments to claims for damages involving physical injury or physical sickness, other than punitive damages. Thus, such assignments cannot be used in, *e.g.,* tort cases in which there is no physical injury or sickness, *e.g.,* insurance bad faith and most cases of wrongful termination, employment discrimination, or defamation. IRC §104(a)(1).

Since 1988, it is no longer the rule that the plaintiff can have no rights greater than those of a general creditor against the assignee, which authorizes the creation of a security interest in the funding asset(s) when an assignment is made. Pub L 100-647, §6079(b)(1)(A)-(B). Now, a majority of assignees active in the business will grant a security interest in the annuity or in United States Treasury bonds that fund the future payments.

Self-insured defendants use assignments to permit a current tax deduction for the cost of funding the structured settlement. Under IRC §461(h), enacted in 1984, there would usually be an adverse tax result if a self-insured defendant were to remain liable on the periodic payment obligation. Self-insureds may face adverse income recognition rules governing annuities owned by nonnatural persons. See IRC §§72(a) and 72(q)(2)(G). (These tax accounting and income recognition problems do not face liability insurers, whether or not the obligation is transferred to an assignee.)

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§49.51 3. Tax Issues in Settling Employment Disputes

Many claims for employment discrimination, wrongful termination, and the like present income tax problems. The plaintiff may be able to recover in tort, but unless the damages flow from a physical personal injury, the narrowed version of IRC §104(a)(2) will make most or all of the recovery taxable. When the tort is nonphysical in character, but symptoms such as insomnia or ulcers result, the recovery will still be taxable. But other cases involving a battery (*e.g.,* groping, fondling, or worse) probably should give rise to a recovery that—except for punitive damages—is all income-tax-free.

Back pay recovered under Title VII of the Civil Rights Act of 1964 (42 USC §2000e—2000e-17) is taxable compensation. *Burke v U.S.* (1992) 504 US 229, 119 L Ed 2d 34, 112 S Ct 1867. Back pay and liquidated damages recovered under the Age Discrimination in Employment Act of 1967 (29 USC §216(b)) are also taxable compensation. *Commissioner v Schleier* (1995) 515 US 323, 132 L Ed 2d 294, 115 S Ct 2159 (back pay and liquidated damages received under ADEA not received on account of personal injury or sickness).

As noted in §49.50, favored tax treatment is given to structured settlement obligations that are assigned only in personal injury cases involving physical injury or sickness. There are a few non-IRC §130 assignment options in the marketplace that can be used in some of the nonphysical injury cases.

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§49.52 4. Constructive Receipt and Economic Benefit Doctrines

Tax law standards concerning the constructive receipt of periodic payments may sometimes affect the taxability of structured settlement benefits. Under the "Law and Analysis" section of Rev Rul 79-220, 1979-2 Cum Bull 74, if a lump-sum damage payment is invested for the benefit of a claimant who has actual or constructive receipt or the economic benefit of a lump-sum payment, only the lump-sum payment is received as damages under IRC §104(a)(2) and none of the income from the investment of such payment is excludable under §104.

The income tax doctrine of constructive receipt is set forth in Treas Reg §1.451-2:

> (a) General Rule. Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time.… However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

NOTE: It is not true that a plaintiff who has learned the cost of the annuity to the defendant is thereby charged with constructive receipt of that amount. See IRS Letter Ruling 8333035, which says that unqualified availability, not knowledge, is decisive. Availability of a sum—without strings attached—is the touchstone. The defendant is generally not required to disclose its cost to fund future periodic payments, but this is unrelated to the tax law. There is a case in which a superior court overturned a settlement, on the ground that its value was unconscionably low, and in which nondisclosure of the present value of the settlement was a factor in the ruling. See *Williams v Southern Cal. Edison* (LA Super Ct, Jan. 18, 1990) reported in 33 ATLA L Rep 253 (1990). There is no tax objection to the plaintiff's negotiating for a particular future payment obligor or annuity issuer.

A constructive receipt question may arise if, *e.g.,* during the course of a mandatory settlement conference or trial, the parties arrive at an agreement concerning the amount that the defendant must spend in order to settle the case; the agreement is then put on record, the plaintiff being given an option to receive the amount to be spent by the defendant either in an all-cash settlement or in a structured settlement; and the plaintiff on the record releases the defendant. In this situation, because the plaintiff has already tendered the release, there is no longer any substantial limitation on the plaintiff's at once demanding the sum that the defendant has agreed to spend. A plaintiff who has the option to receive a given sum of money, without any restriction except a personal inclination, has constructively received that amount. (This scenario of a complete settlement on the record must be distinguished from the great majority of settlements in which the parties intend that no final settlement be reached unless and until the plaintiff executes a written release.)

If court approval of a settlement is required, as when the plaintiff is a minor, the parties' agreement concerning the structured settlement is not yet enforceable; therefore the plaintiff cannot have constructive receipt even if all the parties agree on every term. Much the same analysis applies to cases on appeal. Until all opportunity for a further appeal has been exhausted, the plaintiff will generally not have the right to take possession of a sum of money or an asset.

The economic benefit doctrine may arise if a recipient of structured settlement payments attempts to assign or transfer the right to receive those payments as collateral to obtain a loan. Generally, under income tax law, when a person is entitled to receive a stream of payments, and transfers that right to obtain a lump sum (whether the right is sold outright or merely borrowed against), the taxpayer may be treated as having received the economic benefit, *i.e.,* the discounted present value, of the future payment right. A taxpayer cannot "cash out" or have access to the present value of the payment stream and still be accorded deferred recognition as if the economic benefit of the future payment right had not been realized all at once. This idea overlaps with the doctrine of "assignment of income."

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E. Reliability of the Guaranty of Future Payment

§49.53 1. Reliance on Initial Promisor

In a structured settlement in which there is no assignment, the plaintiff must consider the reliability of the promisor and the promisor's general credit. (Because IRC §130 applies only when an assignment is used, the secured creditor arrangements authorized by the statute are not available if the transaction is modeled on Rev Rul 79-220.)

A large, well-known, highly rated insurance company that underwrites commercial, auto, and other liability risks is generally sufficiently reliable for long term plans. Many government units are also reliable. Some utilities and quasi-governmental entities are effectively barred from becoming insolvent. Finally, the liability insurer's solvency may be guaranteed by the California Insurance Guarantee Association (CIGA). If the limits of CIGA protection are adequate, the plaintiff's payments should be assured.

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§49.54 2. Reliance on Assignee

The annuity companies that are active in the settlement market typically use an affiliate company to serve as an assignee of the periodic payment liability. The plaintiff's attorney might see such an assignment as acceptably secure if:

- The assignee is large and strong;
- Its obligations are guaranteed by a large and strong entity; or
- The plaintiff receives a security interest in the annuity and the annuity issuer is highly reliable.

Regardless of the particular product arrangement, the goal of plaintiff's counsel is to be able to rely on the promise of the flagship or holding company of the particular insurance company family.

Under IRC §130, as amended in 1988, an assignee may grant a security interest in the funding asset to the plaintiff. Some of the companies active in the market have refused to offer this option, but a substantial minority of the industry now permits it.

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§49.55 3. Independent Ratings of Insurance Companies

Depending on the identity of the future payment obligor, whether there is a guaranty from another company, and whether the plaintiff will have a security interest in the annuity, aid in evaluating reliability can be obtained from ratings in either Best's Insurance Reports, Life/Health Edition or Property/Casualty Edition, published by A.M. Best Company. Counsel should also obtain ratings from at least one of the following rating services: Standard & Poor's Insurance Rating Services, Moody's Investors Service, or Duff & Phelps Credit Rating Company.

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F. Estate and Benefits Planning; Trusts

§49.56 1. Estate and Government Benefits Planning

If the structured settlement provides guaranteed payments and the plaintiff dies before the last such payment is made, successors in interest will receive the remaining payments free of income tax. See §49.49. However, the value at date of death of the right to receive the remaining payment will be a part of the decedent's estate for purposes of federal estate taxation. The IRS routinely grants extensions of time—up to 10 years—for the payment of estate taxes when the main asset is a periodic payment right.

Probate can be avoided by having the settlement agreement and annuity application designate particular persons as beneficiaries, although this may sacrifice postsettlement flexibility. It will usually be better to provide that the plaintiff's estate will be the successor, because the plaintiff will then be able to dispose of the periodic payment right by will or inter vivos gift. But neither designating specific individuals nor designating the estate is the best course in every case.

Sometimes periodic payment plans can be structured to avoid impairment of the injured party's postsettlement eligibility for government benefits. If the plaintiff will be eligible for Medicare because of permanent disability, an allocation may be made among the categories of damages (*e.g.,* future medical, lost wages, general damages) to avoid future reimbursement claims.

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§49.57 2. Trusts

At times, trusts are used in structured settlements to accomplish various purposes. The tax and functional attributes of these different trusts must be carefully distinguished.

In some settlements periodic payments flow into a conventional trust for the plaintiff's benefit. The trust's main purpose is to defray medical expenses that are expected to be substantial, although their likely timing is uncertain. Such a trust serves a money management function. If the trustee has discretion to distribute or accumulate income, the net income is taxable to the trust (*i.e.,* at the entity level). IRC §641. If the trustee must currently distribute income, the income is taxable to the beneficiary.

A funding vehicle in which an assignee owns Treasury bonds, rather than an annuity, as qualified funding assets under IRC §130 is described in §49.38. In the past, the bonds were typically held by a reliable institution in a trust, although the plaintiff had no interest in that trust. Now the plaintiff should become a secured creditor, whether or not a trust is used. The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) amendment to IRC §130 allows the recipient to have a secured creditor interest in the bonds. The trust itself should not be the IRC §130 assignee. See Note in §49.38.

In certain situations, reversionary trusts offer a sensible, efficient compromise. They are most often seen when:

- Future medical expenses will be heavy;
- Liability is questionable; and
- The defendant is a government entity or a nonprofit corporation.

In most cases, a special needs trust established under Prob C §§3604-3605 and 42 USC §1396p(d)(4)(A) should be planned so it is funded either wholly or in part by payments from a structured settlement.

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G. Attorney Fees

§49.58 1. Primacy of Present Value

Plaintiff's attorney fees should be calculated on the present value (usually cost) of the total settlement. As noted in *Schneider v Kaiser Found. Hosps.* (1989) 215 CA3d 1311, 1319, 264 CR 227, 231, disapproved on other grounds in *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 27, 10 CR3d 183:

> [W]e think the cost approach with its simplicity of application and avoidance of risk inherent in evaluating subjective factors is the preferable approach.... The courts in various states which have addressed this issue have also uniformly concluded the value of a periodic payment settlement for the purpose of calculating a contingent attorney's fee is the present value of the periodic payments, which is normally best represented by the cost of the annuity purchased to fund the payments.

A structured settlement proposal should usually contain up-front cash equal to at least a third of the present value of the settlement, plus some cash for the plaintiff after payment of the attorney fee.

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§49.59 2. Periodic Payment of Attorney Fee

Occasionally, a plaintiff's attorney seeks periodic payment of the contingent fee. The attorney may assume that such an arrangement allows the attorney to recognize income as payments are received from the annuity company, but this may not be the result.

Typically, a "structured" attorney fee uses a promise from the periodic payment obligor running directly to the attorney. Thus, the attorney no longer relies on the client for deferred compensation. Arguably, the employer/client has given the attorney property (the promise of a third party) in exchange for services. The IRS has ruled in one instance that such an attorney fee arrangement was "property" within the meaning of IRC §83 because the settlement obligor's promise was funded or secured by an annuity. The property was not subject to a substantial risk of forfeiture, because the taxpayer's right to receive payments was not conditioned on the future performance of services. Consequently, the IRS concluded that the taxpayer was required to include the present fair market value of the property (*i.e.,* the annuity premium) in income for the taxable year in which the annuity was purchased. IRS Letter Ruling 9134006.

The taxpayer successfully challenged the IRS ruling in *Childs v Commissioner* (1994) 103 TC 634, aff'd (11th Cir 1996) 89 F3d 856. Because the payments could not be assigned, accelerated, deferred, increased, or decreased by the recipients, the court held that the fair market value of the attorneys' rights to receive payments under the settlement agreements were not includable in income under IRC §83 in the year the policies were purchased. The court held that the promise to pay under the structured settlement was neither funded nor secured and thus did not meet the §83 definition of property. In *Childs,* the taxpayer's position was probably helped by the fact that the fee was funded with an Executive Life annuity.

PRACTICE TIP: One possible solution to this risk is to achieve the reliability objective of the attorney not by making the lawyer the promisee of an institution's promise, but through other mechanisms, such as a collection account or a court order.

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Good Faith Settlement

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I. INTRODUCTION

§50.1 A. Scope of Chapter

This chapter covers the requirements of, and procedures for, determining whether a settlement between a plaintiff and fewer than all defendants was made in good faith with respect to the remaining defendants. See CCP §§877, 877.6. It gives an overview (see §§50.3-50.7), then discusses obtaining a good faith determination (see §§50.8-50.24), opposition to a motion for good faith determination (see §50.25), reply papers (see §50.26), the hearing (see §50.27), and the posthearing (see §50.28), and also provides forms (see §§50.29-50.34).

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§50.2 B. Governing Law

The effect of a good faith settlement, and procedures for making and opposing motions to determine good faith, are set forth in CCP §§877, 877.6.

NOTE: These statutes apply when defendants are alleged to be joint tortfeasors or co-obligors on a contract debt. CCP §877.6. They do not apply to co-obligors who have an agreement in writing to apportion liability among themselves (CCP §877(c)), nor to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on a contract debt if the contract was made before January 1, 1988 (CCP §877(d)). *Hartford Acc. & Indem. Co. v Superior Court* (1994) 29 CA4th 435, 34 CR2d 520 (CCP §877.6(c) limited to "claims … for equitable comparative contribution … *based on comparative negligence or comparative fault*"; claim for contribution among insurers providing overlapping coverage not barred by §877.6(c), because action by insurer based on equitable apportionment of contractual undertakings, not fault concepts).

As used in the statute, the term "joint-tortfeasors" includes joint, concurrent, and successive tortfeasors. *Turcon Constr., Inc. v Norton-Villiers, Ltd.* (1983) 139 CA3d 280, 283, 188 CR 580.

These statutes apply only to settlements between joint tortfeasors that occur *before* verdict or judgment. *Jhaveri v Teitelbaum* (2009) 176 CA4th 740, 749, 98 CR3d 268 (CCP §§877 and 877.6 inapplicable to postjudgment settlement).

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II. OVERVIEW

§50.3 A. Impact of Good Faith Determination

Unless the terms of a settlement expressly provide that a settlement with one party discharges other joint tortfeasors or co-obligors, their liability is not discharged. CCP §877(a). Thus, in a multiparty case, a plaintiff may settle with one party and pursue the lawsuit against the remaining parties. A determination by a court that a settlement was made in good faith under CCP §877.6 bars any other joint tortfeasor or co-obligor from asserting further claims against the settling party for equitable comparative contribution or partial or comparative indemnity based on comparative negligence or comparative fault. CCP §877.6(c). See *Britz, Inc. v Dow Chem. Co.* (1999) 73 CA4th 177, 86 CR2d 188 (joint tortfeasor that obtained good faith settlement determination and was dismissed from case could not bring separate indemnity action against its former codefendants after they also settled with plaintiff and received good faith settlement determination).

The nonsettling parties get the benefit of an offset against the plaintiff for the amount of the settlement. CCP §877(a). See *Reed v Wilson* (1999) 73 CA4th 439, 86 CR2d 510 (offset applies to judgment only, so defendant is generally not entitled to offset costs awarded to prevailing plaintiff after claim of liability is adjudicated).

Note that a good faith settlement by one party does not bar the nonsettling parties from seeking express contractual indemnity (*C. L. Peck Contractors v Superior Court* (1984) 159 CA3d 828, 205 CR 754), equitable apportionment of contractual undertakings (*Hartford Acc. & Indem. Co. v Superior Court* (1994) 29 CA4th 435, 34 CR2d 520 (overlapping insurance coverage)), or statutory indemnity (*Kantor v Housing Auth.* (1992) 8 CA4th 424, 10 CR2d 695).

PRACTICE TIP: Because there is always a possibility that a court may find that a settlement is not in good faith, it is good practice to include a clause in the settlement that voids the settlement if it is not found to be in good faith.

A good faith settlement determination by a court bars total equitable indemnity claims of nonsettling tortfeasors. *Far W. Fin. Corp. v D&S, Inc.* (1988) 46 C3d 796, 817, 251 CR 202 (to rule otherwise would contravene the purpose of CCP §877.6(c) to encourage settlements and fairly apportion costs among all parties).

Insurers, when acting in their role as insurers, are not tortfeasors or joint tortfeasors for purposes of §877.6. See *Hartford Acc. & Indem. Co v Superior Court, supra* (in suit against multiple insurers providing overlapping coverage, insurer that settles with plaintiff and obtains good faith determination may not use determination to avoid contribution claims from other insurers). However, a joint tortfeasor's liability insurer that has settled with a plaintiff "steps into the shoes" of its insured; thus, an alleged joint tortfeasor's liability insurer, which settled with the plaintiff before suit was filed, is barred from seeking equitable indemnity from settling defendants who obtained a good faith settlement determination under §877.6. *Mid-Century Ins. Exch. v Daimler-Chrysler Corp.* (2001) 93 CA4th 310, 112 CR2d 880. A defending insurer is not bound by a settlement that was made without its participation and approval, even if the settlement was found to be in good faith under §877.6. *Hamilton v Maryland Cas. Co.* (2002) 27 C4th 718, 117 CR2d 318 (§877.6 confirmation showed that insured was paying fair share of claimant's damages, but did not determine fairness of settlement to insurer).

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§50.4 B. Equitable Nature of Proceeding

The hearing authorized by CCP §877.6 is equitable in nature and is not an action at law. Thus, the court is empowered to determine a fact issue normally in the province of the jury. A jury trial is not required by the statute or the constitution. *Widson v International Harvester Co.* (1984) 153 CA3d 45, 56, 200 CR 136.

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§50.5 C. Parties That May Move for Good Faith Ruling

Any party to an action is entitled to a hearing on the issue of the good faith of a settlement. CCP §877.6(a)(1). This includes nonsettling defendants in the action. *Greshko v County of Los Angeles* (1987) 194 CA3d 822, 829, 239 CR 846. One court has held that a cross-defendant who settles with the cross-complainant but not the plaintiff is entitled to a good faith determination. *KAOM, Inc. v Superior Court* (1995) 35 CA4th 549, 41 CR2d 310. But see *Arizona Pipeline Co. v Superior Court* (1994) 22 CA4th 33, 27 CR2d 118 (under CCP §877.6, "plaintiff or other claimant" refers to injured party claimants, not joint tortfeasors; when only complainants are joint tortfeasors asserting indemnity and contribution claims against one another, statute does not apply).

Good faith settlement procedures under CCP §877.6 apply even if there are no nonsettling defendants; later-named defendants or the last defendant to settle the case can use §877.6 to extinguish indemnity claims by joint tortfeasors or co-obligors who have already settled. *Wilshire Ins. Co. v Tuff Boy Holding, Inc.* (2001) 86 CA4th 627, 638, 103 CR2d 480.

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Source: Civil Litigation/California Civil Procedure Before Trial/50 Good Faith Settlement/§50.6 D. Procedural Overview

§50.6 D. Procedural Overview

The statute provides two alternative procedures for seeking a determination by the court that a settlement is in good faith:

- **Notice of motion** (CCP §877.6(a)(1)). Under this procedure, the party seeking a good faith settlement determination gives notice of the settlement to all parties, as provided in CCP §1005(b). The court may shorten the time for giving the required notice on a showing of good cause.
- **Notice of settlement** (CCP §877.6(a)(2)). Alternatively, the settling party may give notice of settlement to all parties and the court, together with an application for determination of good faith settlement and a proposed order. The application should indicate the settling parties and the basis, terms, and amount of the settlement. A nonsettling party has 25 days from the mailing of the notice, or 20 days in the case of personal service, to file a motion contesting the good faith of the settlement. If no motion is filed, the court may approve the settlement without a hearing.

PRACTICE TIP: The choice of procedure is often dictated by timing considerations. If there is no particular hurry in obtaining a good faith determination, the attorney may serve a notice of settlement. If time is of the essence, a party should proceed by way of motion. Before filing the motion, the attorney should contact other parties to learn whether the motion will be opposed. An unopposed moving party can file a "bare-bones" memorandum and a declaration from the attorney outlining the terms of the settlement. Because the burden of proof is on the party opposing the good faith of the settlement, if that party files opposing papers and declarations, the moving party can supply the needed detailed analysis. See *City of Grand Terrace v Superior Court* (1987) 192 CA3d 1251, 1260, 238 CR 119.

Although CCP §877.6 does not provide a mechanism for a dismissal of cross-complaints barred by the good faith determination, Cal Rules of Ct 3.1382 provides that a notice or an application for determination of good faith may include a request to dismiss a pleading or a portion of a pleading.

PRACTICE TIP: Requesting dismissal of a cross-complaint in the same motion as the motion for determination of good faith settlement allows the court to find that the settlement is in good faith and immediately dismiss the related cross-complaints.

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Source: Civil Litigation/California Civil Procedure Before Trial/50 Good Faith Settlement/§50.7 E. Impact of Fair Responsibility Act of 1986 on Good Faith Determinations

§50.7 E. Impact of Fair Responsibility Act of 1986 on Good Faith Determinations

Under the Fair Responsibility Act of 1986 (CC §§1431-1431.5) (also known as Proposition 51), joint tortfeasors are severally liable for noneconomic damages arising from personal injury, wrongful death, and property damage. CC §1431.2(a). Economic damages are objectively verifiable monetary losses, including medical expenses, lost earnings, burial costs, loss of use of property, and loss of business or employment opportunities. CC §1431.2(b)(1). Noneconomic damages are subjective, nonmonetary losses, including pain, suffering, inconvenience, mental suffering, and emotional distress. CC §1431.2(b)(2).

Courts have apportioned liability even if one tortfeasor acted intentionally and the other acted negligently. See, *e.g., Martin v U.S.* (9th Cir 1993) 984 F2d 1033; *Weidenfeller v Star & Garter* (1991) 1 CA4th 1, 2 CR2d 14. Joint tortfeasors remain jointly liable for economic damages. *Bostick v Flex Equip. Co.* (2007) 147 CA4th 80, 90, 54 CR3d 28.

NOTE: Proposition 51 does not apply to causes of action that accrued before June 4, 1986. *Evangelatos v Superior Court* (1988) 44 C3d 1188, 246 CR 629. In the context of a latent, progressively developing disease, a cause of action has accrued, and application of Proposition 51 is precluded, if the plaintiff has been diagnosed with the disease or discovered the illness before June 4, 1986. *Buttram v Owens-Corning Fiberglas Corp.* (1997) 16 C4th 520, 66 CR2d 438 (mesothelioma).

The Act itself does not specify how a good faith settlement should be apportioned, if at all, between noneconomic and economic damages if the settlement is later deducted from judgments against nonsettling defendants. The approach used by a judge to determine the effect of the settlement on the defendants' liability can affect the amount the plaintiff recovers and the amount each remaining defendant pays.

In *Ehret v Congoleum Corp.* (1999) 73 CA4th 1308, 1320, 87 CR2d 363, the court of appeal stated that the court should determine what portion of the settlement is economic damages because only the amount attributable to the joint responsibility for economic damages can be used as an offset. In the absence of a prior allocation of the settlement between economic and noneconomic damages, the settlement should be apportioned in the same percentage as reflected in the jury verdict in order to determine the offset for the settlement from the verdict against the nonsettling joint tortfeasor. *Espinoza v Machonga* (1992) 9 CA4th 268, 276, 11 CR2d 498. See also *Hackett v John Crane, Inc.* (2002) 98 CA4th 1233, 120 CR2d 662; *Wilson v John Crane, Inc.* (2000) 81 CA4th 847, 97 CR2d 240 (applying *Espinoza* formula).

For discussion of the calculation method used in *Espinoza* and of a proposed alternative method, see Peyrat, *Calculating Judgments Under Proposition 51: Effect of Plaintiff's Fault, Settlements, and Workers' Compensation*, 15 CEB Civ Litigation Rep 88 (Mar. 1993). See also Watson & Walsh, *How Proposition 51 Works: Its Judicial Development and Impact on Practice*, 22 CEB Civ Litigation Rep 6 (Feb. 2000).

In *Bostick v Flex Equip. Co.* (2007) 147 CA4th 80, 93, 54 CR3d 28, the court held that Proposition 51 does not apply in strict liability cases involving a single product in which all defendants are in the same chain of distribution. The court distinguished *Wilson v John Crane, Inc., supra,* as a case involving multiple products. *Bostick*, 147 CA4th at 95 n9. See also *Wimberly v Derby Cycle Corp.* (1997) 56 CA4th 618, 633, 65 CR2d 532.

A nonsettling defendant can set off an economic damages award even if the settling defendants were found not liable. *McComber v Wells* (1999) 72 CA4th 512, 85 CR2d 376.

PRACTICE TIP: Before negotiating a settlement, plaintiff's attorney can estimate what portion of the provable damages is economic and what portion is noneconomic, then draft a settlement agreement that specifies reasonable amounts for the two forms of damages. It is not at all clear, however, that the "good faith judge" will, or ought, to approve an apportionment of damages between economic and noneconomic. Nonsettling defendants may oppose a good faith motion if they perceive the apportionment to be unfair. Settling defendants are indifferent to any apportionment between economic and noneconomic damages except to the extent that an unreasonable apportionment may provide a reason for determining the settlement not to have been in good faith.

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III. OBTAINING GOOD FAITH DETERMINATION

A. Notice of Motion

§50.8 1. Content

Any party that wants to obtain a hearing, at which the good faith of a settlement may be determined, may file and serve a notice of motion. See form in §50.29. The notice may include a request to dismiss a pleading or a portion of a pleading. The notice must list each party and pleading or portion of pleading affected by the settlement and the date when the affected pleading was filed. Cal Rules of Ct 3.1382.

The notice may be in the form of other notices of motion with attached memorandum, declarations, exhibits, and proposed order. The form, format, and general contents of notices of motion are discussed in chap 12.

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§50.9 2. Service

The notice of hearing must be served on all affected parties at least 16 court days before the scheduled hearing date; the notice period is increased by 5 calendar days if service is by mail entirely within California; by 10 calendar days if mailing is from or to another state; and by 20 calendar days if from or to another nation. CCP §1005(a)(5), (b). See chap 18 on service generally and by express mail and facsimile transmission.

On a showing of good cause, the court can shorten the notice time to allow good faith to be determined before trial or, if the trial is already started, before a verdict or judgment. CCP §877.6(a)(1).

NOTE: Generally, if a settlement is entered into after a verdict or judgment, cross-complaints against the settling party are not barred. *Be v Western Truck Exch.* (1997) 55 CA4th 1139, 64 CR2d 527; *Southern Cal. White Trucks v Teresinski* (1987) 190 CA3d 1393, 236 CR 159. However, in a bifurcated trial against multiple defendants, a good faith determination of a settlement reached after a verdict on the liability phase but prior to litigating the issue of damages will bar indemnity cross-complaints. *Price Pfister, Inc. v William Lyon Co.* (1993) 14 CA4th 1643, 18 CR2d 437.

The court has discretion to allow a continuance of the hearing for the purpose of giving the party opposing the motion additional time to conclude discovery on the good faith issues raised in the motion. *City of Grand Terrace v Superior Court* (1987) 192 CA3d 1251, 1265, 238 CR 119.

PRACTICE TIP: If there are some matters on which discovery has not been completed which deal with the issues raised in the motion, counsel should notice the motion with sufficient time to allow the opposing parties to conclude that discovery. Taking this step can avoid an extra trip to law and motion because the court may grant a continuance to allow the additional discovery.

The notice should be delivered to all parties and to likely parties. If there is a potential party who had not been served with summons and complaint by the time the settlement was concluded, that party can be served with both those papers and the notice of motion for good faith settlement.

PRACTICE TIP: The motion should be set far enough in advance to allow the new party sufficient time and opportunity to conduct discovery prior to the hearing. Otherwise, that party could later reopen the issue of good faith. *Singer Co. v Superior Court* (1986) 179 CA3d 875, 225 CR 159.

Other than the mention in CCP §877 of settlement "before verdict or judgment," there is no time limit within which to make a motion for determination of good faith. A court has held that a motion can be made as late as 5 years after the settlement. *Greshko v County of Los Angeles* (1987) 194 CA3d 822, 829, 239 CR 846.

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B. Factors Affecting Good Faith Determinations

§50.10 1. Burden of Proof

The most significant procedural difference between a motion for good faith settlement and other motions is that in a good faith settlement motion, the burden of proof is on the party opposing the motion. CCP §877.6(d). Despite this burden-shifting, the moving party should thoroughly prepare moving papers that analyze the relevant factors supporting a finding that the settlement is in good faith.

When the settlement provides for contingent payments, or involves consideration that is difficult to value, the settling parties are responsible for establishing the value of the settlement. See *Brehm Communities v Superior* Court (2001) 88 CA4th 730, 105 CR2d 918 (settling parties must present competent evidence, not mere speculation, of value of nonmonetary consideration to be transferred).

When the settling parties have allocated a portion or portions of the settlement to particular issues or claims, the burden is on them to explain the evidentiary basis of the allocation so as to show that it is reasonable and to demonstrate that the allocation was reached in a sufficiently adversarial manner to justify the presumption that a reasonable valuation was reached. See, *e.g., L.C. Rudd & Son v Superior Court* (1997) 52 CA4th 742, 60 CR2d 703; *Regan Roofing Co. v Superior* Court (1994) 21 CA4th 1685, 27 CR2d 62; *Erreca's v Superior* Court (1993) 19 CA4th 1475, 24 CR2d 156.

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§50.11 2. Reasonable Range Test of *Tech-Bilt*

The leading case in the analysis for determining whether a settlement is in good faith is *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 213 CR 256.

From a public policy standpoint, the two major goals of the statutory scheme behind CCP §§877 and 877.6 are to equitably share the cost of settlements between the parties at fault and to encourage settlements. 38 C3d at 494. To ensure that these goals are applied independently so that they do not defeat each other, the *Tech-Bilt* court developed the "reasonable range" test for good faith determination. The test requires the court to weigh various factors and analyze whether the amount of the proposed settlement is within the "reasonable range" of the settling defendant's proportional share of comparative liability for the plaintiff's injuries. 38 C3d at 499. The factors include:

- A rough approximation of the plaintiff's total potential recovery;
- A rough approximation of the settling defendant's proportionate liability;
- The amount paid in settlement;
- The allocation of proceeds among plaintiffs;
- A recognition that the settling defendant should pay less in settlement than if it were found liable at trial;
- The financial condition of the settling defendant;
- The insurance policy limits of the settling defendant; and
- The existence of fraud, collusion, or tortious misconduct on the part of the settling parties aimed to injure the interests of the nonsettling defendants.

Each of these factors is evaluated on the basis of the information that was available to the parties at the time the settlement was entered into. 38 C3d at 499. No one factor is determinative. Each must be weighed individually and an assessment made with respect to how it impacts the others.

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§50.12 3. Rough Approximation of Plaintiff's Total Recovery

The approximation of total recovery to which the plaintiff is entitled is not determined exclusively by the sums prayed for in the complaint. The court is not required to ignore its own experience and may view the prayer as a comparison point in valuing the plaintiff's claim. *Kohn v Superior Court* (1983) 142 CA3d 323, 191 CR 78. The court must look to whether the settlement figure is out of proportion to the plaintiff's probable recovery. *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256. When the settlement is disproportionate to the amount prayed for, evidence of a lack of liability of the settling defendant will support a finding of good faith. *Wysong Miles Co. v Western Indus. Movers* (1983) 143 CA3d 278, 191 CR 671.

NOTE: The Fair Responsibility Act of 1986 (CC §§1431-1431.5), when applicable, requires a separate analysis of economic damage exposure and noneconomic damage exposure. See §50.7.

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§50.13 4. Rough Approximation of Settling Defendant's Proportion of Liability

Payment by a settling party of less than its theoretical proportional share does not necessarily render a settlement in bad faith. Exact proportionality is not required. The court will balance all factors and determine if the settlement "is so far out of the ballpark … to be inconsistent with the equitable objectives of the statute." *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256.

EXAMPLE: A settlement was held not to be in good faith when the settling party settled for approximately 1 percent of the potential settlement value of the case. *Gehl Bros. Mfg. Co. v Superior Court* (1986) 183 CA3d 178, 228 CR 19. In *Gehl,* the plaintiff was allegedly injured by equipment manufactured by the defendants. Although the trial court found the estimated settlement value to be between $1.5 and $2.5 million, one manufacturer settled for $10,000. The trial court found that this "cost of defense settlement" was consistent with a finding of remote liability. 183 CA3d at 182. The appellate court reversed, holding that the settlement was consistent with a finding of no liability and it could not be said that the settling defendant was not liable as a matter of law. Liability for design defects or failure to warn or provide safety devices falls with some proportion on all parties participating in designing and marketing the product. The proportional share of liability that the settling defendant should have borne was greater than the 1 percent it paid in settlement. 183 CA3d at 184. See also *Long Beach Mem. Med. Ctr. v Superior Court* (2009) 172 CA4th 865, 875, 91 CR3d 494 (in case involving several defendants and nearly $8 million in global settlement, abuse of discretion to hold physicians' $200,000 settlement to be in good faith when evidence at time of settlement showed they shared in more than nominal liability and they timed offer to escape liability from other defendants, and offer represented only 10 percent of their insurance policy limit).

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§50.14 5. Amount Paid in Settlement

In some cases—*e.g.,* when payment is contingent, or there is a "sliding scale recovery" agreement—a settlement may be structured in such a way that it is difficult to calculate the value of the consideration. In such cases, the initial burden is on the settling parties to establish the settlement's value. See §50.10. The court must be given sufficient information to evaluate the good faith of the settlement. See *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 239 CR 626 (addressing specific issue of putting value on "sliding scale," or "Mary Carter," settlement). See also, *e.g., Brehm Communities v Superior Court* (2001) 88 CA4th 730, 105 CR2d 918 (evaluation of settlement involving transfer of unvalued assets and intangibles); *Regan Roofing Co. v Superior Court* (1994) 21 CA4th 1685, 27 CR2d 62 (assigned indemnity rights). For further discussion of sliding scale settlements, see chap 49.

PRACTICE TIP: For a settlement to be found in good faith, its value must be within the reasonable range of the potential liability of the settling party. Note that the plaintiff's counsel has an interest in setting a value as low as possible to decrease the offset to which nonsettling parties are entitled. The settling defendant has an interest in ascribing a high value to the settlement to ensure that the settlement is found to be in good faith. A way to balance these competing interests is to put a clause in the settlement that voids it if the settlement is not found to be in good faith or if the value ascribed to it is raised by the trial court.

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§50.15 6. Allocation of Proceeds Among Plaintiffs

A settlement that includes an assignment to the plaintiffs of the settling defendant's rights under an insurance policy when the insurer denied coverage may be held not to be in good faith. See *Southern Cal. Gas Co. v Superior Court* (1986) 187 CA3d 1030, 232 CR 320. In this case, the court found that the assignment of rights under the policy had no determined value and the plaintiffs were not required to pursue those rights. Thus, the nonsettling defendants were deprived of credit for the full value of the settlement. The assignment also was not allocated among the various plaintiffs to the action. Again, this would prejudice the nonsettling parties right to an offset. 187 CA3d at 1036. The court held that the settlement must be entered into in good faith, not only with respect to the plaintiff but with respect to the nonsettling defendants.

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§50.16 7. Recognition That Settling Defendants Should Pay Less in Settlement Than After Trial

The uncertainty and expense of litigation make a settlement for less than the total potential liability sometimes in the best interest of the plaintiff. When factoring in this consideration, an analysis should be made of what chance there is that a jury will find the settling defendant responsible for the plaintiff's injuries and what comparative negligence, if any, the jury will charge to the plaintiff.

NOTE: In a complex case, expert testimony is almost always used. The cost of developing and presenting expensive evidence should be factored into the analysis.

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§50.17 8. Financial Condition of Settling Defendant

A declaration from the settling party outlining his or her financial condition and available insurance (see §50.18) should be presented. This factor should be highlighted if the settlement is disproportionately low (considering the settling party's liability) because of the settling party's impaired solvency. A relatively insolvent and uninsured or underinsured settling party who is clearly liable can settle in good faith at a disproportionately low amount. *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256.

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§50.18 9. Insurance Coverage and Policy Limits of Settling Defendant

A defendant's lack of insurance, including low policy limits, is a factor that may justify an apparently low settlement, in the same way as impaired solvency (see §50.17). Thus, the papers seeking a determination of good faith should fully inform the court about policies and policy limits.

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§50.19 10. Fraud, Collusion, or Misconduct of Settling Parties

A settlement must be in good faith with respect to all parties. *Southern Cal. Gas Co. v Superior Court* (1986) 187 CA3d 1030, 1036, 232 CR 320. This requirement of good faith extends not only to the amount of the settlement, but also to any allocation that the settling parties make that operates to exclude any portion of the setoff to which nonsettling defendants are entitled. *Erreca's v Superior Court* (1993) 19 CA4th 1475, 24 CR2d 156. Certain settlement tactics or motives by the settling parties constitute bad faith. They include:

- A plaintiff singling out the most unpopular defendant and trying the case against that defendant alone by settling with all other codefendants;
- A plaintiff settling with a defendant capable of providing crucial witnesses, in order to eliminate their testimony from the trial; and
- A codefendant and a plaintiff conspiring to assign a disproportionately large amount of their settlement to the plaintiff's least valuable cause of action, leaving the nonsettling codefendants fully exposed to the plaintiff's most valuable cause of action. *Torres v Union Pac. R.R.* (1984) 157 CA3d 499, 504, 203 CR 825.

NOTE: The conduct of the nonsettling defendant is also at issue during a good faith determination. Acts by the nonsettling defendant that are unreasonable and attempt to frustrate the settlement can be considered by the court in determining whether there is a good faith settlement. *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 881, 239 CR 626. Although the court can issue sanctions against the nonsettling party, any sanction it issues must be in proportion to the nonsettling defendant's conduct. 43 C3d at 882.

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§50.20 C. Declarations and Evidence Supporting *Tech-Bilt* Factors

Declarations under penalty of perjury or affidavits must be presented to the court to assist it in arriving at a good faith determination. *City of Grand Terrace v Superior Court* (1987) 192 CA3d 1251, 238 CR 119. These documents must be served with the notice of the hearing. Under CCP §877.6(b), the court has discretion to consider other evidence in making its determination of good faith. "Other evidence" can be anything that the court finds helpful in reaching a determination.

All declarations must state evidentiary facts from which the court can determine good or bad faith. Affidavits or declarations setting forth only conclusions, opinions, or ultimate facts are not sufficient. "[E]ven an expert's opinion cannot rise to the dignity of substantial evidence if it is unsubstantiated by facts." *Greshko v County of Los Angeles* (1987) 194 CA3d 822, 834, 239 CR 846.

When the motion is made by the settling defendant, the supporting declaration may show only that a settlement has been made, the amount of the settlement, a brief background of the case, and, possibly, the basis for the settlement. See *City of Grand Terrace v Superior Court, supra.* Such a barebones declaration is sufficient because the burden of proof is actually on the party opposing the motion to show lack of good faith. CCP §877.6(d). If the motion is contested and declarations are filed indicating that the settlement was not made in good faith, the moving party must submit counterdeclarations. These declarations should marshal the facts in light of the *Tech-Bilt* factors (see §§50.11-50.19) and provide a thorough analysis of their impact. Counterdeclarations may be filed to refute points raised by the opposition.

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D. Alternative Method: Notice of Settlement

1. Notice of Settlement

§50.21 a. Content

A settling party may give notice of the settlement to all parties and to the court together with an application for determination of good faith settlement and a proposed order, instead of proceeding by noticed motion under CCP §877.6(a)(1). CCP §877.6(a)(2). The application must indicate the settling parties and the basis, terms, and amount of the settlement. CCP §877.6(a)(2). See forms in §§50.31-50.33.

NOTE: A party may not proceed by notice of settlement if the parties have entered into a confidentiality agreement regarding the case or the terms of the settlement. In that case, a motion is necessary. CCP §877.6(a)(2).

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§50.22 b. Service

The notice of settlement, application, and proposed order must be served on all parties and the court by certified mail, return receipt requested. CCP §877.6(a)(2). Within 25 days after the mailing of the notice, application, and proposed order, or within 20 days after personal service, any nonsettling party may file a notice of motion to contest the good faith of the settlement. CCP §877.6(a)(2). See §§50.8-50.9.

If none of the nonsettling parties files a motion within 25 days after mailing of the notice, application, and proposed order, or within 20 days after personal service, the court may approve the settlement. CCP §877.6(a)(2).

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2. Opposing Application for Determination of Good Faith Settlement: Motion to Contest Good Faith

§50.23 a. Content

A nonsettling party may file a notice of motion to contest the good faith of a settlement within 25 days after the mailing of a notice of settlement, application for determination of good faith, and proposed order, or within 20 days if personal service is used. CCP §877.6(a)(2). This notice may be in the form of other notices of motion with attached memorandum, declarations, exhibits, and proposed order. The form, format, and general contents of notices of motion are discussed in chap 12.

The motion must discuss the factors affecting good faith determinations demonstrating a lack of good faith discussed in §§50.11-50.19. The party asserting a lack of good faith has the burden of proof on that issue. CCP §877.6(d). A motion contesting the good faith of a settlement serves the same function as opposition to a motion for good faith determination. See §50.25.

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§50.24 b. Service

The notice of hearing and moving papers must be served on all affected parties in the manner provided by CCP §1005(b). CCP §877.6(a)(2). See §50.9.

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§50.25 IV. OPPOSITION TO MOTION FOR GOOD FAITH DETERMINATION

The party asserting a lack of good faith has the burden of proof on that issue. CCP §877.6(d). A lack of good faith is demonstrated by a showing that the settlement is so far "out of the ballpark" in relation to the *Tech-Bilt* factors as to be inconsistent with the statutory objectives of promoting equitable sharing of costs between parties at fault and promoting settlements. *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 499, 213 CR 256. The opposition must address the *Tech-Bilt* factors one by one and discuss how the settlement controverts each. Primarily, it must be established that the settlement is not within the "reasonable range" of the settling tortfeasor's proportional share of comparative liability.

PRACTICE TIP: In opposing a good faith determination of a sliding scale agreement (see §50.14), counsel may pursue two avenues of attack: First, argue that the settlement is "out of the ballpark" under the *Tech-Bilt* analysis; second, even if it is in the ballpark, request the court to raise the value assigned to it by the settling parties.

Opposition papers must be filed and served 9 court days before the date selected for the hearing. CCP §1005(b). Opposition papers must be served by personal delivery, fax, express mail, or other method consistent with CCP §§1010-1013, and reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c). Service by fax is permitted only when the parties agree and the agreement is confirmed in writing. CCP §1013(e). See chap 18. The opposition must contain declarations demonstrating that the settlement is not in good faith.

PRACTICE TIP: A nonsettling defendant can request a determination that a settlement lacks good faith. CCP §877.6(a)(1). Doing so may have the practical effect of placing a burden (to show good faith) on the settling parties.

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§50.26 V. REPLY PAPERS

Code of Civil Procedure §877.6 does not explicitly authorize a requesting party to file reply papers. It is advisable to check local rules, if any, on the filing of reply papers. Any reply must be filed and served at least 5 court days before the date selected for the hearing. CCP §1005(b); Cal Rules of Ct 3.1300(a). Reply papers must be served by personal delivery, fax, express mail, or other method consistent with CCP §§1010-1013, and reasonably calculated to ensure delivery by the close of the next business day after the papers are filed. CCP §1005(c). Service by fax is permitted only when the parties agree and the agreement is confirmed in writing. CCP §1013(e). On fax filing and service, see chap 25.

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§50.27 VI. THE HEARING

In most instances, a motion for a good faith determination or a motion to contest the good faith of a settlement will be heard by the judge assigned to the case for all purposes. A judge who hears a settlement proceeding is not barred from hearing a good faith settlement motion. If nonsettling parties object to having the settlement judge preside over a good faith hearing, they should request assignment to another judge and, if necessary, file a CCP §170.6 disqualification motion. *Horton v Superior* Court (1987) 194 CA3d 727, 733, 238 CR 467. See also *Erreca's v Superior Court* (1993) 19 CA4th 1475, 24 CR2d 156 (when trial court presided over settlement discussions that went beyond general matters to include tentative damages allocation, it may have given impression that it approved particular allocations and valuations, issues that it would have to decide in good faith hearing; use of this procedure could create appearance of unfairness).

Most courts treat hearings on requests for good faith determinations like hearings on other motions. See generally chap 12. The extent of the hearing is largely left to the trial court's discretion. See *Erreca's v Superior Court, supra* (trial court not bound to hear oral argument in absence of new contentions after having "digested" paperwork). Local rules may provide that counsel can learn of the court's tentative decision by telephone a day or more before the hearing date.

Objections to incompetent evidence must be made at the earliest opportunity; otherwise, the court may consider the evidence. If the objection is not asserted, it is waived. *Falk v Falk* (1941) 48 CA2d 780, 789, 120 P2d 724.

Before a court may make a CCP §877.6 good faith finding, the settling parties must present competent evidence of the value of nonmonetary compensation to be transferred. *Brehm Communities v Superior Court* (2001) 88 CA4th 730, 735, 105 CR2d 918.

If a settling party gives notice of a settlement to all parties and to the court under CCP §877.6(a)(2), and no motion to contest the good faith of the settlement is filed within 25 days, or within 20 days if personal service is used, the court may approve the settlement without a hearing. As a rule, the court simply holds the proposed order approving the settlement until the time period has run. Some courts may require a supplemental declaration by counsel demonstrating compliance with CCP §877.6(a)(2). See form in §50.30.

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§50.28 VII. POSTHEARING

Once a decision of good faith or the lack of it is made, any party aggrieved by the determination may petition the proper higher court to review the decision by writ of mandate. CCP §877.6(e). The petition for writ of mandate must be filed within 20 days after service of the written notice of the decision, although a party may ask the court for additional time not to exceed 20 days. CCP §877.6(a)(2).

PRACTICE TIP: At the hearing, if the court rules adversely, counsel may wish to petition immediately for the additional 20 days. Doing so will save a trip to court if any reason arises why the writ of mandate cannot be filed within the required 20 days.

After receipt of all materials filed by the parties, the reviewing court must decide within 30 days whether it will hear the writ and notify the parties of its decision. CCP §877.6(e)(1). If the court decides to hear the writ, the hearing is given a "special precedence" over all other civil matters with less precedence. During the pendency of the review of the determination, any period of time that would subject a party to dismissal under CCP §§583.310-583.430 is tolled.

A challenge to the good faith determination must be made by petition for writ of mandate. An aggrieved party may not seek review of the determination in an appeal from the final judgment of the plaintiff's claims against the nonsettling defendants. *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 498, 9 CR3d 342; *Main Fiber Prods. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 87 CR2d 108.

However, writ review is not the exclusive means of review if the party seeking review had earlier filed a timely writ petition, which was summarily denied. In this situation, a trial court's good faith settlement determination is subject to appellate review on appeal from the judgment. *Wilshire Ins. Co. v Tuff Boy Holding, Inc.* (2001) 86 CA4th 627, 636, 103 CR2d 480 (distinguishing *Main Fiber Prods. v Morgan & Franz Ins. Agency, supra*).

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Source: Civil Litigation/California Civil Procedure Before Trial/50 Good Faith Settlement/ VIII. FORMS/§50.29 A. Form: Notice of Motion to Determine Good Faith of Settlement

VIII. FORMS

§50.29 A. Form: Notice of Motion to Determine Good Faith of Settlement

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR ORDER DETERMINING GOOD FAITH OF SETTLEMENT (CCP §877.6(a)(1)); _ _[*AND TO DISMISS CROSS-COMPLAINT FILED BY _ _[NAME]_ _ ;]_ _ _ _[SUPPORTING MEMORANDUM;]_ _ _ _[DECLARATION(S);]_ _ _ _[PROPOSED ORDER]_ _**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	_ _[*Estimated length: _ _*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §877.6 for an order determining that the settlement of plaintiff** _ _[*name*]_ _**'s claim against** _ _[*name of settling defendant*]_ _ **entered into on** _ _[*date*]_ _**, was made in good faith, and that the cross-complaint filed by** _ _[*name of settling defendant*]_ _ **on** _ _[*date*]_ _ **be dismissed. The grounds for issuance of this order are that plaintiff has settled** _ _[*his/her/its*]_ _ **claim against this defendant and the settlement was made in good faith, and, in addition, that the cross-complaint is barred by the good faith settlement.**

The parties affected by this settlement are: _ _[*names of parties*]_ _**.**

This motion is based on the attached documents and exhibits, including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §50.8.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/50 Good Faith Settlement/§50.30 B. Form: Declaration Supporting Motion to Determine Good Faith of Settlement

§50.30 B. Form: Declaration Supporting Motion to Determine Good Faith of Settlement

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**DECLARATION OF** _ _[*NAME*]_ _ **SUPPORTING** _ _[*NAME*]_ _**'S MOTION FOR ORDER DETERMINING GOOD FAITH OF SETTLEMENT (CCP §877.6)**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	_ _[*Estimated length:* _ _]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

I, _ _[*name*]_ _**, declare:**

1. I am the attorney of record for _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them. I make this declaration in support of** _ _[*name's*]_ _ **motion for order determining good faith of settlement in accordance with Code of Civil Procedure §877.6.**

2. The Court is requested to take judicial notice of the complaint in this action under Evidence Code §452(d)(1). Plaintiff, _ _[*name*]_ _**, seeks to recover damages for** _ _[*nature of claim*]_ _**, which allegedly occurred on** _ _[*date*]_ _**. Persons alleged in the complaint to be** _ _[*joint tortfeasors/co-obligors*]_ _ **are defendants** _ _[*list names*]_ _**.**

3. On or about _ _[*date*]_ _**, plaintiff and defendant entered into a settlement agreement, under which this defendant agreed to pay the plaintiff $**_ _[*state amount*]_ _ **and the plaintiff agreed to settle all claims against this defendant** _ _[*and to dismiss this defendant from this action*]_ _**.**

4. The terms of this settlement are as follows: _ _[*Specify*]_ _**.**

5. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §50.20.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/50 Good Faith Settlement/§50.31 C. Form: Notice of Settlement

§50.31 C. Form: Notice of Settlement

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF SETTLEMENT**
vs	)	**(CCP §877.6(a)(2))**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

TO THE SUPERIOR COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiff _ _[*name*]_ _ **has entered into a settlement with defendant** _ _[*name*]_ _ **and that defendant will apply to this court for a determination that the settlement was made in good faith in accordance with Code of Civil Procedure §877.6(a)(2). A copy of the application and** _ _[*proposed*]_ _ **order determining good faith settlement are served and filed concurrently with this notice of settlement.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party and one for the court); ___ office copies.

Comment: See §§50.21-50.22.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/50 Good Faith Settlement/§50.32 D. Form: Application for Determination of Good Faith of Settlement

§50.32 D. Form: Application for Determination of Good Faith of Settlement

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**APPLICATION FOR ORDER DETERMINING GOOD FAITH OF SETTLEMENT (CCP §877.6(a)(2));** _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

_ _[*E.g., Defendant*]_ _, _ _[*name*]_ _, **applies to this court under Code of Civil Procedure §877.6(a)(2) for a determination that the settlement described below was entered into in good faith.**

1. Settling Parties: The parties to this settlement are _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, and** _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**.**

2. Terms: The basis of the settlement is that _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, contends that** _ _[*state facts demonstrating general contentions and reasonableness of settlement*]_ _**. Defendant has agreed to pay plaintiff the sum of $**_ _[*state amount*]_ _ **in exchange for a general release and request for dismissal of this action with prejudice. This settlement is expressly conditioned on the court's determination that it is made in good faith.**

3. Amount: Defendant _ _[*name*]_ _ **has agreed to pay plaintiff** _ _[*name*]_ _ **the amount of $**_ _[*state amount*]_ _**. This settlement amount represents fair and reasonable consideration for the compromise, release, and waiver of plaintiff's claims.**

This application is based on this application and the attached declaration of _ _[*name of declarant*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.

Comment: See §§50.21-50.22.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/50 Good Faith Settlement/§50.33 E. Form: Proposed Order Determining Good Faith of Settlement

§50.33 E. Form: Proposed Order Determining Good Faith of Settlement

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	_ _[*PROPOSED*]_ _ **ORDER DETERMINING GOOD FAITH OF SETTLEMENT (CCP §877.6(a)(2))**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

The application of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, dated _ _[*date*]_ _, for an order determining the good faith of a settlement has been presented to this court; and

IT APPEARING TO THE SATISFACTION OF THE COURT that the application is made under Code of Civil Procedure §877.6(a)(2); that copies of the application, together with the notice of settlement and a copy of this _ _[*proposed*]_ _ order were served by certified mail, return receipt requested, on this court and all parties to this action on _ _[*date*]_ _; and that no notice of motion to contest the good faith of the settlement has been filed within the time allowed by Code of Civil Procedure §877.6(a)(2);

NOW THEREFORE, IT IS ORDERED that the settlement between _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, and _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, described in said application was made and entered into in good faith within the meaning and affect of Code of Civil Procedure §877.6.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original (present to judge for signature, then file); ___ copies for service (one for each other party); ___ office copies.

Comment: See §50.21.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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Source: Civil Litigation/California Civil Procedure Before Trial/50 Good Faith Settlement/§50.34 F. Form: Declaration Supporting Application for Determination of Good Faith of Settlement

§50.34 F. Form: Declaration Supporting Application for Determination of Good Faith of Settlement

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	_ _[*NAME*]_ _**'S APPLICATION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FOR ORDER DETERMINING**
	)	**GOOD FAITH OF**
	)	**SETTLEMENT (CCP**
_____	)	**§877.6(a)(2))**

I, _ _[*name*]_ _, declare:

1. I am the attorney of record for _ _[*e.g., defendant*]_ _, _ _[*name*]_ _. The facts stated in this declaration are within my personal knowledge and if called to testify I could competently testify to them. I make this declaration in support of _ _[*name*]_ _'s application for determination of good faith settlement in accordance with Code of Civil Procedure §877.6(a)(2).

2. The Court is requested to take judicial notice of the complaint in this action under Evidence Code §452(d)(1). Plaintiff, _ _[*name*]_ _, seeks to recover damages for _ _[*nature of claim*]_ _, which allegedly occurred on _ _[*date*]_ _. Persons alleged in the complaint to be _ _[*joint tortfeasors/co-obligors*]_ _ are defendants _ _[*list names*]_ _.

3. _ _[*State general nature of claim and alleged involvement of settling party.*]_ _

4. On or about _ _[*date*]_ _, plaintiff and defendant entered into a settlement agreement, under which this defendant agreed to pay plaintiff $_ _[*state amount*]_ _ and plaintiff agreed to settle all claims against this defendant _ _[*and to dismiss this defendant from this action*]_ _. This agreement was expressly conditioned on the court's determining that the settlement was made in good faith.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk); ___ copies for service (one for each other party); ___ office copies.
Comment: See §§50.21-50.22.

Note: The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On the many specific details required, see chap 11 and the sample form in §11.35. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44 and 2.131-2.134 and the discussion in §11.27.

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